

DEFENDING COMPENSATION CLAIMS: THE EMPLOYER'S PERSPECTIVE

INTRODUCTORY REMARKS

Despite its long history the scheme for managing and administering workers compensation in New South Wales continues to change and evolve. While the recent attempts to continue Legislative reform appear to have stalled, pronouncements at the Appellate level continue to have a significant impact on this area of the law.

In my experience most large employers in New South Wales regard this scheme as being characterised by confusion and mismanagement such as presents one of many disincentives to the transaction of business within the State.

In broad terms the practical problems which arise in respect of workers' compensation disputes when acting for employers relate to the areas of the availability of defences, limited and constrained rights of appeal, inadequate identification and investigation of issues and constraints on obtaining evidence. What follows is a brief review of the nature of these difficulties and some of the circumstances in which they arise.

WHAT DEFENCES AND WHEN ARE THEY AVAILABLE

In order to consider the availability and the operation of the main defences available to an employer in responding to a compensation claim it is now firstly necessary to consider the circumstances in which those defences may become available.

There are now a large number of Presidential Decisions (commencing within *Mateus v Zodune Pty Limited [2007] NSW WCC PD227*) which emphasis the primacy of a "Section 74 Notice" in determining those issues which can properly be said to be before the Commission for determination in a dispute and setting the limited circumstances in which leave will be given to argue issues not identified in such a Notice.

Where an employer seeks to agitate an issue not identified (or not properly identified) in a Section 74 Notice practitioners need to be aware of those matters which are considered to be relevant to the exercising of the discretion by an Arbitrator under section 289A(4) to grant leave to agitate those issues. Those matters include the following:

- a. The degree of difficulty or complexity to which the un-notified issues give rise;
- b. When the Insurer notified that it wished to contest any un-notified issues;

- c. The degree to which the Insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability;
- d. Any prejudice that may be occasioned to the worker;
- e. The merit and substance of the issue sought to be raised;
- f. The general conduct of the parties in the proceedings;
- g. Any other relevant matters arising from the particular circumstances of the case.

In addition Deputy President Roach has expressed certain further helpful observations including that:

- 1 A decision by an Insurer to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved.
- 2 Any Insurer seeking to dispute an un-notified matter is seeking to have a discretion exercised in its favour and accordingly must act promptly to bring the matter to the attention of the Commission and all other parties.
- 3 Any unreasonable or unexplained delay in giving notice of an un-notified matter will be relevant to the exercise of the discretion.
- 4 In addressing the prejudice to the worker it will be significant to consider when and in what circumstances the worker was first made aware of the un-notified issue that is sought to be raised.
- 5 Thought it will be relevant to the exercise of the discretion to keep in mind that the Commission must act according to Equity, good conscious and the substantial merits of the case, those matters will not be determinative.

Assuming that adequate notice has been given or that leave is able to be obtained to dispute issues not notified, the defences available to employers in Workers Compensation Claim fall broadly into five (5) main categories.

FIVE MAIN DEFENCES

1. Injury

The starting point for a Workers' entitlement to receive Compensation Benefits is the Receipt of Injury (Section 9 of the WCA) and Injury is defined (in Section 4 of WCA), as Personal Injury arising out of, or in the course of employment and includes a disease contributed to, or aggravated by employment.

The question of whether a Worker has sustained injury inevitably needs to be answered by a combination of Factual and Medical Evidence and the agitation of a defence based on the issue of Injury should take into account the following matters:-

- a. Incident does not equal injury;
- b. Injury may not require an incident;
- c. Even when incident results in injury, it does not automatically result in the failure of multiple body parts;
- d. Pain is not an injury – it is a symptom. Injury involves, a pathological alteration to a person’s physiology.

2. Causation

It is important to understand that the question of Causation will often involve different considerations to the question of whether a Worker has sustained an injury.

Where a Worker has sustained an injury, it is still important to be able to determine what pathology, if any, can properly be said to have been caused by the employment, or any incident in that employment.

In general terms, what is required to determine the question of Causation is a “common sense evaluation of the Causal chain” (*Kooragang Cement Pty Ltd -v- Bates [1994] 35NSWLR452 at Page 463*) and each case must be determined on it’s own facts.

