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RECENT DEVELOPMENTS

New PIAWE for workers injured on and from 21 October 2019

Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019

The NSW government has published a Regulation as anticipated by the *Workers Compensation Legislation Amendment Act 2018* relating to changes to the method of calculating PIAWE for the purpose of determining a worker's entitlement to weekly payments of compensation.

The Regulation commences on 21 October 2019 with the objective of simplifying the calculation of pre-injury average weekly earnings by providing that overtime and allowances are no longer excluded from PIAWE as the weekly average of a worker's gross earnings over 52 weeks prior to their date of injury (subject to adjustment in some circumstances).

There will effectively be two different methods for calculating PIAWE for workers injured before and after the commencement date.

Employers and workers will be able to agree on the PIAWE amount to be applied as an alternative to the insurer making a PIAWE work capacity decision. The agreement must be approved by the insurer.

Link: Reference guide for PIAWE provides an overview of the changes.

New workers compensation Guidelines

New Guidelines issued by SIRA governing insurer conduct and case management will apply to all claims from 21 October 2019 replacing the Guidelines previously issued in December 2018.

Link: Workers compensation guidelines

Amended Standards of Practice

Amendments to SIRA's *Standards of Practice: Expectations for insurer claims administration* and conduct designed to deliver effective claims management practices will also apply from 21 October 2019.

Link: Standards of practice: expectations for insurer claims administration and conduct

RECENT DECISIONS

When can video surveillance footage be sent to an AMS?

Moston v Goldenfields Water County Council [2019] NSWWCC 282 (27 August 2019)

Link to decision

Summary

This decision provides a timely reminder of the restrictions that apply when seeking to provide video surveillance film to an Approved Medical Specialist (AMS). The Guidelines specify that video surveillance can only be sent to an AMS in exceptional circumstances.

Background

The worker suffered psychological injury and claimed lump sum compensation under section 66 of the *Workers Compensation Act* 1987. Liability was disputed by the insurer and the worker commenced proceedings in the Workers Compensation Commission.

The dispute on permanent impairment was to be referred to an AMS and the insurer sought to put surveillance reports, video surveillance film and a medical report by Dr Ingram with his comments on the surveillance to the AMS.

The worker objected to this relying on the Workers Compensation Medical Dispute Assessment Guidelines, particularly Part 2.26.

Relevant parts of the Guidelines state as follows:

"The Registrar arranges the assessment

2.23 The Registrar advises the parties of the date, time and location of the assessment.

2.24 If an interpreter is required, the Registrar is to organise for a National Accreditation Authority for Translators and Interpreters (NAATI) certified interpreter to attend the examination. In circumstances where a NAATI certified interpreter is unavailable the Registrar may approve an interpreter.

2.25 When the Registrar refers the matter to the AMS, the Registrar is to provide the AMS with:

2.25.1 all documentation admitted on behalf of a party to proceedings relevant to the medical dispute referred in compliance with the 2016 Regulation

2.25.2 any applicable provisions of the Workers Compensation Commission Rules 2011, and

2.25.3 any orders of a Court or the Commission.

2.26 The Commission file may contain video surveillance material obtained as part of investigators' reports. Video surveillance shall not be disclosed to the AMS unless ordered by the Commission in exceptional circumstances.

2.27 Parties to a medical dispute are not to attach legal submissions in the documents lodged in connection with the dispute. Any legal submissions will be removed from the documents lodged prior to referral to the AMS.

2.28 If it is necessary for a worker to bring x-rays or similar documents to the assessment, the worker will be advised of this in the letter from the Registrar.

2.29 The parties are not to communicate directly with the AMS at any time with the exception of the worker during the examination.

2.30 The parties are not to provide additional information directly to the AMS at any time.

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2.31 An AMS may call for the production of medical records necessary or desirable for the purposes of assessing a medical dispute. This request should be made through the Registrar."

Decision

The Arbitrator was required to decide whether there were 'exceptional circumstances' that would allow the video surveillance to be disclosed to the AMS and expressed the view that exceptional circumstances would include scenarios such as:

- the worker fails to disclose a "significant recreational or vocational activity" which the worker undertakes as shown by the footage; or
- where the footage shows the worker "in paid employment when he says he cannot work".

In this case, the worker was shown in the surveillance footage to be part of a local cycling group. The Arbitrator noted that this information had been disclosed to Dr Ingram by the worker and so he found there were no exceptional circumstances and ordered that the footage should not be sent to the AMS.

The Arbitrator then considered the surveillance reports and Dr Ingram's report interpreting surveillance finding that the exclusion in the Guidelines only applied to the video footage and not to the reports. The reports that had been served with the Reply were therefore allowed to be sent to the AMS.

Implications

This decision provides examples of when video surveillance can be sent to an AMS and should be borne in mind when an insurer believes that the surveillance footage is relevant to a medical dispute. Clearly, if the worker has already admitted to behaviour or conduct that is the subject of the video surveillance, then it is highly unlikely that the surveillance footage will be allowed to be disclosed to the AMS.

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RECENT DECISIONS

Employer establishes section 11A defence

Vinod v Boral Shared Business Services Pty Ltd [2019] NSWWCC 254 (25 July 2019)

Link to decision

Summary

An employer has successfully defended a worker's claim for psychological injury relying on section 11A of the *Workers Compensation Act* 1987 ('the 1987 Act').

Legislation

Section 11A of the *Workers Compensation Act* 1987.

