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LEGISLATIVE DEVELOPMENTS

All the latest changes and commencement dates

A number of the further changes made by the ***Workers Compensation Legislation Amendment Act 2018*** commenced on 1 January 2019. The amendments include:

- The Workers Compensation Commission will resume its role as the sole dispute resolution tribunal for workers compensation matters, with SIRA and WIRO losing their respective roles regarding merit and procedural reviews of work capacity decisions. The Commission will now have the power to determine disputes regarding work capacity decisions, which it had previously been prohibited from doing.
- The Commission will now have the power to determine claims for section 66 permanent impairment compensation without necessarily referring the claim to an Approved Medical Specialist, in circumstances to be prescribed by regulation. The Commission's determination will be treated as an assessment for the purposes of the one assessment permitted by section 322A of the 1998 Act.
- A single *decision notice* pursuant to section 78 of the 1998 Act will replace the previous requirement for dispute notices pursuant to section 54 of the 1987 Act or section 74 of the 1998 Act. A new form for the decision notice has been released by icare.
- Commutation of liability for medical expenses pursuant to section 87EAA of the 1987 Act is not permitted in relation to a catastrophic injury (as defined in the regulation).

Awaiting Proclamation

- The calculation of pre-injury average weekly earnings (PIAWE) in respect of injuries received on or after (date to be proclaimed) will be :

  The weekly average of the gross pre-injury earnings received by a worker during the period of 52 weeks before the injury for work in any employment in which the worker was engaged at the time of injury.
- There will no longer be any need to separate overtime and allowances from earnings when making the calculation, and no change to the PIAWE after the first 52 weeks of compensation payments to remove overtime and allowances. Adjustments will still be required for non-pecuniary benefits (NPB).
- A new Schedule 3 to the 1987 Act will include the definitions for PIAWE; earnings; PIAWE for short-term workers, apprentices, trainees and young people; current work capacity; current weekly earnings; and the value of NPB.
- Consequential changes have been made to the calculation of weekly payments pursuant to sections 36, 37 and 38 of the 1987 Act.

The **Workers Compensation Amendment Regulation 2018** also introduced changes on 1 January 2019, including the requirements for section 78 decision notices issued by insurers, and changes to Schedule 6 costs for lawyers advising workers on reviews of work capacity decisions.

New **Workers Compensation Guidelines** take effect from 1 January 2019 and include (at part 7.5 of the Guidelines) detailed requirements for independent medical examinations (IME) and reports, and the information to be provided to a worker regarding an IME examination. The guidelines include the criteria for catastrophic injuries (at Part 9 Commutation).

New **Workers Compensation Medical Dispute Assessment Guidelines** also take effect from 1 January 2019 and deal with the referral of disputes to the Commission for allocation to an Approved Medical Specialist, the medical assessment process, Medical Assessment Certificate, and appeals.

SIRA has issued an information fact sheet for workers regarding independent medical examinations, which can be ***downloaded here***.

All of these changes are being incorporated into the TurksLegal Online *Guide to Workers Compensation in NSW*. If you have not yet registered for access to the Guide, please ***click here***.

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RECENT DECISIONS

Respondent acted reasonably suspending weekly benefits pursuant to section 48A

Joanna Cross v Department of Education & Training [2018] NSWCC 275 9 November 2018

Link to decision

Background

The worker made a claim for weekly benefits in respect of two separate injuries suffered on 13 August 2014 and 2 February 2015 arising out of or in the course of her employment as an administration assistant at Orange High School.

The occurrence of each of the injuries was not disputed although the second injury was characterised as being a recurrence of the initial injury.

The worker underwent surgery on her left shoulder in July 2015 and did not work thereafter. The worker moved to Victoria in August 2015.

The respondent opposed the claim for weekly benefits relying on sections 40 and 48A of the *Workplace Injury Management and Workers Compensation Act 1998* on the basis that the worker did not make reasonable efforts to return work in suitable employment at her place of employment at Orange High School.

Determination of Dispute

The dispute on weekly benefits was referred to an arbitrator for determination and the matter proceeded to arbitration hearing on 2 November 2018.

Based on the evidence and submissions by the parties, the arbitrator found that the worker was not totally incapacitated for work in the period for which she claimed weekly benefits but only that she was not fit to return to her pre-injury role as an administrative assistant.

The arbitrator considered that the worker's entitlement to weekly benefits was for a maximum period of 130 weeks on the basis that there was a single incapacity for work arising from a single injury (one discrete injury with the same pathology) that stemmed from separate events.

The respondent's insurer had originally issued a 'Notice of Warning to Suspend Weekly Benefits' advising the worker that her weekly benefits may be suspended if she did not meet her obligations under *Chapter 3 of the 1998 Act*.

The notice referred to a Return to Work plan advising that there were duties available at Orange High School and her obligation to make reasonable efforts to return to work in suitable or pre-injury employment at the pre-injury or another place of employment.

