SRB Legal

INSURANCE LAWYERS

WORKERS' COMPENSATION CLAIMS WA NEWSLETTER

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STATUTORY DEVELOPMENTS

New medical and allied health fees amendments to the Workers' Compensation and Injury Management (Scale of Fees) Regulations 1998 came into effect on 1 November 2016. The amendments apply a 1.87% increase to all medical and allied health fees, based on the application of WorkCover WA composite index.

A compilation of all medical and allied fees is available on the WorkCover WA website.

CHANGES TO THE WORKCOVER GUIDELINES

The Fourth Edition of the WorkCover WA Guidelines for the Evaluation of Permanent Impairment ("the Guidelines") will come into effect as of 1 December 2016, replacing the Third Edition WorkCover WA Guides for Evaluation of Permanent Impairment.

Importantly, the Guidelines have been amended to:

- create further consistency with the National Guidelines for the Evaluation of Permanent Impairment;
- include a preface for each Chapter, which refers specifically what chapter of the AMA Guides is applicable to the chapter of the Guidelines.

By way of brief summary, we note the following amendments:

- when assessing the impact of an injury on activities of daily living, the assessment is now required to be verified by reference to **objective assessments** where possible;
- the AMS is required to consider **all** relevant medical and allied health information provided and provide all results from clinical examination;
- range of motion assessments have been further described, and it is a requirement to test both joints **bilaterally** (which previously may not have been included by the AMS.)

CASE LAW UPDATES

DISTRICT COURT FIND IN FAVOUR OF WORKER

On 4 October 2016, the District Court of Western Australia handed down a decision in the matter of *Massih v Electricity Networks Corporation t/as Western Power* [2016] WADC 146.

The Facts

The Appellant (Mr Massih) worked for the Respondent (Western Power) for 26 years. He alleges that on 14 April 2014 he suffered injuries to his neck, lower back and left knee.

Liability for Mr Massih's claim for compensation, pursuant to the Workers' Compensation and Injury Management Act 1981 ("the Act"), was admitted by Western Power. However, a dispute arose as to the need for a hip replacement surgery and the associated costs.

It is noted that Mr Massih had pre-existing osteoarthritis in his left hip.

The claim proceeded to arbitration and the arbitrator refused Mr Massih's application.

Mr Massih appealed the arbitrator's decision to dismiss his claim. The grounds of appeal were as follows:

- the arbitrator miscomprehended the evidence and failed to consider whether the injury to Mr Massih's left hip occurred on 15 April 2014 (the arbitrator concluded that the hip problems could not be considered as the First Medical Certificate and Form 2B did not refer to the hip injury);
- the arbitrator incorrectly required Mr Massih to prove his case on a balance of probabilities to the higher standard of satisfaction applied in *Briginshaw v Briginshaw* (*Briginshaw v Briginshaw* specifically deals with the higher level of satisfaction required in cases which involve serious allegations of 'moral delinquency');
- the arbitrator should have applied the but for test in determining whether Mr Massih's hip problems were caused by an injury received during the accident at work; and
- the arbitrator took into account irrelevant considerations when he considered whether the hip replacement surgery was necessary (the arbitrator took into account whether all other treatment options had been exhausted and whether the proposed surgery would allow Mr Massih to return to work despite his other injuries).

The District Court Decision

Schoombee DCJ found that the appeal should be allowed and decision of the Arbitrator should be quashed and therefore, the Applicant is entitled to have the hip replacement surgery funded by Western Power.

The decision was based on the fact that:

- the arbitrator applied the wrong test and did not consider whether the hip injury was caused during the work accident;
- the arbitrator required an unnecessarily high level of satisfaction and exactness of proof and applied the *Briginshaw v Briginshaw* test (not applicable to matters in the workers' compensation jurisdiction in the absence of allegations of fraud);
- the arbitrator made an error in law by not requiring Western Power to present evidence that the pre-existing osteoarthritis would have resulted in the same symptomatology in any event, but expecting Mr Massih, to prove that the pre-existing osteoarthritis would not have done so; and
- the arbitrator also erred when she held that she was not persuaded as to the reasonableness of the proposed surgery because it might mean that Mr Massih would nevertheless remain totally incapacitated by reason of his other injuries. The issue was whether the worker required the surgery as a consequence of the work injury.

