

REVIEW OF WORK INJURY DAMAGES

Paul Macken

Leigh Virtue & Associates

INTRODUCTION

In the ideal world, the ultimate goal for a Worker who has suffered injury in the workplace is recovery and return to full function and full employment. Unfortunately, for a large number of injured workers (and those who represent them) their goal involves the maximisation of impairment with a view, where possible, to recovering damages for a work injury.

What follows is a review of the statutory provisions governing claims for Work Injury Damages together with general advice regarding dealing with these claims.

PROCEDURAL MATTERS

Section 280A of the WIM Act 1998 states “a claim for work injury damages in respect of an injury cannot be made unless a claim for lump sum compensation in respect of the injury is made before or at the same time as the claim for work injury damages”.

Section 280B Lump Sum Compensation to be Paid before Damages Recovered

2. “An injured worker cannot recover damages in respect of an injury from the employer liable to pay compensation under this Act in respect of the injury unless and until any permanent impairment compensation to which the worker is entitled in respect of the injury has been paid.
3. This section does not prevent a claim for damages from being made before any permanent impairment compensation to which the worker is entitled in respect of the injury has been paid.

Section 281 Liability to be Accepted and Settlement Offer Made

1. “The person on whom a claim for lump sum compensation or work injury damages is made must, within the time required by this section, determine the claim by:
 - (a) accepting liability and making a reasonable Offer of Settlement to the claimant, or
 - (b) disputing liability.

2. A claim must be so determined:

- (a) Within one month after the degree of permanent impairment first becomes fully ascertainable, as agreed by the parties or as determined by an Approved Medical Specialist, or
- (b) Within two months after the Claimant has provided to the insurer all relevant particulars about the claim, whichever is the later.

2(A) “The determination of a claim cannot be delayed beyond two months after the claimant has provided to the insurer all relevant particulars about the claim (that delay being on the basis that the degree of permanent impairment of the injured worker resulting from the injury is not fully ascertainable), unless the insurer has within that two month period notified the Claimant that the degree of permanent impairment of the injured worker resulting from the injury is not fully ascertainable.

2(B) When the person on whom a claim is made accepts or disputes liability, the person must notify the Claimant as to whether or not the person accepts that the degree of permanent impairment of the injured worker resulting from the injury is sufficient for an award of damages.

3. An Offer of Settlement is to specify an amount of compensation or damages or a manner of determining an amount of compensation or damages.

4. If an offer of Settlement is made on the basis that the insurer accepts only partial liability for the claim, the Offer is to include details sufficient to ascertain the extent to which liability is accepted.

5. An employer is not required to determine a claim as provided by this section if:

- (a) the employer has duly forwarded the claim to an insurer who the employer believes is liable to indemnify the employer in respect of the claim, and
- (b) the employer has complied with all reasonable requests of the insurer with respect to the claim.

6. This section does not apply to a claim for work injury damages in respect of the death of a person, except as the Workers Compensation Guidelines may otherwise provide”.

Section 282 Relevant Particulars about a Claim

1. “The relevant particulars about a claim are full details of the following sufficient to enable the insurer, as far as practicable, to make a proper assessment of the Claimant’s full entitlement on the claim:

- (a) the injury received by the Claimant;
 - (b) all impairments arising from the injury;
 - (c) any previous injury, or any pre-existing condition or abnormality, to which any proportion of an impairment is or may be due (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act);
 - (d) in the case of a claim for work injury damages, details of the economic losses that are being claimed as damages and details of the alleged negligence or other tort of the employer;
 - (e) information relevant to a determination as to whether or not the degree of permanent impairment resulting from the injury will change;
 - (f) in addition, in the case of a claim for lump sum compensation, details of all previous employment to the nature of which the injury is or may be due;
 - (g) such other matters as the Workers Compensation Guidelines may require”.
2. “If the employer requires the Claimant to submit himself or herself for examination by a medical practitioner provided and paid for by the employer, the Claimant is not considered to have provided all relevant particulars about the Claimant until the worker has complied with that requirement.
 3. The insurer is not entitled to delay the determination or a claim under this Division on the ground that any particulars about the claim are insufficient unless the insurer requested further relevant particulars within two weeks after the Claimant provided particulars.
 4. In this section, injury is not limited by the meaning given by Section 4”.