The employer has the onus of establishing a defence to a claim for psychological injury under section 11A of the 1987 Act. The employer must prove that the worker's injury was wholly or predominantly caused by reasonable actions taken in relation to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of the worker.

Background

The worker had commenced work with the employer in September 2007. He alleged that he had been subjected to poor management, workplace bullying and stress from about May 2015, when he started reporting to a new manager.

The worker claimed that his new manager had a micromanaging style and that he was overbearing. The worker alleged that he was singled out and bullied about his time sheets.

The employer submitted that the worker was 'asked to do no more than other employees in relation to the completion of timesheets' and that completing these records was an essential requirement of the worker's employment.

A number of meetings were arranged with the worker to discuss completing timesheets. The worker did not attend a final meeting that was scheduled for 6 February 2017 and resigned later that day. The employer planned to terminate the worker's employment on the same day.

Decision

The dispute came before Arbitrator Burge who was required to determine:

1. whether the worker's injury was wholly or predominantly caused by the actions of the employer;
2. whether the actions taken by the employer related to performance appraisal, transfer and/or discipline of the worker; and
3. whether the employer's actions were reasonable.

The worker's evidence revealed that 'it was overwhelmingly the issue of timesheets which caused his difficulties in the workplace'. The worker did not describe any specific incidents which he claimed to constitute examples of bullying and harassment, other than matters relating to timesheets.

Arbitrator Burge noted that the worker's treating psychologist had suggested there were elements of workplace bullying involved but did not set out specific instances of the bullying in his reports.

Contemporaneous clinical notes of the worker's treating medical practitioners referred to stress stemming from the completion of timesheets. The employer also obtained medical evidence which supported the view that the issue relating to the timesheets wholly or predominantly caused the worker's psychological injury.

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Arbitrator Burge concluded that the worker's injury was predominantly caused by the employer's actions with regard to discipline. In his opinion, each of the employer's actions predominantly arose from the issue of the worker's completion (or non-completion) of timesheets.

Arbitrator Burge accepted that the test of reasonableness of the employer's actions was objective. He noted that the requirement to complete timesheets was shared by every person in the worker's team. Arbitrator Burge found that it was reasonable for the employer to request the worker to complete the timesheets as it was a fundamental part of his employment.

Critically, Arbitrator Burge stated:

> "...when the respondent became aware of the applicant's issues with regards to timesheets, it began a careful, measured and considered approach to try and assist the applicant to complete the timesheets as required…
>
> In my view, the respondent reacted appropriately in undertaking an investigation into whether the requirements of the applicant's role were too onerous, and once that investigation concluded, took appropriate steps by way of discipline and performance management to try to have the applicant comply with the directives of his employer."

The section 11A defence was successfully made out with an award entered in favour of the employer in respect of the claim for weekly compensation and section 60 expenses.

Conclusion

In order to successfully defend a claim relying on section 11A, the medical and factual evidence must support the employer's contention that the worker's psychological injury was wholly or predominantly caused by reasonable actions taken in relation to transfer, discipline and/or performance appraisal.

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RECENT DECISIONS

Successful appeal against decision of AMS

Elena Martinez v Paraplegic & Quadriplegic Association of NSW [2019] NSWWCCMA 111 (13 August 2019)

Link to decision

Summary

This case concerns a decision by the Medical Appeal Panel ('MAP') of the Workers Compensation Commission in relation to an appeal against the decision of an Approved Medical Specialist (AMS). The MAP determined that the decision of the AMS should be revoked because the AMS failed to provide sufficient reasons for his decision. There was also consideration of whether the AMS had adequately considered all of the available medical evidence.

Background

The worker was employed as a personal carer. On 22 November 2015, the worker suffered an injury to her right shoulder while assisting another carer to move a patient to a position higher up on a bed.

Following her work injury, the worker fell in an unrelated incident at Aldi on 21 January 2018, which aggravated the pain in her shoulder.

The worker made a claim for lump sum compensation in respect of her work injury and was referred to an AMS who assessed her total permanent impairment at 19% WPI. However, the AMS attributed only 10% WPI to the work injury. The AMS provided his reasons for this as follows:

> *"She has a significantly reduced range of motion which is less than that found following the operation and in subsequent reviews, prior to the fall on 21/01/2018.*
>
> *Therefore, impairment attributable to injury 22/11/2015 = 10% WPI."*

The worker filed an Application to Appeal against the decision of the AMS on the grounds that the AMS had failed to provide adequate reasons explaining why he attributed only 10% WPI to the injury on 22 November 2015. The worker further alleged that the AMS had failed to consider all of the available medical evidence and had made assumptions that were not sustainable given the whole of the evidence.

Decision

The MAP agreed with the submission that the AMS had failed to provide adequate reasons for why he assessed 19% WPI but only attributed 10% WPI to the work injury. The AMS was found to have disregarded a number of medical opinions to the effect that the deterioration of the worker's condition was a result of her work injury (as distinct from the fall in January 2018).

Overall, the MAP agreed with the AMS' assessment of 19% WPI. However, the MAP considered that the appropriate deduction to be applied to take account of the impairment not related to the work injury was one-fifth (being attributable to pre-existing degenerative changes, rather than the incident on 21 January 2018). This resulted in the assessment of permanent impairment attributable to the work injury being determined as 15% WPI so that

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the Medical Assessment Certificate was ordered to be revoked and a new Medical Assessment Certificate issued in its place.

Implications

This decision underscores the obligations of an AMS, which include giving adequate consideration to all of the available medical evidence and providing satisfactory reasons for their findings.

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