As with most issues, the onus of proof, in regard to Causation, rests with the Worker and it is therefore up to the Worker to ensure that there is sufficient evidence to enable the onus to be discharged.

3. Substantial Contributing Factor

One of the most common grounds on which liability for the payment of Compensation Benefits is disputed on behalf of an Employer is by reliance on Section 9A of the WCA, which provides that no compensation is payable in respect of an injury, unless the employment concerned was a substantial contributing factor to the injury.

Importantly, a finding to the effect that a Worker has sustained an injury is insufficient on it’s own, to establish an entitlement to the payment of compensation. The imposition of Section 9A now means that the determination of this entitlement is a two step process requiring that the evidence discloses the occurrence of an injury and that the evidence supports a finding that employment is a substantial contributing factor to the injury. It is again important to note that the onus of proof in this regard rests with the Worker and must be discharged to the civil standard.

On the other hand, it is also important to realize that once an injury has been sustained to which employment is a substantial contributing factor, it is not possible, for employment to cease to be a substantial contributing factor at a later date. For this reason, a Denial of Liability on the basis that employment is “no longer” a substantial contributing factor is meaningless.

4. Statutory Exclusions

Whilst a Worker may otherwise satisfy the requirements of the Legislation, so as to be entitled to compensation, the payment of Compensation Benefits may otherwise be excluded by the operation of the Statute, in certain circumstances, examples of which are, as follows:-

- a. ***Journey Claims*** – the payment of compensation for injury sustained on a journey may be excluded, if the injury is attributable to serious, or wilful misconduct (Section 10 (1A)), if the injury resulted from the medical, or other condition of the Worker and the journey did not cause, or contribute to the injury (Section 10 (1D)), or if the injury was received during, or after any interruption of, or deviation from any such journey and the interruption, or deviation was made for a reason unconnected with the Worker’s employment, or the purpose of the journey (Section 10(2) of the WCA).
- b. ***Psychological Injury caused by reasonable action of the Employer*** – the Act provides, in Section 11A of the WCA, that no compensation is payable in respect of an injury that is a Psychological Injury, if the injury is wholly, or pre-dominantly caused by reasonable action taken, or proposed to be taken by, or on behalf of the Employer, with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment, or dismissal of Workers, or provision of Employment Benefits to Workers.

Reliance on a defence under Section 11A by an Employer inevitably requires overcoming three main hurdles. The first is to demonstrate that the injury was wholly, or pre-dominantly caused by reasonable action by the Employer (rather than wholly, or pre-dominantly caused by some other aspect of the employment). The second hurdle involves proving that the action of the Employer was reasonable and the third hurdle involves proving that it was action with respect to one, or other of the matters identified in the Legislation.

- c. ***Serious and Wilful Misconduct*** – the Legislation provides in Section 14 of the WCA that if an injury to a Worker is solely attributable to the serious and wilful misconduct of the Worker, compensation is not payable in respect of that injury, unless it results in death, or serious and permanent disablement.

- d. ***Not seeking suitable Employment*** - there are several provisions within the Legislation which have the effect of imposing a penalty on a Worker who is not seeking suitable work, or complying with obligations directed at returning the Worker to suitable work. The first such provision is found in Section 38 of the WCA, which, governs a Worker's entitlement during a period of partial incapacity for work where the Worker is not suitably employed and provides, that compensation is not payable in accordance with the Section during any period, unless the Worker is seeking suitable employment during that period, as determined by reference to Section 38A.

Further, after a period of one hundred and four (104) weeks of partial incapacity, payments of Weekly Compensation to a Worker can be discontinued by reference to Section 52A of the WCA, if, at the time of the discontinuance of payments, the Worker is not suitably employed and is either not seeking suitable employment, has previously unreasonably rejected suitable employment, or has sought suitable employment, but failed to obtain suitable employment primarily because of the state of the labour market.

