

Disease Provisions

NSW Workers Compensation

By Craig Bell | September 2012

Sections 15-19 of the *Workers Compensation Act 1987* (WCA 1987) deal with issues of disease. Given that hearing loss is almost a specialty of its own, I will restrict my paper to issues relating to Sections 15 and 16 of the WCA 1987.

Generally, the main issues to determine are:-

1. The existence of a disease
2. The date of injury for a claim which relates to disease.

Section 15 deals with disease of a gradual process, in other words diseases which are of such a nature to be contracted by a gradual process. This includes repetitive strain injury (RSI). Such diseases often happen over a long period of time and perhaps with a number of employers.

Section 16 deals with an aggravation etc of a pre-existing disease and of course it can also occur over time with several employers.

It is important to note that Sections 15 and 16 are primarily concerned with setting the date of injury by way of a legislative mechanism. Before the sections are even contemplated, the worker still has to satisfy that an injury occurred under Section 4 and employment was a substantial contributing factor under Section 9A. Thus the first focus of the case manager is whether an injury occurred with the insured. It is only then that Sections 15 and 16 are considered.

Existence of a disease

Of course the issue of whether or not the worker has a disease is a medical question. It should be noted by case managers that, just because the worker has a pre-existing condition, does not mean it is a disease. The question of whether or not the worker has a disease will be determined on the balance of the medical evidence. It is recommended that if you are in a position to appoint an IME, the question of whether or not the worker has a disease should be put to the IME.

At the same time an accurate account of the injury, whether it be nature and conditions or frank incident, should go to the IME. This will assist the IME in commenting on causation.

Certain medical conditions are deemed to be work related diseases pursuant to Section 19 of the WCA 1987. The Regulations set out circumstances in which these conditions will be held to be work related and includes such things as Q fever, brucellosis and leptospirosis.

Section 4

Section 4 Definition of “injury” (for injury before 19 June 2012)

(a) means personal injury arising out of or in the course of employment,

(b) includes:

(i) a disease which is contracted by a worker in the course of employment and to which the employment was a contributing factor, and

(ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the employment was a contributing factor to the aggravation, acceleration, exacerbation or deterioration, and

(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers’ Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.

Section 4 Definition of “injury” (for injury on or after 19 June 2012).

(a) means personal injury arising out of or in the course of employment,

(b) includes a “disease injury”, which means:

(i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

(ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease, and

(c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers’ Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.

Section 4 Difference between old and new law

Of course the main difference is the introduction of “the main contributing factor”. This does not exist in any other jurisdiction. Thus the wording seems to be a creation of the NSW Parliament. The parliamentary reading speeches to the amendment provide no real guide as to the intention or meaning of the words. However, in my view “the main contributing factor” is a narrower concept than “a substantial contributing factor”. Thus, it is likely to be more difficult for a worker to prove injury if the worker has to prove employment was “the main contributing factor”. Of course, this will be subject to any subsequent case law.

The other major difference is that disease is now omitted from Section 9A of the WCA 1987. Therefore, once there is consideration of “the main contributing factor” under Section 4, there is no consideration of Section 9A.

Section 15

Section 15 Diseases of gradual process—employer liable, date of injury etc

(cf former ss 7 (4), (4C), (5), 16 (1A))

(1) *If an injury is a disease which is of such a nature as to be contracted by a gradual process:*

(a) *the injury shall, for the purposes of this Act, be deemed to have happened:*

(i) *at the time of the worker's death or incapacity, or*

(ii) *if death or incapacity has not resulted from the injury—at the time the worker makes a claim for compensation with respect to the injury, and*

(b) *compensation is payable by the employer who last employed the worker in employment to the nature of which the disease was due.*

(2) *Any employers who, during the 12 months preceding a worker's death or incapacity or the date of the claim (as the case requires), employed the worker in any employment to the nature of which the disease was due shall be liable to make to the employer by whom compensation is payable such contributions as, in default of agreement, may be determined by the Commission.*

(2A) *The Commission is to determine the contributions that a particular employer is liable to make on the basis of the following formula, or on such other basis as the Commission considers just and equitable in the special circumstances of the case:*

$$C = T \times \frac{A}{B}$$

where:

C *is the contribution to be calculated for the particular employer concerned.*

T *is the amount of compensation to which the employer is required to contribute.*

A *is the total period of employment of the worker with the employer during the 12 month period concerned, in employment to the nature of which the injury was due.*

B *is the total period of employment of the worker with all employers during the 12 month period concerned, in employment to the nature of which the injury was due.*

(3) *Total or partial loss of sight which is of gradual onset shall for the purposes of subsection (1) be deemed to be a disease and to be of such nature as to be contracted by gradual process.*

(4) *In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3.*

(4A) *In this section, a reference to employment to the nature of which a disease was due includes a reference to employment the nature of which was a contributing factor to the disease.*

