SRB Legal

INSURANCE LAWYERS

WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

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1. LEGISLATIVE DEVELOPMENTS

The Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2015, came into effect on 1 July 2015. The main changes are to allow an extra hour for Item 6 and to allow extra time for Interlocutory Applications and Directions Hearings.

2. AMENDMENTS TO THE CONCILIATION & ARBITRATION RULES

FROM 1 JULY 2015 THE FOLLOWING CHANGES HAVE TAKEN EFFECT

Conciliation Rule Changes

Changes to the Conciliation rules include:

1. Rule 26 regarding lodgement of documents; and
2. the insertion of Rule 28A to allow for lodgement of documents by email.

Conditions of Lodgement by Email

An email which includes documents lodged under Rule 28A must:

1. state the senders name, postal address and email address;
2. state a telephone number through which the sender can be contacted;
3. list and describe the documents being lodged by email.

Any documents lodged must relate to a current Conciliation Service dispute. Documents relating to disputes before an Arbitration Service cannot be lodged by email.

Documents relating to Memorandum of Agreements and s92(f) Deeds cannot be lodged via email.

The subject line must include the Conciliation Case Reference Number.

Documents need to be submitted at least 7 days prior to a scheduled Conference.

Documents submitted by email must be in PDF, TIF, IPEG OR PNG format and be less than 5mb.

Arbitration Rule Changes

Changes to the Arbitration rules include:

1. Rule 22 now requires a Certificate of Service to be lodged with the Registrar for an Application to extend time to lodge an Application for Arbitration (Form 152);
2. Rule 25(4) and Rule 29(6), timeframes have been changed from 14 days to 28 days;
3. Rule 32 now provides a proceeding may be discontinued by Notice of Discontinuance signed by all parties and lodged with the Registrar;

4. Rule 37 now includes a requirement for a notice consenting to or opposing Interlocutory Applications;

5. Rule 48 now requires an Interlocutory Application to be lodged for requests for orders to produce documents;

6. Rule 57 inserts sub-Rule 2A confining, without leave of an Arbitrator, all evidence in chief of a witness to the witness statement lodged;

7. Rule 31 has been deleted and submissions on Applications for Leave to adduce material is now covered by amendments to Rule 37;

8. Rule 63A requires a party served with an Application for an Order as to Costs and/or for an assessment of costs to lodge a notice consenting or opposing to the Application (Form 164A).

3. CASE UPDATES

Coles Supermarket Pty Ltd v Kovacevich [2015] WADC87

In this matter, in issue was the worker's credibility, and whether a work related hernia incapacitated him from 2009 to date.

At Arbitration the employer's case was that there was no medical evidence to support the nature and extent of the worker's symptoms.

At Arbitration however, the Arbitrator raised, for the first time, the possibility that he could find that the worker had an illness conviction which was a genuine belief on his part that he was and had been in pain which caused him to have an incapacity to a greater extent than was organically justified.

The Arbitrator relied on the decisions of ***Michael v Panetta*** (Unreported, WASCA, 18 December 1995, Library No: 950700) and ***SDR Australia Pty Ltd v Nedic*** [2009] WACC, C3-2009, in support of the proposition that it was not necessary for there to be medical evidence in order to make a finding of an illness conviction.

On appeal, Derrick DCJ held that Commission McCann (as the then was) in ***SDR v Nedic*** had mis-stated the law as found by the Supreme Court in ***Michael v Panetta***. Derrick DCJ, held that ***Michael v Panetta*** is not authority for the proposition that it is not necessary for expert, psychological or psychiatric evidence to be led in order to establish the causal involvement of an illness conviction. After considering the ***Michael v Panetta*** decision in detail, Derrick DCJ noted that there was relevant psychological evidence before the Court in ***Michael v Panetta***, and that in that decision, the Court's comments were limited to the need to adduce psychiatric evidence.

Derrick DCJ summarised the position as follows:

> *"[There is] … nothing in the decisions in **Michael v Panetta** and **SDR Australia v Nedic** [that] alters the fundamental and tried principle, that before a trier of fact can make a finding of fact there must be some evidence which is capable of providing a basis for the making of that finding."*

Derrick DCJ therefore held that the Arbitrator erred in law by making a finding there was an illness conviction when there was no expert medical evidence to this effect.

The appeal also considered whether or not the Arbitrator could make this finding when the issue had not been raised at the Conciliation.

Derrick DCJ, after considering the relevant statutory provisions, held that an Arbitrator is not strictly confined to determining the issues that were actually in dispute and dealt with during the Conciliation process.

He held:

> *"… if … the additional issue in dispute identified in the Application for Arbitration is one that arises out of, or is closely related to, the issue or issues that were in dispute at Conciliation, and the issue is one which can be dealt with in the Arbitration without causing prejudice to the other party, then the Arbitrator will be more likely to exercise his or her discretion to deal with the issue as part of the arbitration".*

This is a very useful decision. In our experience, Arbitrators at WorkCover have been prepared to consider finding that there is an illness conviction in the absence of expert medical evidence. Subject to any further appeal, this decision "*puts this issue to bed*", and it will now be necessary for workers to lead expert medical evidence in order for there to be a finding of illness conviction.

Dewi Sari Sia v Child & Adolescent Health Service (Princess Margaret Hospital).

This was an appeal against a Costs Order.

Following a determination that the Appellant should receive physiotherapy and pilates expenses but not gym and chiropractic expenses, the Arbitrator ordered that the Appellant should recover only 50% of her legal costs and disbursements of the WorkCover WA proceedings.

The Appellant appealed.

On appeal, Keen DCJ considered that what was before the Arbitrator was a rolled up claim for reasonable treatment expenses. He considered the disposition of the matter should reflect the general rule that a successful party will be entitled to an Order for costs. He said that merely succeeding to part of the claim does not of itself disentitle a claimant to the costs of the proceedings. For that to occur, there has to be something more, which was not demonstrated in this case. In the circumstances, he exercised his discretion to order that the successful party should receive its costs there having been no satisfactory demonstration of conduct on the part of the Appellant which ought to have disentitled her to those costs.

Wilson v Riverton Rossmoyne Bowling and Recreation and Club Inc. [2015] WAADC 54

This was a claim for damages for psychiatric injury caused by workplace bullying. At Trial the Judge did not find the Appellant to be a truthful witness and considered that she had exaggerated the majority of her allegations. The Judge did not accept the Appellant's evidence and dismissed the claim in its entirety. The claim largely turns on its own facts.

Date: 6 August 2015

Should you require any further information relating to the above decision, please contact one of the following partners on telephone (08) 9221 3110.

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