Finally Sections 47 and 48 of WIM impose on Workers an obligation to participate and co-operate in the establishment of an Injury Management Plan and the obligations imposed under that plan, together with an obligation to make all reasonable efforts to return to work with his, or her pre-injury Employer, as soon as possible. The failure to comply with these obligations can result in a Worker having no entitlement to Weekly Compensation during the period of that failure (subject to notification being given to the Worker in accordance with Section 57 of the WIM).

- e. ***Recovery of Damages*** – if a Worker recovers Damages in respect of an injury from the Employer, or from another person, the Worker then has no further entitlement to the payment of Statutory Compensation (Section 151A and 151Z of the WCA). Damages is defined under the Legislation, in Section 149 of the WCA, as any form of Monetary Compensation, however, the Damages must be paid in respect of the injury for which compensation would otherwise be recoverable.

- f. ***Limitation Periods*** – under Section 261 of the WIM, compensation cannot be recovered unless a Claim for Compensation has been made within six (6) months after the injury, or accident happened. However, there are several exceptions to this Statutory exclusion. The first is where particulars of an injury received by a Worker are entered into a Register of Injuries kept by the Employer under the Act.

Further, the failure to make a claim within the six month period is not a bar to recovery of compensation, if it is found that the failure was occasioned by ignorance, mistake, absence from the State, or other reasonable cause and either the claim was made within three (3) years after the Date of Injury, or the claim is not made within three years, but the claim is in respect of an injury, which resulted in death, or serious and permanent disablement.

Further, the failure to make a claim within the period required is not a bar to the recovery of compensation if the Insurer concerned determined to accept the claim outside that period.

Finally, if an injured Worker becomes aware that he, or she has sustained an injury, after the injury was received (i.e. Latent Injury), the injury is taken to be received when the Worker first became so aware.

5. ***Quantum***

Where a Worker establishes all of those elements necessary to give rise to entitlements to the payment of Statutory Compensation Benefits, it is still open to an Employer to dispute the nature and extent of those entitlements.

Disputes as to the Quantum of Entitlements, may relate to issues such as the following:-

- a. Whether a Worker is totally, or partially incapacitated;
- b. If a Worker is partially incapacitated, the extent of any entitlement to Weekly Compensation by reference to Section 40 of the WCA;
- c. The extent of any entitlement to Lump Sum Compensation, or Impairment, by reference to Section 66;
- d. Whether and if so, to what extent Lump Sum Compensation is payable for Pain and Suffering pursuant to Section 67 of the Act;
- e. Whether Section 60 Expenses are reasonably necessary as a result of injury and whether the rate at which Section 60 Expenses can be recovered, are limited.

PROBLEMS ASSOCIATED WITH APPEALS

In the current scheme, the opportunities by which disputed Compensation claims can be resolved are extremely limited, with the result that the majority of disputes now proceed to a Determination by an Arbitrator in the Workers' Compensation Commission. This also results in the requirement that parties give careful and reasoned consideration to what Appeal options are available, in circumstances of an adverse Determination by an Arbitrator.

Limitations on Appeals

An Appeal in respect of a Decision of an Arbitrator is available by leave, unless the decision appealed against is of an interlocutory nature (Section 352(8) of the WIM). A decision is of an interlocutory nature, if it is a decision which does not finally dispose of, or determine the rights of the parties.

The Commission is not to Grant Leave to Appeal, unless the amount of compensation at issue on the Appeal is both at least \$5,000.00 and at least 20% of the amount awarded in the decision appealed against (Section 352 (2) of the WIM).

An Appeal can only be made within twenty eight (28) days after the making of the decision appealed against (Section 352 (4) of the WIM). Despite this, the Commission Rules (Rule 16.2), permits the Commission to extend the time for making an Appeal in "exceptional circumstances".

The Rules provide that for the purpose of the twenty eight day time limit, a decision is made when the Commission issues the Certificate of Determination of the dispute.

An Appeal is required to have attached to it, a copy of the Certificate of Determination and must include arguments in favour of the Review of the Decision, details of the amount of compensation at issue on the Appeal, any new evidence for which leave will be sought and an indication as to whether the Appeal can be dealt with solely on the basis of the Written Application.