(5) *This section does not apply to an injury to which section 17 applies.*

It is important to note that Section 15 (as is Section 16) is a vehicle to determine the date of injury (and liable employer) once it has been determined that an injury has occurred. Therefore the worker would still have to prove that there was an injury under Section 4(b)(i). In doing this the worker only has to prove that the respondent's employment was of the class of employment to which the nature of the injury was due. Thus the worker does not have to establish if the disease was actually brought about or contributed to by the employment undertaken by the employer (causal nexus); it is enough only that the disease is incidental to the class of employment. *Crisp v Chapman* (1994) 10 NSW CCR 492 and *Smith v Mann* (1932) 47 CLR 426. It is enough for the worker to show that the employment was of such a kind so as to expose the worker to the risk of injury: *Tame v Commonwealth Collieries Pty Limited* (1947)47SR(NSW) 269

By way of example, in *Cabramatta Motor Body Repairers (NSW) Pty Ltd v Raymond & Pegrin Pty Ltd* (2006) NSWCCPD132, the evidence was that the two paint pack system released a vapour that was known to have caused occupational asthma. That is all the worker had to show in terms of Section 15.

It is likely that the amendment to Section 4 will make much of the above case law irrelevant. This is because the narrow concept of "the main contributing factor" in my view is inconsistent with the concept of disease being incidental to a class of employment. However, this will be subject to any subsequent case law.

Section 16

16 Aggravation etc of diseases—employer liable, date of injury etc (cf former ss 7 (4A), (5), 16 (1A))

(1) If an injury consists in the aggravation, acceleration, exacerbation or deterioration of a disease:

(a) the injury shall, for the purposes of this Act, be deemed to have happened:

- (i) at the time of the worker's death or incapacity, or
- (ii) if death or incapacity has not resulted from the injury—at the time the worker makes a claim for compensation with respect to the injury, and

(b) compensation is payable by the employer who last employed the worker in employment that was a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration.

(2) Any employers who, during the 12 months preceding a worker's death or incapacity or the date of the claim (as the case requires), employed the worker in any such employment shall be liable to make to the employer by whom compensation is payable such contributions as, in default of agreement, may be determined by the Commission.

(2A) The Commission is to determine the contributions that a particular employer is liable to make on the basis of the following formula, or on such other basis as the Commission considers just and equitable in the special circumstances of the case:

$$C = T \times \frac{A}{B}$$

where:

C is the contribution to be calculated for the particular employer concerned.

T is the amount of compensation to which the employer is required to contribute.

A is the total period of employment of the worker with the employer during the 12 month period concerned, in employment that has been a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned.

B is the total period of employment of the worker with all employers during the 12 month period concerned, in employment that has been a substantial contributing factor to the aggravation, acceleration, exacerbation or deterioration concerned.

(3) In this section, a reference to an injury includes a reference to a permanent impairment for which compensation is payable under Division 4 of Part 3.

(4) This section does not apply to an injury to which section 17 applies.

Section 16 is, similar to Section 15, a provision to artificially set a date of injury. It is not determinative of the issue of injury and therefore the worker would have to establish an injury under Section 4(b)(ii) before the question of Section 16 becomes relevant. In *Kelly v Western Institute NSW TAFE Commission (2010) NSWCCPD 71*, DP Roche found that: “aggravation or exacerbation of a disease occurs where the experience of the disease by the patient is increased or intensified by an increase or intensifying of the symptoms”. So there must be evidence of symptoms.

Date of Injury (applicable to Section 15 and Section 16)

Firstly, it is important for you to understand that the existence of disease does not necessarily mean that Sections 15/16 will automatically apply to determine the date of injury. It is possible that a frank injury can aggravate a disease. In that case the date of injury would be the date of the frank injury. This is demonstrated in *Australian Conveyor Engineering Pty Limited v Mecha Engineering Pty Ltd and Anor (1998) 45NSW LR 606* when the worker fell from a rickety welding stand and landed on a concrete floor aggravating pre-existing degenerative changes of the spine at L4/5 and L5/S1. The worker experienced back pain and was off work for 8 weeks. Sheller JA agreed that Section 16’s object “was to provide a worker with recourse against one employer where there were several whose employment of the worker substantially contributed to the aggravation...” etc. Why should a later employer be responsible for the earlier frank injury?

However, if the injury is a simple aggravation injury where over a period of time employment was a substantial contributing factor to the aggravation etc. of a disease, Sections 15/16 identify the following as the date of injury:

1. Date of death or incapacity; or
2. If death or incapacity has not resulted from the injury – at the time the worker makes a claim for compensation with respect to the injury.

In most cases the determination of the date of injury is quite simple. The date of injury is when the worker first ceased work and was unable to engage in pre-injury work resulting in a weekly entitlement. It is

noted that incapacity is an inability to engage in pre-injury work either partially or totally (*Davis v State Rail Authority (NSW)* (2001) 21NSW CCR 322) and relates to incapacity (as in s34) i.e. where there is an entitlement to weekly benefits (*P&O Berkeley Challenge Pty Ltd v Alfonzo* (2000) 49NSWLR481). Thus symptoms prior to the date of incapacity are not relevant to incapacity or the date of injury. *Nand v Spotless Services (NSW) Pty Limited* (2010) NSW WCCPD 103. Neither are physical difficulties with the work which do not result in an entitlement to weekly compensation.