Whilst Schoombee DCJ considered it unnecessary to decide, for the purposes of this appeal, whether the liability of the insurer of the employer is limited to the injuries listed in Form 2B or the incapacity stated in Form 3A, she did go onto to state that her view is that there is no indication in the Act that this should be the case.

Significance to Insurers

This decision demonstrates that:

- workers are not usually bound by a high burden of proof when establishing whether surgery is reasonable;
- employers are bound to present evidence in aggravation cases as to whether, but for the incident, the symptomology would have still arisen; and
- an arbitrator can probably make a decision in regards to an injury, in accepted claims, even when a Form 2B or a Form 3A does not list that specific injury.

DISTRICT COURT EMPHASISES IMPORTANCE OF DISCHARGING PERSUASIVE BURDEN OF PROOF

On 7 October 2016, the District Court of Western Australia handed down a decision in the matter of *Slater v BHP Billiton Iron Ore Pty Ltd* [2016] WADC 148.

The Facts

In 2011, Ms Debbie Slater ('the Appellant') was employed by BHP Billiton Iron Ore Pty Ltd ('the Respondent') to work as a dump-truck operator at a BHP Mine.

On 2 December 2011, the Appellant was at the work site when she exited from a bus outside and walked over a level surface to fill her water bottle. The Appellant was outside, undercover on concrete ground and she states her left ankle just "gave way"'. The Appellant suffered an ankle sprain.

In April 2014, the Appellant was moved from her usual duties as a dump-truck driver to the road crew. As part of those duties, the Appellant was required to assist in the installation of signage in an area of roadwork construction. Whilst performing these duties and walking on uneven terrain, she started to develop 'sharp pains' in her left foot.

On 2 May 2014, the Appellant lodged a workers' compensation claim pursuant to the *Workers' Compensation and Injury Management Act 1981* (WA) ('the Act').

The claim proceeded to arbitration and the Arbitrator dismissed the Appellant' application. The Appellant appealed the Arbitrator's decision to dismiss his claim. The grounds of appeal were as follows:

- having found the Appellant *'did suffer some form of injury to her left ankle at the worksite on 2 December 2011*' (words of the Arbitrator), the Arbitrator failed to properly determine whether the Appellant suffered an "injury" as defined by the Act' and in particular, whether the Appellant's alleged incapacity in 2014 resulted from that injury;
- the Arbitrator failed to take into consideration that the Appellant had a past fracture that was not the fracture that constituted the earlier non-work injury of June 2010;
- in deciding the question of causation, the Arbitrator had confused relevant operational causes with issues of the Appellant's predisposition to injury;
- the Arbitrator failed to take into consideration that, subsequent to recovery from the June 2010 injury and passing a pre-employment medical check-up with the respondent, the

Appellant experienced no difficulties with her ankle or in carrying out her duties prior to the worksite injury of 2 December 2011; and

- alternatively, and in any event, the Arbitrator failed to consider whether the Appellant suffered an injury in April 2014.

The District Court Decision

Parry DCJ refused the Appellant leave to appeal on the basis that leave could not be granted unless a question of law was involved.

Parry DCJ was not satisfied that the Arbitrator had erred in law or erred in mixed law and fact on the basis that:

