

Operational Outcomes Partnership

Session nine

Notable WCC decisions in 2019 and claims management processes

State Insurance
Regulatory Authority

27 February 2020

Operational
Outcomes
Partnership

27 February 2020

Welcome



Introduction to our ninth Operational Outcomes Partnership

Sarah Cutri
Acting Manager
Claims Supervision

What's currently happening at SIRA?

- NI review
- Insurer portal roll out
- Consultations
- SIRA repoint
- Employer supervision activities

Agenda

Understanding Date Claim Made

WCC Notable decisions in 2019

Refreshment break

Group Discussion

Understanding Date Claim Made

Emma Hagan -
Snr Design
Officer

Understanding when a claim is made



Legislative definition & requirements

- s4 of Workplace Injury Management and Workers Compensation Act 1998
 - *claim* means a claim for compensation or work injury damages that a person has made or is entitled to make.
- s260 of Workplace Injury Management and Workers Compensation Act 1998



So what do the Guidelines say?

Part 3 of the Workers Compensation Guidelines specify the requirements for making a claim....

- ✓ name and contact details of the **worker**
- ✓ name and contact details of the **employer**
- ✓ name and contact details of the **worker's medical practitioner**
- ✓ name and contact details of any **witnesses or witness statements**
- ✓ **description of the injury and how it happened**
- ✓ **information to support** the medical expenses and other losses the worker is claiming

Actions by a worker to make a claim

A worker needs to assert their right to make the claim

- Confirms to the insurer they want to make a claim
- Claim form (*unless the insurer waives this requirement*)
- Certificate of capacity (*evidence of incapacity to support injury and loss*)

A claim is considered made by the worker when the worker has provided the required information to the insurer

When a claim for weekly payments is the first notification of injury

- If a certificate of capacity and a claim form is provided with the initial notification (or sufficient information is included) then this would amount to a claim for weekly payments.

**Division 2 of Part 3 of the 1998 Act.*

- The date claim made would be the same date as the date of notification

Relevant Case Law

- Fletcher International Exports Pty Limited V Barrow & Anor [2007] NSWCA 244
- Tan v National Australia Bank Ltd [2008] NSWCA 198



What date to use?

When is the claim made?

- the **date the worker has provided information** that meets the information requirements set out in Part 3 of the Guidelines
- the date claim made is on receipt of the **certificate of capacity or some other evidence the worker is making the claim** if the insurer has all of the relevant information to determine liability.

A few things to consider

- Take a pragmatic approach
- The determination of whether a claim has been made should not be approached in an overly technical way
- Remember the objectives of the Act
- Remember the overarching claims mgt principles
 - Fairness and empathy
 - transparency and participation
 - Timeliness and efficiency

Workers compensation insurer data reporting requirements

C: 2.1.9 Date claim made

- Only when the conditions for a claim to be made have been met is the Date claim made (C: 2.1.9) data item to be populated with a date.
- The date that a claim is made with the insurer in accordance with the SIRA Workers Compensation Guidelines.

Data field and date claim made

- Is there a specific field for Date Claim Made in your claims management system?
- Do the people who enter Date Claim Made understand it?
- Does your system provider understand Date Claim Made?
- Is your system provider correctly mapping the Date Claim Made in your monthly data submission to SIRA?
- Do you have visibility of your data submission, before it is submitted to SIRA?

Test 3 – date claim made

The measure

In the event that a claim has been reasonably excused, and a subsequent liability decision is made, we check that:

- The date claim made **field has been populated**
- The period from date claim made, to the date of the liability decision, is **within 21 days**

Are you experiencing data issues?

If you have any data issues / errors around Date Claim Made, please liaise with your Portfolio Manager.

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Questions?



