

Section 54 Recoveries policy effective 14 February 2011



WorkCover Corporation

To: Employers Mutual, Legal Panel and relevant WorkCover staff

Issued by: Technical Services

Topic: **Section 54 Recoveries policy**

Authorised by: Jeff Matthews

Position: Deputy CEO, Scheme Performance & Contract Management

Date of effect: 14 February 2011

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Who should read this: Employers Mutual, Echelon, Minter Ellison and relevant WorkCover staff

Action required: See Instruction

Manual reference: Chapter 17

Section of the Act: Section 54 of the *Workers Rehabilitation & Compensation Act, 1986*

Contact officer: Manager, Technical Services

Phone: (08) 8233 2371

Review date for this policy: This policy is ongoing and will be reviewed by WorkCover from time-to-time, as required.

Note: All references to sections of the Act, relate to the *Workers Rehabilitation & Compensation Act, 1986* unless otherwise stated.

Background

WorkCover is entitled to recover some or all the monies paid on a claim where a worker is either injured in a motor vehicle accident (and the worker is entitled to claim damages from compulsory third party insurance) or where a worker is injured as a result of the negligence or wrongdoing of a person other than the employer. If the worker is successful in bringing a common law action against either the Motor Accident Commission or a third party insurer, WorkCover may recover compensation both paid and payable from the worker's award of common law damages pursuant to section 54(7) of the Act.

Before 1 July 2010, workers who obtained damages at common law exceeding the monies paid on their claim ('pays') agreed with WorkCover to redeem their future workers compensation entitlements with a 'cost neutral' redemption. The redemption was 'cost neutral' for WorkCover because the redemption payment represented the difference between WorkCover's pays and the damages awarded at common law and recovered by WorkCover pursuant to section 54(7).

However in many cases, WorkCover contributed to the redemption payment to achieve a global settlement of the worker's common law action and compensation claim. This meant that workers were incentivised to pursue their common law claim and exit the system with a redemption payment. The Scheme also benefited by recovering compensation it had paid and by extinguishing its future liabilities for income maintenance and medical expenses.

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With the commencement of legislative amendments to section 42 of the Workers Rehabilitation and Compensation Act, WorkCover reviewed its redemption policy and associated operational instruction. The amendments to section 42 of the Act came into effect for all claims from 1 July 2010.

In addition to the legislative changes the WorkCover Board has reviewed its position regarding the section 42 redemption provisions, particularly in respect to the redemption of weekly payments. The WorkCover Board has decided that there will be no redemption of weekly payments considered. The WorkCover Board is mindful of the review by Clayton and Walsh who argued in their report tabled before the South Australian Government in December 2007 "*redemptions fundamentally undermine the principle and dynamics of a return to work focused workers compensation scheme*".

This policy compliments the current section 42 redemption policy.

Redemptions comprising damages recovered pursuant to section 54(7)

In December 2010 the WorkCover Board reviewed its position regarding the section 42 redemption provisions with respect to damages recovered pursuant to section 54(7) and has determined that WorkCover will not be a party to redemption agreements for income maintenance on claims against registered employers, including those proposed in the context of section 54 recovery actions.

Implicit in this decision was the Board's recognition that some workers have engaged with WorkCover and initiated proceedings against negligent third parties with a view to achieving recovery for the Scheme and finalisation of their workers compensation entitlements with a redemption payment.

Transitional Considerations

To ensure consistency between the Board's position on common law recoveries for registered employers and the expectations of workers in these circumstances, the Board authorises WorkCover to be a party to redemption agreements proposed in the context of section 54 recovery actions where:

1. The worker is pursuing a claim for damages at common law arising out of a compensable disability; and
2. The worker has issued proceedings on or before 22 October 2010; and
3. The worker satisfies one or more of the legislative criteria set out in section 42(2)(e) of the Act.

No other grandfathering or transitional clauses apply.

Other relevant information

Refer to the Injury and Case Management Manual, Chapter 17 for further information.

Jeff Matthews
Deputy CEO, WorkCoverSA

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This publication is not intended as a substitute for the requirements of the *Workers Rehabilitation and Compensation Act, 1986* or the *Occupational Health Safety and Welfare Act, 1986*.