- whilst the Arbitrator has commented that the Appellant *'did suffer some form of injury to her left ankle at the worksite on 2 December 2011*', when the arbitrator's reasons for decision were read as a whole, it is clear that the Arbitrator did not make a finding that the Appellant suffered an "an injury" within the meaning of the Act;
- the Arbitrator had correctly understood that the key question for determination at Arbitration was whether the Appellant had discharged the persuasive burden of proving that it is more probable than not that she did suffer an "injury'. It was clear that the Arbitrator meant that there was an "incident" when describing what had occurred on 2 December 2011 at the work site concerning the claimant's left ankle, not that she had sustained an injury for the purposes of the Act;
- the Arbitrator has correctly concluded on the evidence that the Appellant had not discharged her persuasive burden of proving that it was more probable than not that she sustained an "injury" on 2 December 2011 on the basis that the incident on 2 December 2011 was not work-related. The "incident" had occurred because of a pre-existing degeneration and instability. The Appellant had simply been walking across a flat surface and the incident had not occurred as a result of the Appellant twisting or stepping on uneven ground;
- grounds 2 and 4 above did not involve any question of law and therefore these grounds to appeal were refused;
- the Arbitrator was correct in determining that the Appellant had not suffered an injury as defined by the Act in April 2014 as she had not described **any injury or injurious mechanism** but that simply her ankle had just started hurting and that the soreness was not work-related;
- the Appellant had failed to prove her case, and in particular had failed to prove that it was more probable than not that she sustained an "injury" within the meaning of the Act in December 2011 or April 2014.

Parry DCJ referred to the decision of *Ansett Transport Industries (Operations) Pty Ltd v Srdic* (1982) 66 FLR 41 in which Toohey J set out principles in relation to workers' compensation claims. Parry DCJ confirmed that the arbitrator's decision was consistent with the first *Srdic* principle. The first *Srdic* principle states that the question of whether there has been a personal injury by accident 'is a *question distinct from, and logically anterior to, the question whether what has happened arose in the course the relevant employment*'.

The Arbitrator's decision was also consistent with the sixth *Srdic* principle on the basis that:

"*a worker does not suffer personal injury by accident arising in the course of his employment where he suffers, at his place of employment,* ***a sudden and distinct physiological change as the product of the inevitable development of a progressive disease from which he is suffering and where such change can in no way be attributable to or associated with some incident of his employment****".* [Our emphasis added]

Implications

This decision highlights that:

1. whilst an "*incident*" can occur during the course of employment, this does not automatically mean that a worker has suffered an "injury" pursuant to section 5 of the Act; and
2. with respect to the burden of proof, where a worker alleges that he has received an injury, or exacerbation of a pre-exiting injury as a consequence of his employment and where the employment was a contributing factor and contributed to a significant degree**,** the worker carries the burden of proof of establishing its case to the requisite standard. If the worker cannot discharge the persuasive burden, this will be fatal to the success of a worker's claim.

DISTRICT COURT CLARIFIES COMPLEXITIES REGARDING CALCULATING TERMINATION DATE

On 31 October 2016, the District Court of Western Australia handed down a decision in the matter of *Reale v WesFarmers Kleenheart Gas Pty Ltd* [No 2] [2016] WADC 153.

The Facts

Ms Reale ('the Plaintiff') sustained a neck injury in the course of her employment with WesFarmers Kleenheart Gas Pty Ltd ('the Defendant') on 16 February 2012.

On 17 February 2012, the Plaintiff attended her general practitioner as a result of symptoms from the injury. She described the symptoms as 'a bad muscle strain in the left shoulder'.

The Plaintiff did not attend work on 22, 23 and 24 February 2012.

At the suggestion of the Defendant, she consulted with the Defendant's preferred medical practice and received a 'Workers' Compensation FIRST medical certificate' (form 3) dated 24 February 2012 which certified her fit for *'light admin duties only'.*

On or about 2 March 2012, the Plaintiff provided the Defendant with the First Medical certificate and a 'Workers' Compensation claim form' (form 2B). The form was partially completed and was dated 2 March 2012. The form contained the Plaintiff's details, a report of how 'the occurrence' on 16 February 2012 happened and a declaration and consent authority.

On or about 15 March 2012, the Plaintiff received an insurer's notice that liability was accepted (form 3A) **in respect of reasonable medical expenses** for the injury sustained on 16 February 2012.

On 13 June 2012, the Plaintiff was certified totally unfit for work by a progress medical certificate.

A further insurer's notice that liability is accepted (form 3A) dated 28 June 2012 was sent **only to the Defendant** (not the Plaintiff) by Wesfarmers Group WorkCover (who administers workers compensation claims on behalf of the Defendant) that notified the Plaintiff's employer that **liability was accepted in respect of weekly payments and reasonable medical expenses.** It was not known whether and when the notice of 28 June 2012 was provided to the Plaintiff. It can was inferred that **after 28 June 2012,** the Plaintiff was made aware that liability to pay 'weekly payments and reasonable medical expenses' was accepted by the Defendant.