Notable WCC Decisions in 2019

Workers Compensation
Commission



Today's Topic

Notable WCC decisions in 2019

- Improve claim outcomes based on 2019 notable decisions from WCC
- Help to provide an understanding of notable decisions and considerations to take into account
- Take a deep dive into s11A to provide a better understanding based on the WCC cases

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Introducing our guest presenters

Workers Compensation Commission

Belinda Gamble, Principal Lawyer

Parnel McAdam, Principal Lawyer

Workers Compensation Commission

*Recent Decisions and
Practical Implications*

27 February 2020





AGENDA

1. The Commission
2. Notable Decisions in 2019
3. Section 11A
 - a) Construction of the section
 - b) Some recent cases
 - c) Practical advice

The Commission



WHO WE ARE

- An independent statutory tribunal
- Resolve disputes between injured workers and employers
- Deal with almost 7,000 dispute each year
- Roughly 1,200 matters on hand at any time

ONLINE PORTAL

- From 1 January 2020, all proceedings conducted through the online portal
- All documents produced by third parties are in electronic form



PARTICIPATION IN PROCEEDINGS

- Rare that the insurer decision maker participate in the proceedings.
- Ability to influence outcome of the case.
- Enhances settlement prospects.
- Enhances goodwill, shows good faith and is respectful to worker who is bringing the claim and the Commission.

WCC Website



WCC WEBSITE

- New website launched in 2019
- General information about dispute pathways, legal resources, publications
- Arbitrator, Medical Appeal Panel and Registrar decisions published
- Presidential and Supreme Court decisions available on Austlii/Jade/LexisNexis

INFORMATIONAL VIDEOS

- If there is going to be a dispute and a claimant that you are managing is going to the Commission, the videos contain useful information about the Commission's process.

POLICY REVIEW

- The Commission is currently undertaking a comprehensive policy review
- Two new Practice Directions issued January
 - PD 16 – Appeal against medical assessment
 - PD 17 – Reconsideration applications
- Other PDs updated to reflect the Online Portal and changes to legislation and Rules

NOTABLE DECISIONS IN 2019

Prince v Seven Network (Operations) Limited [2019] NSWWC 313

- Ms Prince was a contestant on Seven Network’s television program “House Rules”. She claimed a psychological injury as a consequence of treatment she received while on the show.
- Seven argued that Ms Prince was a ‘contestant’, not a ‘worker’ and relied on the contract between Ms Prince and Seven that said Ms Prince's participation in the show *'was not employment, does not create an employer/employee relationship... and is not subject to ... workplace agreement.'*



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House Rules reality TV contestant wins compensation after being portrayed as 'bully'

By [Antonette Collins](#)

Updated 23 Oct 2019, 1:45pm



PHOTO: Nicole Prince (right) with her House Rules partner Fiona Taylor. (Channel Seven)

The Workers Compensation Commission (WCC) has ruled a former reality TV contestant, who claimed she had been traumatised psychologically after being on a show, is entitled to compensation.



NOTABLE DECISIONS IN 2019

Jennifer Stefanac v Secretary, Department of Family and Community Services [2019] NSWWCCR 4

- Ms Stefanac suffered a psychological injury during the course of her employment as an Aboriginal case worker with FACS. She was certified fit for her role in any location other than at Blacktown or Mt Druitt which was her usual places of employment.
- The insurer made a WCD on the basis that the worker had an ability to work eight hours a day, five days per week as an Administrative Officer. The WCD was supported by a vocational assessment, the GP's sign off on suitable roles and various Certificates of Capacity. The worker's entitlement to weekly compensation was reduced to \$132.

NOTABLE DECISIONS IN 2019

Jennifer Stefanac v Secretary, Department of Family and Community Services [2019] NSWWCCR 4

- The Registrar's Delegate found that the worker in this case has capacity to undertake suitable employment and that he was not to have regard to the worker's place of residence or whether the suitable employment was generally available in the employment market.
- The Delegate declined to make an interim payment direction and the application was dismissed.

NOTABLE DECISIONS IN 2019

Jennifer Stefanac v Secretary, Department of Family and Community Services [2019] NSWWCCR 4

- Make sure WCD is supported by adequate medical evidence.
- The onus is on the worker to provide evidence to set aside the decision.
- The WCD may be susceptible to challenge in the Commission but the applicant must have cogent evidence.

