

RECENT DECISIONS

Disputed injuries cannot be referred to an AMS for assessment

Favetti Bricklaying Pty Limited v Benedek and Anor [2017] NSWSC 417 (24 April 2017)

[Link to decision](#)

Summary

The Workers Compensation Commission (WCC) does not have the power to refer an injured worker to an Approved Medical Specialist (AMS) if liability for an injury is disputed.

The WCC must first decide whether an injury is work-related before the injury can be referred to an AMS for assessment. This applies whether the referral to an AMS is for a claim for permanent impairment or a threshold dispute for the purposes of a work injury damages claim.

Background

On 5 October 2005, Mr Benedek (the injured worker) sustained a lumbar spine injury while employed by Favetti Bricklaying Pty Limited (the employer) as a bricklayer. On 5 November 2008, the injured worker and employer entered into a complying agreement for 14% whole person impairment (WPI).

On 6 April 2015, the injured worker made a claim for a further 7% WPI, including injury to the thoracic spine. The injured worker asked his employer to concede that his level of impairment exceeded 15% WPI so that he could make a claim for work injury damages. On 28 May 2015, the employer disputed liability for the alleged injury to

the thoracic spine, and disputed that the injured worker sustained any permanent impairment above 14% WPI.

On 28 October 2015, the injured worker filed an application for assessment of WPI in the WCC. The employer filed a response on 11 November 2015 and requested that the matter be listed for a teleconference. The employer said that the Registrar did not have the power to refer the matter to an AMS until the dispute regarding the thoracic spine injury was determined.

WCC Decision

The WCC decided that there was a distinction between a claim for permanent impairment compensation and a threshold dispute for a work injury damages claim. The WCC has jurisdiction to determine whether an injury to a specific body part, in this case the thoracic spine, is work-related if the injured worker is making a claim for permanent impairment compensation. However, the WCC decided that it did not have jurisdiction to determine what constitutes an injury for the purposes of a work injury damages claim.

On 7 December 2015, the WCC referred the injured worker to an AMS to assess the level of WPI for the lumbar spine, thoracic spine and scarring. The employer filed a Summons in the Supreme Court to have the WCC's decision to refer the injured worker to an AMS set aside and declared invalid.

Decision

Justice Bellew referred to Section 321 of *Workplace Injury Management and Workers Compensation Act 1998* (WIMA), which states:

(1) A medical dispute may be referred for assessment under this Part by a court, the Commission or the Registrar, either of their own motion or at the request of a party to the dispute. The Registrar is to give the parties notice of the referral.

...

(4) The Registrar may not refer for assessment under this Part:

(a) a medical dispute concerning permanent impairment (including hearing loss) of an injured worker where liability is in issue and has not been determined by the Commission ...

His Honour found that section 321(4)(a) of WIMA did not allow the WCC to refer the matter to an AMS to assess the degree of permanent impairment as a result of the disputed injury to the thoracic spine.

Justice Bellew stated if the injured worker were allowed to be assessed by an AMS for a body part which was disputed by the employer, the employer could be 'forced to defend a work injury damages claim in respect of an injury for which it was not liable, on the basis that it had no connection at all with the worker's employment'.

Also, pursuant to section 322A of WIMA, only one assessment can be made of the degree of permanent impairment of an injured worker. If a Medical Assessment Certificate were issued which included a disputed body part, and later the employer was not found to be liable for that body part, there would be no power to refer the matter for a further assessment.

The WCC made its original decision because under section 105 of WIMA it does not have jurisdiction in respect of matters arising under Part 5 (Common law remedies) of the *Workers Compensation Act 1987* (WCA). Part 5 includes section 151H of WCA, which states that common law

damages cannot be awarded unless the injury results in the degree of impairment of the injured worker that is at least 15%.

His Honour pointed out that section 151H of WCA does not incorporate a power of referral. This means that if the AMS referral is to see if the injured worker's injury results in at least 15% WPI so that he or she can be awarded common law damages, the AMS referral must be restricted to body parts where liability is not in dispute, as required by section 321 of WIMA.

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