The worker contended that it was not reasonable for her to return to work in Orange and that the respondent was made well aware that she intended to move to live in Victoria and had signalled her intention before doing so and was assured that there would be no problem transferring her case to Melbourne.

The arbitrator reviewed communications between the worker and the respondent's case managers and rehabilitation consultants before noting that at the time the notices were issued to the worker she was still employed by the respondent and had previously indicated that she was prepared to travel back to Orange and resume her role until successful in obtaining a position in Victoria.

The arbitrator noted that the worker foreshadowed that this would be difficult as she was not fit to seek a full time position and would not be an attractive candidate for prospective employers.

The arbitrator concluded that in the circumstances, the respondent was not acting unreasonably in offering the applicant suitable employment in Orange.

The arbitrator noted the definition of 'suitable employment' under section 32A of the *Workers Compensation Act 1987* meaning work for which the worker is currently suited haviand in particular, having regard 'any plan or document prepared as part of the return to work planning process, including an injury management plan…' - subsection (a)(iii), and that this is to be regardless of 'the worker's place of residence' - subsection (b)(iv).

The arbitrator concluded that having regard to all of the evidence, the worker had not made reasonable efforts to return to work in suitable employment at Orange High School and there was no evidence that she had made any such efforts to find work at another place of employment.

The arbitrator entered an award for the respondent in respect of the claim for weekly benefits.

Implications

The decision underscores the importance of ensuring that steps are taken to formulate an appropriate return to work plan and to notify injured workers of their obligations in terms of injury management and making reasonable efforts to find suitable employment.

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RECENT DECISIONS

Work Injury Damages: A timely reminder about strict timeframes

Van Der Borght v Memjet North Ryde Pty Ltd [2018] NSWDC 346 27 November 2018

Link to decision

An employer has been unable to dispute liability in a work injury damages claim after failing to serve a pre-filing defence within 42 days of receiving the worker's pre-filing statement. The pre-filing statement was served directly on the employer's solicitor by email. The employer's attempts to argue that this did not constitute valid service were unsuccessful.

The case

Sections 315, 316 and 317 of the *Workplace Injury Management & Workers Compensation Act* 1998

These sections provide that:

- A pre-filing statement must be served on a defendant before a worker can commence court proceedings to recover work injury damages.
- A defendant is not entitled to assert that a pre-filing statement is defective unless it has notified the worker of the alleged defects within 7 days of receipt of the pre-filing statement.
- A defendant is unable to file a defence disputing liability for the claim if a pre-filing defence was not served within 42 days of receipt of the pre-filing statement.

Background

The worker suffered a psychological injury during the course of his employment and pursued a claim for work injury damages against his employer. After receiving the worker's notice of claim, the employer's solicitor wrote to the worker's solicitor advising they acted on behalf of the employer.

On 29 November 2017, the worker's solicitor sent an email to the employer's solicitor serving a pre-filing statement.

The email was received by the law firm acting for the employer, however, for reasons unknown, the email did not come to the attention of the solicitor with carriage of the matter and as a result, a pre-filing defence was not served within 42 days of receiving the pre-filing statement.

The worker subsequently argued that the employer was not permitted to file a defence disputing liability for the work injury damages claim as the pre-filing defence was served out of time.

The employer submitted at the hearing that the pre-filing statement was not validly served as it had not been served directly on the employer and/or the employer's insurer. That is, the employer argued that service on its solicitor was not sufficient.

Decision

Judge Levy considered the wording of the relevant sections of the Workplace Injury Management & Workers Compensation Act 1998. His Honour noted that section 315 of that Act requires service of a pre-filing statement on the 'defendant', which he determined should include the appointed legal representative of the employer or the employer's insurer.

His Honour observed that the employer's solicitors did not assert that the pre-filing statement was defective for any reason, including service, until after the pre-filing defence had been served. Any such notice was required to be given within 7 days of receiving the pre-filing statement pursuant to section 317 of the 1998 Act.

The employer's solicitor had advised the worker's solicitor that they were acting on behalf of the employer on instructions from the insurer. Judge Levy determined that it was then reasonable to infer that further correspondence relevant to the claim could be addressed to the employer's solicitor.

His Honour concluded that the pre-filing statement had been validly served. Although the employer's solicitor had no knowledge of his or her firm receiving the email attaching the pre-filing statement, service was nevertheless considered to

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be effective as the firm's IT records confirmed that it had been received. As a consequence, His Honour then determined that the employer was not entitled to file a defence disputing liability for the worker's claim.

Implications

This case serves as a timely reminder of the strict and unforgiving legislative timeframes for responding to work injury damages claims.

- If an employer believes that a pre-filing statement is invalid for any reason, then it must notify the worker within seven days of receipt.
- It is crucial that a pre-filing defence is served within 42 days of receiving a pre-filing statement, to ensure that an employer is not prohibited from disputing liability for the claim.