NOTABLE DECISIONS IN 2019

Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWCCPD 3

- For a worker to have suffered from a consequential condition it is not necessary for there to be a diagnosable injury.
- Even though there is no identifiable pathology an alleged consequential condition may be still be compensable providing common-sense test of causation in *Kooragang Cement Pty Ltd v Bates* is established.

CONSEQUENTIAL CONDITIONS

Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWCCPD 3

- Deputy President Wood provided the same reasoning in the recent case of *Seif v Secretary, Department of Family and Community Services* [2020] NSWCCPD 6 (6 February 2020)
- At [124] the Deputy President said that “...the Arbitrator erred by requiring the appellant to establish some type of pathological change to have occurred in order to make the left shoulder condition compensable. Further, the Arbitrator erred in requiring the medical evidence to identify an injury and looking to the medical experts to provide a diagnosis. Such an approach is inconsistent with the authorities of *Moon, Kumar* and *Brennan* relied upon by the appellant, as well as a number of other Presidential decisions.”

CONSEQUENTIAL CONDITIONS

Principle

Prompt action will be taken to assess and address any additional or consequential medical condition identified on a certificate of capacity.

- What is the reason for inclusion on certificate of capacity?
- Will worker make a claim for reasonably necessary treatment or weekly benefits?
- Document workers intention
- Make a liability decision (where required)

NOTABLE DECISIONS IN 2019

RSM Building Services Pty Ltd v Hochbaum [2019] NSWCCPD 15

- Mr Hochbaum was notified he would not be entitled to weekly payments beyond 25 December 2017 on reaching the 260 week maximum under s39. He had not been assessed as suffering more than 20% WPI.
- A MAC was issued on 16 July 2018 assessing Mr Hochbaum as 21 % WPI and insurer recommenced weekly payments from 16 July 2018.
- At first instance, the Arbitrator awarded weekly compensation between the date payments ceased under s39 and the date of the MAC.

NOTABLE DECISIONS IN 2019

RSM Building Services Pty Ltd v Hochbaum [2019] NSWCCPD 15

- The Arbitrator's decision was overturned by the President of the Commission.
- There is no entitlement to “back pay” of weekly compensation payments for periods between when a worker's payments cease under s 39(1) (having received 260 weeks of weekly compensation) and any future date when they obtain an assessment of more than 20% WPI from an AMS.
- Subject to challenge in Court of Appeal.

NOTABLE DECISIONS

Hee v State Transit Authority of New South Wales [2019] NSWCA 175

*Section 38A (1) states: 'If the determination of the amount of weekly payments of compensation payable to a worker with highest needs in accordance with this Subdivision results in an amount that is **less** than \$788.32, the amount is to be treated as \$788.32.'*

NOTABLE DECISIONS

Hee v State Transit Authority of New South Wales [2019] NSWCA 175

- Mr Hee argued that despite returning to his usual rostered shifts he was no longer able to undertake overtime work to the same extent as before his injury and this amounted to partial incapacity for work.



NOTABLE DECISIONS

Hee v State Transit Authority of New South Wales [2019] NSWCA 175

In a two-to-one decision, the Court of Appeal reluctantly found in favour of the appellant. Simpson AJA summarised the critical error of the Senior Arbitrator in his original decision at [162]:

'It appears to have been assumed by the arbitrator that, because Mr Hee had returned, essentially, to his pre-injury work regime, he had returned to his "pre-injury employment". Contrary to the STA's submissions, that was not the finding the arbitrator made. That finding was that Mr Hee had "resumed his full pre-injury duties". The distinction is, in this case, significant. The arbitrator's assumption failed to take into account Mr Hee's claim that he was working less overtime than he had pre-injury, and had therefore not returned to his "pre-injury employment".'



NOTABLE DECISIONS IN 2019

SECTION 11A

- *Rail Corporation NSW v Aravanopoulos* [2019] NSWCCPD 65 (17 December 2019)
- *Canterbury Bankstown Council v Gazi* [2019] NSWCCPD 14 (11 April 2019)



Section 11A





ISSUES

- Construction of the section
- Recent cases on point
- Practical advice

STATUTORY CONSTRUCTION

No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly 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.