Grounds For Appeal

The format for Appeals in the Commission requires that the Appeal address various procedural issues (such as the basis for granting leave and the time of filing) and then set out the Grounds of Appeal relied on, followed by Submissions in support of those Grounds. The Appeal filed should also identify what relief is sought and include Submissions as to Costs, together with a List of Authorities. Up until the recent amendments to the legislation appeals to Presidential Members were by way of a review. During this period it was not necessary to demonstrate that the decision of the Arbitrator was affected by identifiable error and the task of the Presidential Member by way of review was to ascertain what the true and correct view of the issue in dispute should be.

With the amendments that came into effect on 1 February 2011, an Appeal is now limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of such an error. Section 352(5) of the WIM now specifically states that “the appeal is not a review or a new hearing”.

It is important for Practitioners to be aware that Section 345 of the *Legal Profession Act, 2004* applies to Appeals to the Commission, so that it is necessary for a Practitioner to certify to reasonable prospects of success.

Procedural Matters

As indicated, an Appeal should be filed within twenty eight (28) days. Once an Appeal is registered by the Commission, the Appellant is to file and serve a sealed copy of the Appeal within fourteen (14) days and to file a Certificate of Service within a further seven (7) days.

The Respondent to the Appeal has twenty eight (28) days from the date of service (forty two (42) days from the Date of Registration), in which to file and serve a Notice of Opposition and a further seven (7) days in which to file a Certificate of Service.

The Appellant has a period of fourteen (14) days in which to file and serve any Submissions in reply to a Notice of Opposition.

A typed Transcript of the proceedings before the Arbitrator is only provided after an Appeal has been filed (an Audio recording is provided upon request without an Appeal).

If the Appellant wishes to make additional Submissions based on the Transcript, such Submissions are to be filed and served within twenty eight (28) days of the date of the provision of the Transcript.

Alternatives To Appeal

A party who is dissatisfied with some, or all of an Arbitrator’s Decision, who does not wish to proceed with an Appeal, or who is prevented from Appealing, by reason of the leave requirements, can seek to proceed by way of an Application for Re-consideration (in accordance with Section 350 (3) of the WIM), which provides that the Commission may re-consider any matter that has been dealt with by the Commission and rescind, alter, or amend any Decision previously made, or given by the Commission.

Applications for Re-consideration are dealt with in accordance with the Registrar’s Guideline, issued on 22 October 2007 and it is important to make sure that an Application for Re-consideration includes the information required by the Guideline. This information includes the matter that is the subject of the Application for Re-consideration, the basis upon which Re-consideration is sought, any special circumstances which justify any delay in the making of the Application for Re-consideration and Submissions addressing why the Decision should be the subject of a Re-consideration, rather than an Appeal.

Finally, a party may also apply to the Commission for a Review of any Weekly Payments of Compensation, in accordance with Section 55 of the WCA. This Application for Review is dependant upon there being a change of circumstances and the onus of proving a change of circumstances rests with the party applying for the Review.

DIFFICULTIES ASSOCIATED WITH IDENTIFYING AND INVESTIGATING ISSUES

The unfortunate reality is that when acting for an Employer, legal advice is often only sought, long after important decisions have already been made in respect of the claim. Despite this, it remains, in my view, extremely important to return to what could be regarded as First Principles in the provision of such advice, even where a claim has proceeded beyond certain important initial considerations. In particular, care needs to be given to the following Primary Issues in providing advice:-

1. Notification of Injury

- Has notification of injury been given in accordance with the requirements of the Act?
- Has the Notice of Injury provided all of the necessary information? If not, is the failure otherwise excused?
- Do any specific consequences flow from the Date of Notification of Injury?

2. Injury

- Has an injury been sustained and if so, what is the nature of it?
- What are the circumstances of the injury and what are the consequences of such circumstances?
- What special considerations arise in respect of disease cases?

3. Claim for Compensation

- Has a claim been made in accordance with the requirements of the Act? If not, is the failure to claim otherwise excused?
- Has the claim been made within the time required by the Act?
- Do any specific issues arise from the making of the claim?

