WORKERS COMPENSATION: KEEPING UP WITH THE CHANGES

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Looking at the constant changes occurring in the workers compensation landscape, one might be excused for thinking that keeping up with the Kardashians would be easier – and arguably more enjoyable.

Whilst the recent legislative changes have brought good news for injured workers, the judicial interpretation in a recent case has been disappointing from the perspective of an injured worker.

Just when we were getting used to the far-reaching changes that were introduced in June 2012, we now have the *Workers Compensation Amendment Act 2015* ('*2015 Act*') and the *State Insurance and Care Governance Act 2015 ('SICG Act'),* which received Governor's assent on 21 August 2015. The Acts commence on a day to be appointed by proclamation. Schedule 2 [1], Schedule 3 [1] - [3] and Schedule 6 of the *2015 Act* commenced on the date of assent. Structural reform under the *SICG Act* commenced on 1 September 2015.

Following the passage through parliament of the two Bills, the Minister said, 'Today is a win for both injured workers and businesses across NSW'. It is claimed that a deficit of $4.1 billion has been fixed and that the new system is financially sustainable.

Introduced as the '2015 Workers Compensation Reform Package', the main elements highlighted are:

1. **Introduction of three simplified agencies:** namely, *SafeWork NSW*, being a risk-based regulator for work health and safety; *Insurance & Care NSW* (icare), being a customer-focused organisation delivering insurance and care services; and *State Insurance Regulatory Authority* (SIRA), being an independent regulator overseeing all State insurance schemes;
2. **Increased benefits**: payment of medical expenses, certain prostheses, and aids for life for seriously injured workers, increased lump sum and minimum weekly payments, and new financial assistance for return to work, education and retraining; and
3. **Premium reductions**: employers with good safety and return-to-work performance records will be rewarded with 5-20 per cent discounts.

Snapshot

- *The Workers Compensation Amendment Act 2015* and the *State Insurance and Care Governance Act 2015* – together billed as the '2015 Workers Compensation Reform Package' – received assent on 21 August.
- The main highlights of the package include the introduction of three simplified agencies, increased benefits for injured workers, and premium reductions for employers with good safety and return to work performance records.
- Whilst the legislative changes have brought good news for injured workers, judicial interpretation in the recent case of *Cram Fluid Power Pty Limited v Green* [2015] NSWCA 250 has been disappointing from the perspective of an injured worker.

Workers Compensation Amendment Act 2015

At a glance, the new benefits available for claims made on or after the date of proclamation of the *2015 Act* are as follows:

- Section 66 lump sum compensation amounts have increased, the maximum amount being $577,050 where the impairment is 74 per cent or greater. These will be increased once a year;
- Death Benefit lump sum increased to $750,000 (s 25);
- Funeral expenses increased to $15,000 (s 26);
- Worker remains in the 'serious' category until maximum medical improvement is reached (effective 21 August 2015);
- The term 'worker with highest needs' replaces 'seriously injured worker';
- 'Worker with highest needs' is one whose degree of impairment is more than 30 per cent or where an assessment of impairment is pending or the insurer agrees that the impairment is more than 30 per cent;
- A mid-tier category has been introduced: 'worker with high needs' where the impairment is more than 20 per cent;
- A 'worker with high needs' who is assessed as having current work capacity will continue to be eligible for weekly compensation after the second entitlement period;
- A 'worker with highest needs' also has a minimum weekly entitelment ($788.32 as indexed);
- Termination of weekly payments on retiring age is extended by 12 months to 'first anniversary after the retirement age' for claims first made on or after 1 October 2012;
- Extension on the time limits for claiming s 60 medical benefits to two years for workers with 10 per cent or less impairment; and five years for workers with 11-20 per cent impairment;
- No time limits apply for medical benefits where the impairment exceeds 20 per cent;
- Removal of the mandatory requirement for referral of disputes as to future medical treatment to an Approved Medical Specialist;
- Removal of certain limits to the claiming of expenses relating to crutches, artificial members, eyes or teeth and other artificial aids or spectacles, hearing aids, hearing aid batteries, modification of a worker's

home or vehicle and second surgery;

- An application for review of a work capacity decision operates to stay the decision and prevents the insurer from taking further action; and
- In relation to certain work capacity decisions, paid legal representation will be available.