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ONUS

- The worker must prove injury and substantial contributing factor
 - Do not confuse these issues with a s 11A defence
 - See *Flanagan v NSW Police Force* [2017] NSWWCPCPD 33
- The insurer must prove the defence under s 11A

WHOLLY OR PREDOMINANTLY

- These are separate concepts and both must be considered: *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130
- This is a causation test (“caused”) – the common sense chain of causation is the relevant test: *Kooragang Cement Ltd v Bates* (1994) 35 NSWLR 452

ACTIONS OF EMPLOYER

- Seven types of actions considered by 11A
- Not all actions of employers, even if reasonable, will fall within s 11A
- The action taken or proposed to be taken must fall within one of the categories listed
- Consider the factual circumstances – eg is every meeting related to discipline?



WEBB v STATE OF NSW

- Worker was required to attend a meeting
- An allegation of misconduct had been made
 - Occurred at home
 - One year prior to the meeting
 - Unrelated to work, but had the potential to affect his role



WEBB v STATE OF NSW

- Outcome of the meeting:
 - An investigation would take place
 - The worker would be transferred to office duties
- As a result, the worker suffered a psychological injury and went off work
- Worker was ultimately exonerated



WEBB v STATE OF NSW

“The fact that there was a potential for action with respect to discipline is not sufficient to establish that the action conducted by the respondent in calling the meeting and investigating the complaint could be categorised as disciplinary... It is very relevant in my view to the question of whether the action was disciplinary in nature, that the conduct complained of did not occur in the workplace, or arise out of the appellant’s employment.”
at [102]

- The fact that the worker was exonerated was not determinative
- The question of whether the activities were work related was relevant to whether it was discipline
- It was not open to consider what may happen (discipline) if a fact occurred (the complaint was proved)



WHAT MUST BE CONSIDERED

- The entire process must be considered, which can include investigation
- Contrast *Webb* with *Sinclair*, in which allegations were made and a worker was suspended during an investigation
 - In that case, the allegations concerned work conduct and were current, unresolved allegations

CANTERBURY COUNCIL v GAZI

- Worker employed by Canterbury Council for 30 years
- Was transferred during the council amalgamations to a different location as part of new Canterbury Bankstown Council
- What factors could be considered in examining the “whole or predominant cause”

CANTERBURY COUNCIL v GAZI

[173] Those factors may include the circumstances in which a worker was required to work because of the transfer from one position to another, or in the present case the circumstances in which Ms Gazi was required to work following the physical transfer to the amalgamated premises. This is consistent with the broad approach taken in *Heggie*...

[175] There is no warrant to depart from the approach taken in *Heggie* with respect to the category of “transfer” or the other categories in s 11A.

- Judge Phillips relied on *Heggie*
- The whole of the process must be considered
- Reasoning in *Heggie* should be considered in all cases, not just cases on discipline
- That is, the entire process of transfer, which could include pre and post-transfer issues

REASONABLENESS

- The actions of the employer must have been reasonable
- A question of fact
- An objective test weighing the rights of employees against the object of the employment

(See Irwin v Director-General of Education)

REASONABLENESS

- Determined by facts known to the employer or could have been ascertained by reasonably diligent inquiries
- The focus should be on the employer's actions at the time, not a hypothetical analysis of what should have been occurred
- Evidence that post-dates can be considered

(see *Northern NSW Local Health Network v Heggie* [2013]
NSWCA 255

REASONABLENESS

- Procedure and policy documents are relevant and provide an evidentiary basis
- It is not enough that the employer relied on their own policies or procedures if these were not reasonable

(See Jeffery v Lintipal Pty Ltd [2008]NSWCA 138)

RAILCORP v ARAVANOPULES

- Worker was a manager
- Allegations of misconduct were made by two staff members
- Investigation was conducted into the conduct of the worker
- This involved taking statements from various witness



RAILCORP v ARAVANOPULES

- The investigator did not interview the worker
- Statements provided by other witnesses were not provided to the worker
- The investigator made credibility findings without interviewing the worker