For claims for lump sum compensation only, because of the effect of Section 16(3) the date of injury is the date the lump sum claim was made. *Stone v Stannard Bros. Launch Services Pty Limited* (2004) NSW CA 277.

However, difficult questions can be raised where there is a previous claim for weekly compensation and then a subsequent claim for lump sum compensation. I set out three examples. Much of the case law is based on the decision in *Alto Ford Pty Ltd v Antaw* (1999) 18NSWCCR 246 - that there can be different dates of injury under Section 15 and Section 16 for incapacity and impairment injuries.

In *Whitehead v Kassagrove Pty Ltd t/as Moorebank Hotel (No.2)* (2008) NSW WCCPD 38, I note the following:-

1. The worker ceased work because of plantar fasciitis on 22 May 2000 and never returned to full duties.
2. The worker was paid weekly compensation in respect of her condition.
3. On 12 September 2005, a claim for lump sum was made.
4. The WCC found the date of injury for the lump sum was 12 September 2005. This was because of the line of authority including *Alto Ford* and *Stone v Stannard Bros* and the principle that the incapacity had not resulted from the losses.

Whitehead can be contrasted with *Collingridge v Iama Agribusiness Pty Limited* (2011) NSW WCCPD 31. I note the following:-

1. The worker, who was a truck driver for two employers between 1989 and June 1998 felt pain in his back and finally stopped work and then returned to work with the last employer doing clerical duties only.
2. The matter was determined by the Compensation Court and it was found that the last employer was liable under Section 16(1)(a)(i) as 12 June 1998 was the date of incapacity. The worker was also found, as part of the same determination, to have impairment under the Table of Disabilities.
3. The worker then sought further compensation on 15 March 2010 under the Table of Disabilities.
4. DP Roche found that even though the further lump sum claim had been made in 2010, there were not two different dates of injury. This was because there had been a determination of injury by the Compensation Court (12/6/98). Accordingly the worker's further lump sum claim was determined under the table of disabilities rather than whole person impairment.

A third example is represented by the matter of *P&O Berkeley Challenge Pty Ltd v Alfonzo* (2000) NSWCA 214. In that matter the following is relevant:

1. The worker developed pain in her arms and neck in the early 1990's whilst employed by the first employer and was incapacitated in 1993 and the insurer paid weekly compensation. The worker then moved to a second employer and after a further period of incapacity in 1995 and a subsequent payment of weekly compensation, returned to work in February 1996 for two weeks but then ceased work again and did not return to work.
2. The worker claimed weekly compensation ongoing.
3. Obviously the issue was the deemed date of injury and the focus was on the incapacity for which compensation was claimed. It was found that the deemed date of injury was not the first date of incapacity but was the date of incapacity for which the compensation was claimed (Feb 1996). Of course it was of importance that injury was found during each period of work.

Please note that under Section 18, if upon the application of Sections 15/16, the deemed date of injury is after the employment has ceased, the liability of the employer arises immediately before the cessation of employment.

Practical tips

For case managers, a common occurrence is a claim for lump sum compensation that relates to numerous frank incidents and employers as well as nature and conditions allegations including a disease. It is important to follow these steps:-

1. If you have a claim file for a frank incident, it is relevant to a determination of the lump sum claim. It is not appropriate to simply class the claim as a disease claim and point the finger at the last employer/insurer.
2. Arrange for an assessment of the permanent impairment relating to that frank incident.
3. If you are implicated in a general nature and conditions type claim, you will need to determine whether there is a disease. If you object to the worker's medical opinion, you will need an IME to assess disease.
4. At the same time you will need to determine whether employment with your insured was relevant (perhaps obtain a factual but definitely request particulars from the worker's solicitors as to the duties that allegedly contributed to the contracting/aggravation etc of the disease.)
5. Ideally, once you have the evidence in 4. you would send it to an IME and the IME be asked whether employment was the main contributing factor to the contracting/aggravation etc of the disease.
6. Obtain NTD clinical notes to verify when the symptoms arose.
7. Please check the period of insurance to determine whether you cover the full period of the claim.

8. Once you have the above information, if it is a disease, there will need to be a determination of the date of injury under Section 15 or 16.
9. If it is not a disease, apportionment under Section 22 may apply usually based on the periods of risk/employment. Again you will need to determine whether employment with your insured is relevant.
10. Please note that the expression of “nature and conditions” is meaningless: *Toplis v Coles Group Ltd t/as Coles Logistics (2009) NSWCCPD*. Thus if the worker’s claim does not set out the cause of injury and the nature of the allegations supported by appropriate evidence, you should consider declining the claim immediately.

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