Section 313 and 314 of the *Workplace Injury Management and Workers Compensation Act, 1998*

Section 313

Threshold dispute prevents service of Pre-filing Statement at the commencement of Court proceedings

“If there is a dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages, the Claimant cannot commence Court proceedings for the recovery of work injury damages and cannot serve a Pre-Filing Statement under Division 3 unless a degree of permanent impairment has been assessed by an Approved Medical Specialist under Part 7”.

Section 314

What constitutes threshold dispute:

1. “For the purposes of this Part, there is considered to be a dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages if:
 - the person on whom the claim is made has not accepted that the degree of permanent impairment of the injured worker resulting from the injury is at least 15%, or
 - there is a dispute as to whether the degree of permanent impairment resulting from the injury is fully ascertainable.
2. There is considered to be no dispute as to whether the degree of permanent impairment of the injured worker resulting from an injury is sufficient for an award of damages if:
 - (a) the person on whom the claim is made has accepted that the degree of permanent impairment of the injured worker is at least 15%, or
 - (b) an Approved Medical Specialist has given a Medical Assessment Certificate certifying that the degree of permanent impairment of the injured worker is at least 15%.
3. For the purposes of this Part, acceptance by the person on whom a claim for work injury damages is made of the degree of permanent impairment of the injured worker for the purposes of a claim against the person by the injured worker for permanent impairment compensation also constitutes acceptance of the degree of permanent impairment for the purposes of the claim for work injury damages”.

Division 3 Deals with Pre-Filing Statements and Section 315 sets out the requirements for Pre-Filing Statement before Commencing Court Proceedings

1. “Before a Claimant can commence Court proceedings for the recovery of work injury damages, the Claimant must serve on the Defendant a Pre-Filing Statement setting out such particulars of the claim and the evidence that the Claimant will rely on to establish or in support of the claim as the rules may require. The Pre-Filing Statement cannot be served unless:
 - (a) the person on whom the claim is made wholly disputes liability for the claim, or
 - (b) the person on whom the claim is made has made an Offer of Settlement to the Claimant pursuant to the determination of the claim as and when required by Section 281 and one month has elapsed since the Offer was made, or

- (c) the person on whom the claim is made has failed to determine the claim as and when required by Section 281.

Section 316 – Defendant Must Respond to Pre-Filing Statement

1. “The Defendant must, within 28 days after the Pre-filing Statement has been served on the Defendant respond to the Pre-Filing Statement by:-
 - (a) accepting or denying liability (wholly or in part); and
 - (b) (to the extent, if any, that the Defendant does not accept liability) serving on the Claimant a Defence to the claim setting out such particulars of the Defence and evidence that the Defendant will rely on to defend the claim as the rules may require.
2. If the Defendant fails to respond to the Pre-Filing Statement as required by this section within 42 days after it is served on the Defendant, the Claimant can commence Court proceedings for the recovery of work injury damages.

Section 317 – Defective Pre-Filing Statement

1. “The Defendant is not entitled to assert that a Pre-filing Statement served by the Claimant is defective (by reason of incompleteness or otherwise) unless the Defendant has notified the claimant giving details of any alleged defects, within seven days after the Pre-Filing Statement is served by the Claimant.
2. A dispute as to whether a Pre-filing Statement served by the claimant is defective may be referred to the Registrar for determination.
3. The Registrar may give a direction to the Claimant as to the action necessary to cure any defect in the Pre-Filing Statement served by the claimant. If the Claimant fails to comply with the Registrar’s direction within the time allowed for compliance, the Pre-filing Statement served by the claimant is taken not to have been served.
4. If the documents and information that comprise the Pre-Filing Statement are furnished to the Defendant at different times, the Pre-filing Statement is not considered to have been served on the Defendant until the last of the required documents and information is served”.