The Defendant gave a 'Notice to worker about termination day for election' under s93O of the Act (form 36) dated 17 August 2012. The notice purported to inform the Plaintiff of important information as prescribed by s93O(1) of the Act. Relevantly, the notice stated: **'Your termination day for this injury is 03/03/2013, which is about 6 months away'**.

By an application to extend the termination day dated 14 February 2014 (form 35), the Plaintiff sought an extension of the termination day **to 31 July 2014** on the basis that the Defendant (her employer) **had failed to comply with s93O of the Act.** This application was granted by the Director's delegate on 19 February 2014, who thereby purported to extend the Plaintiff's termination day to 28 March 2014 (not 31 July 2014).

On the basis that the Director of WorkCover had extended **her termination day to 28 March 2014,** the Plaintiff purported to elect to retain her right to seek damages under s93K(4) of the Act by filing a notice dated 5 March 2014 (form 34). The notice of election was received by WorkCover on 6 March 2014 and formally registered under signature of the Director's delegate on 12 March 2014.

The Plaintiff issued a writ against the Defendant on 24 April 2014 seeking damages for injuries alleged to have been suffered on 16 February 2012 in the course of her employment with the Defendant

The issue to be determined was whether the notice dated 17 August 2012 (the Form 36 notice) discharged the Defendant' obligations to the Plaintiff under s93O of the Act and whether the Plaintiff has lawfully elected to retain the right to seek damages under s93K(4)(a) of the *Workers' Compensation and Injury Management Act 1981* (the Act).

District Court Decision

Stevenson DCJ determined that the District Court had jurisdiction under the Act to hear and determine the Plaintiff's claim for damages arising out of her work related incident on 16 February 2012 on the basis that:

- on 2 March 2012, the Plaintiff made a claim on the Defendant, for compensation by way of weekly payments with respect to an injury as a result of an occurrence of an injury in her workplace on 16 February 2012;
- by operation of s93M(1) of the Act, the termination day for the Plaintiff to elect to retain the right to seek damages with respect to her injury pursuant to s93L was **initially 3 March 2013;**

- the Defendant accepted liability in respect of **only** reasonable medical expenses on **15 March 2012;**
- on or about 28 June 2012 (more than 3 months after the day on which the claim was made), the Defendant decided to accept liability in respect of the **Plaintiff's compensation claim for weekly payments and reasonable medical expenses.** The Defendant' acceptance of liability was recorded as **28 June 2012;**
- The initial termination date under s93M(1) of the Act **was extended by 9 months by operation of s93M(3)(b)** on the basis that the Plaintiff was 'first notified' that liability was accepted by the Defendant in respect of the weekly payments claim on the earliest date of **28 June 2012;**
- by notice to the Plaintiff about the termination day for her election dated 17 August 2012, the Defendant purported to comply with its statutory obligation under s93O of the Act to notify her in writing that under s93O(1)(a), the day that would be the termination day if no later day were to be fixed under s93M(4). **The notice fatally informed the Plaintiff that the termination day was 3 March 2013.** This was incorrect by reason of the termination day having been fixed as 28 March 2013 under s93M(3)(b). Accordingly, the Defendant' notice did not comply with its statutory obligation under s93O and was null and void;
- on 19 February 2014, the Director's delegate lawfully granted the Plaintiff's application to extend the termination day on the basis that the Defendant's s93O notice was defective **because it did not state the correct termination date**. As a result, the Director's discretion was enlivened under s93M(4)(b) to extend the termination day to 28 March 2014. Accordingly, the termination day for election by the Plaintiff to retain the right to seek damages was fixed as 28 March 2014; and
- on 5 March 2014, the Plaintiff filed an election to retain the right to seek damages under s93K(4) of the Act. The election was formally registered by the Director's delegate on 12 March 2014 and accordingly, the Plaintiff had lawfully exercised her right of election under s93L of the Act to seek damages, which election was made before the termination day.

