

PROPOSED CHANGES

How changes to the Motor Accidents Scheme affect workers compensation in NSW

Summary

Significant reforms to the CTP scheme for those injured as a result of motor vehicle accidents were recently passed by the NSW parliament.

The *Motor Accident Injuries Act 2017* ('the Act') is set to commence on 1 December 2017 with a new CTP scheme to replace the *Motor Accidents Compensation Act 1999* ('MACA'). The new legislation will apply to motor accidents that occur after its commencement.

The question for workers compensation claims managers and employers is how will the new Act affect workers compensation rights and entitlements?

The Changes

The Act represents a substantial shift away from what was a purely fault-based scheme (i.e. the requirement to show fault on the part of an owner/driver in order to obtain damages), to a hybrid model that now provides access to statutory no-fault benefits and modified damages.

The nature of any entitlements will largely be determined by the definition of '*minor injury*'.

Minor Injury

Section 1.6(1) of the Act defines '*minor injury*' as being one or more of a soft tissue injury or a minor psychological or psychiatric injury.

Section 1.6(2) then defines '*soft tissue injury*' as:

'an injury to tissue that connects, supports or surrounds other structures or organs of the body but not an injury to nerves or a complete or partial rupture of tendons, ligaments, menisci or cartilage'

Section 1.6(3) defines "*minor psychological or psychiatric injury*" as '*a psychological or psychiatric injury that is not a recognised psychiatric illness*'.

Claimants who suffer only a '*minor injury*' will be able to access statutory benefits but will not be entitled to pursue a CTP damages claim (section 4.4).

Statutory Benefits

The statutory benefits payable under the Act includes weekly payments, medical expenses and commercial care. The cost of gratuitous care is no longer covered under either statutory benefits (section 3.25) or CTP damages (section 4.3).

Importantly for workers compensation claims managers and employers, section 3.35(1) states:

'An injured person is not entitled to statutory benefits under this part if compensation under the Workers Compensation Act 1987 (workers compensation) is payable to the injured person in respect of the injury concerned (or would be payable if the liability for workers compensation had not been commuted).'

However, the CTP insurer cannot refuse to pay statutory benefits on the basis that workers compensation is payable to the injured person unless they have made a '*successful*' claim for workers compensation, or the injured person has failed to comply with a request by the CTP

insurer to make a claim for compensation in respect of the injury:

A claim for compensation is considered to have been successful if "liability for any workers compensation has been accepted by the insurer for the claim under the Workers Compensation Act 1987. Liability is considered to have been accepted until liability is wholly denied (and for that purpose a denial of liability does not count while it is the subject of a dispute under that Act)."

Section 3.35 then goes on to make it abundantly clear that the entitlement to receive workers compensation will take first priority over the payment of statutory benefits under the Act by:

1. Requiring the injured person to make a claim for workers compensation if the CTP insurer considers, on reasonable grounds, that workers compensation is or may be payable: section 3.35(4);
2. Precluding the payment of statutory benefits in respect of any matter for which workers compensation was paid, before liability for workers compensation was denied: section 3.35(5);
3. Precluding the payment of statutory benefits for funeral expenses if workers compensation is paid or payable in respect of the death: section 3.35(6); and
4. Requiring the injured person who makes a claim for statutory benefits and workers compensation to inform both insurers that they have done so: section 3.35(7).

Section 3.35(7) also allows CTP insurers and workers compensation insurers to exchange information for the purpose of facilitating the proper operation of the section.

Weekly Benefits

Weekly benefits payable to an injured person who is *mostly at fault* or suffers only *minor injury* will cease after 26 weeks. A person is mostly at fault if their contributory negligence was *greater than* 61%: section 3.11(2).

Weekly benefits to other injured persons will cease after 104 weeks (2 years) unless the person's injury is the subject of a pending claim for damages: section 3.12. If it is the subject of a pending claim for damages the weekly benefits cease after 156 weeks (3 years) if the degree of any permanent impairment suffered as a result of the injury is not greater than 10% WPI or after 260 weeks (5 years) where the permanent impairment is greater than 10% WPI.

Medical Expenses

Most injured persons will be entitled to reasonable and necessary medical treatment payments (including commercial care) for life.

Section 3.28 again provides an exception in respect of those *mostly at-fault* or those with only *minor injuries*: section 3.28.

The liability for medical treatment expenses will be transferred from the CTP insurer to the Lifetime Care and Support Authority after 5 years.

CTP Damages

As was previously the case, CTP damages are only available where the injured person can establish that there was an 'at fault' driver who was responsible for the accident, however the entitlement to such damages is now significantly restricted.

There are no damages payable where the injured person suffers only *minor injury*: section 4.3.

The damages otherwise payable are for non-economic loss (subject to satisfying the *greater than* 10% WPI threshold) and for past and future economic loss (not including the cost of medical treatment and care): section 4.5.

A claim for CTP damages cannot be made before the expiration of 20 months after the motor accident unless the degree of permanent impairment is *greater than* 10% WPI: section 6.14.

Finally, a claim for CTP damages cannot be settled within 2 years after the motor accident unless the degree of permanent impairment is *greater than* 10% WPI: section 6.23.

No-Fault Motor Accidents

Accidents that were previously referred to as “blameless motor accidents” are now “*no-fault motor accidents*”: see section 5.1.

Implications for Workers Compensation Claims Managers and Employers

The new scheme will apply to claims for injuries suffered as a result of motor accidents that occur after 1 December 2017.

For those claims, it is advisable to:

1. Check whether the injured worker has lodged a claim for statutory benefits under the Act as well as a claim for workers compensation benefits;
2. Obtain any relevant evidence in order to make early liability decisions. While the Act directs that workers compensation benefits are to be payable before statutory benefits, if liability for a workers compensation claim is wholly denied and not disputed, or is disputed and subsequently upheld in the Workers Compensation Commission; then statutory benefits become payable under the Act. This means that injured workers may be prevented from later returning to claim workers compensation benefits;
3. Note that CTP damages claims are no longer available to injured workers who suffer only ‘*minor injury*’. This may also restrict the number of available section 151Z recovery claims taking account of the precondition that there must be a liability in the third party to “*pay damages to the worker*”;
4. The quantum of CTP damages has been substantially reduced, leaving little incentive for a worker to pursue a CTP damages claim. Therefore, section 151Z recovery claims will need to be pursued directly against CTP insurers rather than waiting to obtain a payback as a result of a worker pursuing a CTP damages claim; and

5. Section 151Z will continue to apply to “*no-fault motor accidents*”, as the definition mirrors the definition for “*blameless motor accidents*” under the MACA.

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