Section 318 – Parties Limited to Pre-Filing Statement and Defence

1. “For the purposes of Court proceedings on a claim for work injury damages:

- (a) the Claimant is not entitled to file a Statement of Claim that is materially different from the proposed Statement of Claim that formed part of the Pre-Filing Statement served by the Claimant, except with the leave of the Court, and
 - (b) the Defendant is not entitled to file a Defence that is materially different from any Defence served on the Claimant in response to the claimant's Pre-Filing Statement within 42 days after service of the pre-filing Statement, except with the leave of the Court, and
 - (c) the Defendant is not entitled to file a Defence that wholly or partly disputes liability for the claim if the Defendant has failed to serve on the Claimant a Defence to the claim as required by this Division within 42 days after the Claimant served the Pre-Filing Statement on the Defendant, and
 - (d) a party to the proceedings is not entitled to have any report or other evidence admitted in the proceedings on the party's behalf if the report or other evidence was not disclosed by the party in a Pre-filing Statement or Defence served under this Division, except with the leave of the Court".
2. "The court is not to grant leave under this section unless satisfied that:
- (a) The material concerned was not reasonably available to the party when the Pre-Filing Statement or Defence was served, and
 - (b) The failure to grant leave would substantially prejudice the party's case".

Section 318A – Mediation of Claim before Commencement of Court Proceedings

- 1. "A Claimant must refer a claim for work injury damages for mediation under this Division before the Claimant can commence court proceedings for recovery of those work injury damages. The claim cannot be referred to mediation until at least 28 days after the Pre-filing Statement has been served on the Defendant under Division 3.
- 2. The Claimant need not refer a claim for work injury damages for mediation if the Defendant has failed to respond to the Claimant's Pre-Filing Statement as required under Division 3 within 42 days after it is served on the Defendant.
- 3. The Defendant may decline to participate in mediation of the claim if the Defendant wholly disputes liability in respect of the claim, but in any other case the Defendant cannot decline to participate in mediation".

Section 318E – Offers made at mediation not to be disclosed to Court

"The amount of any offer of settlement made by a party in the course of mediation of a claim is not to be specified in any pleading, affidavit or other document filed in or in connection with court proceedings on the claim, and is

not to be disclosed to or taken into account by the court, before the court's determination of the amount of damages in the proceedings".

Section 151D – Time limit for commencement of court proceedings against employer for damages

(2) "A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken".

Constraints on the recovery of damages for Work Injuries

Where a claim for damages is made in respect of a Work Injury it is not properly described as "Common Law" damages. This is because the principles that apply to the calculation of Common Law damages are substantially modified (and constrained) by the statutory provisions of the WCA. The most important alterations to those principles are as follows:-

1. No damages can be recovered unless there is at least 15% Permanent Whole Person Impairment (Section 151H).
2. Damages are only recoverable for past and future loss of earnings (Section 151G).
3. The net amount of weekly earnings used for the calculation of the damages is capped at the rate provided for under Section 34 of the WCA (Section 151I).
4. The calculation of damages for future economic loss is limited to the date the injured Worker would reach pension age (Section 151IA).
5. Damages for future economic loss are calculated by reference to a 5% discount rate (Section 151J).
6. The Court is specifically required to take account of the steps taken or that could have been taken by the injured Worker to mitigate damages (Section 151L).
7. Interest on damages can only be awarded in limited circumstances (Section 151M).
8. Contributory negligence applies even if there is a breach of statutory duty and the defence of "Volenti" is dealt with as contributory negligence (Section 151N and Section 151O).
9. Exemplary or punitive damages are not available (Section 151R).