RAILCORP v ARAVANOPULES

- Held that the employer had not acted reasonably in withholding the statements
- There was no explanation for withholding the statements
- Individual blemishes in the process do not make it unreasonable, which is why the process as a whole must be considered
- The failure to provide the statements was significant and not an individual blemish

PRACTICAL TIPS

- **Attach relevant documents like:**
 - Procedural documents allegedly followed
 - Grievance policies etc
 - Signed statements of other witness, that have been given to the worker
- **Differentiate between an injury dispute and an 11A dispute**

PRACTICAL TIPS

- Identify what category the actions fall in – not every category will be relevant and a scattergun approach might not be successful (see *Hobden v South East Illawarra Area Health Service* [2010] NSWCCPD 13 in which the s 74 notice said “the employer acted reasonably in its actions”)



PRACTICAL TIPS

- Employment must be the main/substantial contributing factor, not the actions taken
 - Contrast with s 11A where you are looking at the actions taken
- Get your IME to consider causation:
 - *Hamad v Q Catering Limited* [2017] NSWCCPD 6
- The test is a legal one, but involves causation, which should be considered by IMEs

Refreshment break



Discussion:

How these cases effect ongoing processes and what needs to happen for insurers from an operational perspective

Facilitated by
Sarah Cutri & Emma
Hagan

Collect your thoughts

Audience participation



Case Study exercise

Section 11A

Read the case study below and discuss the following in your group. Record your answers for a wider discussion.

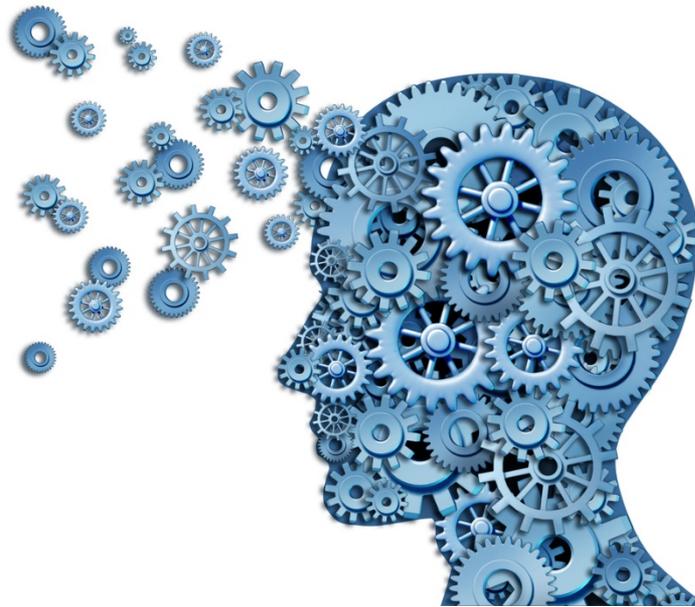
1. What other information might you want before making a liability decision or is there enough with the information presented?
2. Do you consider Employment to be the main/substantial contributing factor or was it the process of the investigation?
3. Is s11A applicable in this case if you were to dispute this claim?
4. If you were to dispute liability, would you base it on s11A or another section of the act?
5. Based on the information presented, do you consider that the psychological condition was wholly or predominantly caused by actions taken or proposed?
6. Based on the information presented, do you consider that the psychological condition was wholly or predominantly caused by actions taken or proposed?
7. Do the employer's actions fit within the categories of s11A and if so what?
8. What was the action taken by the employer?
9. Was the Employer's conduct considered reasonable? And on what basis?

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Discussion

Questions with Parnel & Belinda



Thank you and final words

Sarah Cutri
Acting Manager
Claims Supervision

Feedback



- Please complete the evaluation survey on your tables.
- Only take a few moments.
- It will help us to enhance these forums.

This presentation may contain information that relates to the regulation of workers compensation insurance, motor accident third party (CTP) insurance and home building compensation in NSW. It may include details of some of your obligations under the various schemes that the State Insurance Regulatory Authority (SIRA) administers. However to ensure you comply with your legal obligations you must refer to the appropriate legislation as currently in force. Up to date legislation can be found at the NSW Legislation website legislation.nsw.gov.au.

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