Even if these Primary Issues are satisfied, it may then be necessary to consider certain Secondary Issues, in determining whether Workers' Compensation Benefits are payable. Those issues include such things as the following:-

1. Causation

- If an injury has occurred, what has actually been injured?
- Is the Claimant's current medical condition (or some part of it), causally connected to the incident complained of?
- Has there been some further injury following an initial injury and if so, can it be related by way of Causation to the initial injury?

2. Substantial Contributing Factor

- Is employment a substantial contributing factor to the injury?
- Which, if any, of the factors under Section 9A(2) are relevant to an assessment of the contribution from employment?

3. Disentitling Provisions

- If the injury is a Psychiatric Injury, does Section 11A have application?
- Has a claim been made more than six (6) months, or three (3) years after injury?
- Do the provisions of Chapter 3 of the WIM, or Section 52A of the WCA apply, to preclude Weekly Compensation?

Finally, once these Secondary Issues have been determined, there are then issues to be addressed relating to the Quantification of any Entitlement, with such issues arising, for example, in respect of the following:-

1. Weekly Compensation

- Is the Claimant totally incapacitated, deemed to be totally incapacitated, or partially incapacitated?
- What are the Claimant's Probable Pre-Injury Earnings and Award Rates (or Current Weekly Wage Rate)?
- If partially incapacitated, what is the Worker's Actual Earnings and ability to earn?
- Do any discretionary factors arise?

2. Lump Sum Compensation

- Is the claim by reference to the Table of Disabilities, Whole Person, or both?
- Is the claim related to impairment from a Spinal Injury and does the Date of Injury affect the amount payable?
- Does the claim exceed the threshold for a Section 67 entitlement and if so, what is the Quantum of that entitlement (and for this purpose, can Impairments be aggregated)?

3. *Medical and Treatment Expenses*

- Are the expenses related to the injury?
- Are the expenses reasonably necessary?
- Are the expenses in accordance with the scheduled rates?

Once all of these matters have been considered (where appropriate), care still needs to be taken in giving advice, to consider what the consequence of an Acceptance, or Denial of Liability will be, particularly in the long term and particularly so far as the Employer's business is concerned.

PROBLEMS IN OBTAINING EVIDENCE

In the current incarnation of the Workers' Compensation Scheme, there are a number of practical and legal constraints on an Employer's ability to obtain relevant evidence, in regard to a Claim for Compensation. If instructions are received at the time that Notification of Injury is given or a Claim for Compensation Benefits is made, a decision concerning Liability will usually need to be made within seven (7) days (for Provisional Liability), or twenty one (21) days (for a Compensation Claim). This is often insufficient time to pursue all avenues of investigation, to make a fully informed decision.

Further, if instructions are received after a Dispute Notice has been issued under Section 74 of the WIM, there may be little, or no purpose in obtaining further evidence, because the evidence which can be relied on, may be constrained to that provided with the Dispute Notice.

Despite these constraints, it is still important to be aware of the types of enquiries and investigations that can yield useful relevant information in regard to a claim. Those enquiries include such things as the following:-

Personnel File/Records

- Applications for Employment.
- Pre-Employment Medical
- Training and instruction (including as to Injury Reporting etc).
- Sick Leave records and Certificates.
- Disciplinary issues and documentation.

Information about Other Claims

- Enquiries to the WorkCover Authority.
- Enquiries to the Courts.
- Enquiries to the Motor Accidents Authority.
- Enquiries to other jurisdictions.

Treating Doctors Records

- Medical Certificates and Reports.
- Clinical Notes and Investigations.

Factual Investigation

- Statements (Witnesses, Supervisors and others).
- Videos/photos of injury site and/or work process.
- Police Report/records.
- Information relevant to recoveries.

Surveillance

- Is it any use anymore? If so, when?
- How (and when) will it be introduced?

Once all relevant evidence has been obtained (and assuming it can be obtained within sufficient time), care then needs to be taken as to what evidence is relied on, in order to Decline Liability.

The current WorkCover Guidelines require that a Dispute Notification provides details of the evidence which is relevant to the dispute and which is relied on for the purpose of Declining Liability. The consequence of not providing evidence with a Dispute Notice may be that that evidence is not able to be relied on.