Cram Fluid Power Pty Limited Green [2015] NSWCA 250

If the reform package brought good news to the stake holders, the Court of Appeal decision in *Cram Fluid* handed down on 27 August 2015 somewhat dampened that joy for injured workers.

Mr Green suffered an injury to his lumbar spine on 24 May 2005. He made a claim for lump sum compensation on 14 December 2010 under s 66 of the *Workers Compensation Act 1987* (*'1987 Act'*) in respect of 7 per cent whole person impairment (WPI). The matter was resolved and a complying agreement was signed by the parties.

A new s 66(1A) was introduced on 19 June 2012, which provided that 'Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury'.

Mr Green's condition deteriorated over time and required surgery following which his impairment was assessed at 22 per cent. He made a further claim on 29 October 2013.

The insurer disputed the claim on the basis that Mr Green was precluded by the 2012 Amending Act from bringing a second claim. An arbitrator determined that s 66(1A) would be applied prospectively to claims for lump sum compensation made on or after 19 June 2012 and, accordingly, Mr Green was not precluded from bringing a further claim. President Keating upheld the decision.

On appeal (by leave), the Court of Appeal was required to consider whether the 2013 claim was a claim for compensation made on or after 19 June 2012 and to which the one claim provision of s 66(1A) of the *1987 Act* applies.

The Court of Appeal was also required to consider whether s 66A(3)(c) of the *1987 Act* permits a further claim for lump sum compensation, after 19 June 2012, based on a deterioration, where the first claim was resolved by way of a complying agreement before 19 June 2012.

It was held that:

1. The 2013 claim, although arising out of the same injury as the 2010 claim, was a separate claim and was therefore subject to the 2012 amendments, including the one claim provision in s 66 (1A) of the *1987 Act*;
2. The worker had made a claim for lump sum compensation in 2010 and that was his 'one claim' for lump sum compensation. Section 66(1A) disentitled him from making a claim for further lump sums in 2013;
3. Section 66A(3)(c) of the *1987 Act* is not independent of s 66 (1A) of the 1987 Act. Section 66A(3)(c) has limited operation to claims for further lump sum compensation settled by way of complying agreement, where the claim for further lump sum compensation was made prior to 19 June 2012.

The impact of the Court of Appeal determination is to limit workers to a single claim for lump sum compensation, regardless of when the first claim for lump sums was made. Only those with an unresolved claim for further lump sums made prior to 19 June 2012, can continue with the further claim.

Needless to say, this decision is a blow to injured workers, particularly in situations where the seriousness of the injury does not manifest itself for a number of years.

The 'one claim' provision applies to injuries received before 1 January 2002, but not to injuries received before 4pm on 30 June 1987, which are governed by the *Workers Compensation Act 1926,* by transitional provisions under the *1987 Act*.

As for industrial deafness claims, the *Cram Fluid* decision does not prevent a further claim being made based upon a further or new injury, so long as the whole person impairment arising from the further injury exceeds the 10 per cent threshold (*Sukkar v Adonis Electrics Pty Ltd* [2014] NSWCA 459*)*.

Conclusion

We may not have heard the last word about 'one claim'. It is understood that a High Court appeal is being considered by Mr Green's lawyers.

In the interim, the Workers Compensation Commission has requested practitioners review current dispute applications to ensure that an entitlement to further lump sum compensation for permanent impairment exists.

It should be noted that, despite the Court of Appeal decision, there is nothing to prevent a worker from pursuing a threshold dispute in the Workers Compensation Commission with a view to opening the door for s 60 and other benefits flowing from a high percentage of impairment.

The Workers Compensation Review Officer, Mr Kim Garling, has announced that in light of the 2015 amendments, WIRO will be funding threshold disputes, 'especially in relation to an entitlement to ongoing medical expenses'.

The State government should be applauded for listening to the concerns that the Law Society has expressed over the past few years and for returning essential benefits to workers.

Lowering of the threshold for lifelong access to medical benefits and the extension of medical benefits to two years for those with up to 10 per cent WPI and five years for those with up to 20 per cent WPI, is particularly welcomed. **LSJ**

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