Implications

This case highlights the complex issues surrounding calculating termination dates, and that this day may vary depending on when the worker is first notified that liability is accepted in respect of weekly payments of compensation (not simply medical expenses).

It is important to note that pursuant to s93M(3), if liability for weekly payments is not accepted until after a period of 3 months from when the claim is made with the employer, the Termination Day is 9 months after the worker was notified. Calculations for the purposes of s930 hinge upon the correct calculation.

This decision may affect claims you are handling and you may consider it prudent to audit files where liability to make weekly payments was delayed by more than 3 months to satisfy yourself that you do not have a matter that could potentially turn into a common law claim.

DISTRICT COURT DECISION RE-AFFIRMS LIMITS OF SECTION 61 APPLICATIONS

On 22 September 2016, the District Court of Western Australia handed down a decision in the matter of *Walsh v Fortescue Metal Group Ltd* [2016] WADC 140.

The Facts

In March 2014, Mr Walsh ('the Appellant') sustained an injury to his left arm whilst working for Fortescue Metals Group Limited ('the Respondent). The Appellant was diagnosed by his general practitioner as suffering from a ruptured long head of left biceps.

On 7 April 2015, liability for a "left bicep strain" was accepted by the Respondent.

The Appellant also had a degenerative left shoulder condition.

On 26 June 2015, a section 61 notice was served upon the Appellant which included reports from Dr White who was of the opinion that the Appellant had recovered from his workplace injury to enable him to return to his pre-accident duties and that any ongoing incapacity was as a result of a pre-existing left shoulder condition.

The Appellant filed an application pursuant to section 61 disputing the Respondent's notice to discontinue weekly payments.

The Appellant claimed his degenerative left shoulder condition had become symptomatic in March 2014 as a result of the incident that occurred during the course of his employment.

The claim proceeded to arbitration and the Arbitrator dismissed the Appellant's application which in effect meant that the Appellant's weekly payments of compensation would be discontinued.

Furthermore, the Arbitrator concluded that as the Appellant's application was made in response to a section 61 notice, the Arbitrator was limited to only dealing with whether the Appellant remained entitled to weekly payments.

The Arbitrator could not determine whether the Appellant suffered an injury to his left shoulder at the same time that he had suffered the left bicep injury. This was on the basis that the Respondent had only admitted liability for the bicep injury and that was the only relevant injury for the purposes of the Appellant's Application pursuant to section 61.

District Court Decision

The Appellant appealed the Arbitrator's decision to dismiss his application. The grounds of appeal were as follows:

- the Arbitrator erred in law by misconstruing s 61(1) and misdirected himself as to the issues he had to determine under s 61(1); and
- the Arbitrator applied the wrong test in determining the Appellant's application pursuant to section 61(3).

His Honour found that:

- the purpose of section 61 is only to determine whether an employer is entitled to reduce or discontinue a worker's weekly payments of compensation on the grounds set out in the s 61 notice;
- the terms of section 61(1) do not permit a dispute as to whether a worker has suffered an injury to be determined,
- a section 61(1) application cannot be used to seek to establish liability for an injury;
- section 61 is only concerned with a worker's capacity for work in relation to an injury for which liability has been established; and
- in the Appellant's case, the Arbitrator had not erred in finding that liability for the alleged left shoulder injury could not be determined in the proceedings as liability for the alleged left shoulder injury had not been admitted. The Appellant was required to establish (in a separate application) that the Respondent was liable to pay compensation for the shoulder injury; but this could not be determined pursuant to the section 61 application.

Accordingly, the Appellant's appeal was dismissed.

Implications

This decision reaffirms:

- the narrow scope of section 61 applications as it is limited to determining issues as particularised by the s 61 notice;
- section 61 does not have the power to determine whether a worker has suffered an injury for which the employer has not admitted liability for; and
- the sole purpose of section 61 proceedings is to determine whether an employer is entitled to reduce or discontinue a worker's weekly payments of compensation.

Date: 7 November 2016

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

Graeme Richards	Partner	Byron Winburn-Clarke	Partner
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