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RECENT DECISIONS

Case notes on AMS referrals and the restriction to one assessment…does section 39 apply?

Section 39 of the *Workers Compensation Act 1987* (the 1987 Act) provides that a worker has no entitlement to weekly compensation benefits in respect of an injury after receiving payments for an aggregate period of 260 weeks. However, the restriction does not apply where the WPI that results from the injury is assessed as **more than** 20%.

Section 322A of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) prevents a worker from obtaining more than one assessment of permanent impairment.

The question which then arises is whether section 39 will apply after 260 weeks where the worker's WPI cannot be determined as the worker has not reached maximum medical improvement (MMI).

Matilda Cruises Pty Ltd v Sweeny [2018] NSWWCCPD 37 DP Snell 31 August 2018

Link to decision

The worker had previously obtained at least three WPI assessments in respect of a knee injury after undergoing a number of operations on his knee.

In February 2017, notice was given that his entitlement to weekly compensation would cease towards the end of the year by the operation of section 39.

In December 2017, the worker underwent further surgery for total knee replacement and his solicitors asked the insurer to concede that MMI had not yet been reached and that the worker was not stable for the purposes of assessing WPI.

The insurer responded that MMI was a matter for the Workers Compensation Commission to determine and invited the worker to apply to the Commission.

The worker duly applied for referral to an AMS under section 319(g) of the 1998 Act to determine whether the degree of permanent impairment was fully ascertainable. The insurer opposed the referral arguing that it was precluded by section 322A of the 1998 Act.

Importantly, the worker was an 'existing recipient' and as such Clause 28C(a) of Schedule 8 of the *Workers Compensation Regulation 2016* provides that section 39 does not apply if an assessment of WPI is pending and has not been made because an AMS has declined to make the assessment on the basis that MMI has not been reached and the degree of permanent impairment is not fully ascertainable.

The arbitrator remitted the matter to the Registrar for referral to an AMS to assess whether MMI had been reached. The arbitrator's decision was confirmed by DP Snell on appeal noting that the worker is entitled to be referred to an AMS as the further assessment does not relate to an additional lump sum but was for the purpose of determining whether the worker is exempt from the application of section 39.

The Deputy President's decision is now subject to an appeal to the NSW Court of Appeal.

Singh v B & E Poultry Holdings Pty Ltd [2018] NSWWCCPD 52 DP Snell 3 December 2018

Link to decision

A MAC was issued assessing 14% WPI, however, the worker discontinued proceedings prior to a Certificate of Determination being issued.

The worker then made a subsequent claim for 16% WPI that was disputed by the respondent on the basis that the worker was bound by the previous MAC and could not bring a second claim in respect of the same injury due to the operation of section 66(1A) of the 1987 Act.

The arbitrator found that the worker was not entitled to bring a claim after discontinuing the earlier proceedings after a MAC was issued 'to then make a new claim and obtain a new MAC' and accordingly dismissed the proceedings.

On appeal, DP Snell found that the worker's earlier claim that was the subject of the MAC assessing 14% WPI was binding on the parties and rejected the further application for referral to an AMS for assessment by the operation of section 322A

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He noted that the worker had not sought an order for reconsideration of the MAC under section 329(1)(b). This was not raised before the arbitrator so that failing to deal with that issue did not constitute an error.

DP Snell further added that an application pursuant to s329 would have been futile in any event as this would potentially have the effect of avoiding the application of s322A of the 1998 Act.

Dianne Whitton v Secretary, Department of Education [2019] NSWWCC 27 7 January 2019

Link to decision

The worker was given notice that payments of weekly compensation would cease on 25 December 2017 by the operation of section 39 but was subsequently assessed by an AMS as having 32% WPI.

The insurer reinstated weekly payments from the date of the AMS determination (18 June 2018), not the date on which payments ceased.

The worker commenced proceedings claiming weekly compensation for the intervening period so that the issue for determination was whether she was entitled to weekly compensation after the expiry of 260 weeks during the period prior to her being assessed as having greater than 20% WPI.

The worker relied on the decision in *Kennewell v ISS Facility Services Australia t/as Sontic Pty Ltd* [2018] NSWWCC216 where it was determined that once section 39 is found not to apply then there is no restriction on the worker's entitlement and compensation continues until the worker achieves maximum medical improvement.

If the worker cannot establish that his or her permanent impairment is greater than 20%, then weekly compensation ceases.

A beneficial approach to statutory interpretation was adopted by reasoning that if the parliament wished to limit payments to workers from 260 weeks until after they obtain an assessment of greater than 20% WPI, then the parliament could have specifically provided for this by using 'the clearest of language'.

The arbitrator concluded that section 39 does not apply and that the worker was therefore entitled to weekly benefits from the date on which payments ceased until the determination by the AMS (in accordance with a previous work capacity decision).

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