WORKPLACE INJURY COMPENSATION: STATE-BY-STATE ROUND-UP

AUSTRALIAN CAPITAL TERRITORY

By Steven Hausfeld

Workers' compensation is governed by the *Workers' Compensation Act* 1951 (ACT) (WCA). Different provisions may apply to injuries occurring before 1 July 2002. Many Commonwealth and ACT government employees are covered by Comcare.[1]

STATUTORY BENEFITS

Under the WCA, litigation over benefits is conducted as an arbitration, to which the rules of evidence do not apply, in the ACT Magistrates Court.

Weekly payments in lieu of wages

For the first 26 weeks from the date of total incapacity, weekly payments are at the average weekly pre-incapacity earnings. Generally, this involves averaging earnings, including overtime and allowances, over the prior 12 months. If this would not be 'fair', reference can be made to earnings of appropriate comparison workers.

After 26 weeks, payments for total incapacity drop to the higher of 65% of this amount or the federal minimum wage (defined as the 'statutory floor'), as adjusted from time to time.

For partial incapacity, proportional provisions generally apply, although they are quite complex after the first 26 weeks.

Compensation for permanent injuries

This is governed by a 'table of maims' in schedule 1 of the WCA. Items are expressed as a percentage of a single amount, which is indexed (currently $110,033.13). For combined items, an indexed maximum amount of $165,049.70 applies.

Treatment costs

Reasonable medical and other treatment expenses are payable, but the statutory definition is limiting.

Death benefits

The indexed amount is currently $165,049.70.

COMMON-LAW CLAIMS

Common-law claims are available, without caps or thresholds, except for a generally applicable cap on damages for economic loss, being three times the average weekly earnings.[2]

TIME LIMITS

Notice of injury must be given as soon as practicable after the injury and before the worker voluntarily leaves the employment, and within three years of the worker's death, injury, or knowledge of the injury. However, the Magistrates Court may allow late claims, subject to the usual considerations in s120A.

A claim for permanent injury cannot be made earlier than two years after the injury, unless it has stabilised or the Magistrates Court considers early application justified by the severity of the injury or the worker's imminent death.

For injuries on or after 1 July 2002, common-law claims should be commenced within three years, although an extension can be granted.

A claim not rejected within 28 days is deemed accepted. Once a worker has been on benefits for 12 months, the claim cannot be rejected without approval of the Magistrates Court.

MEDICAL EVIDENCE

In most proceedings, the *Practice Direction 1 of 2000* applies, which generally requires service of medical reports 28 days prior to hearing and any supplementary reports 'forthwith'. Reports are admissible as they stand unless within 14 days the party served requests the medical expert to be available for cross-examination.[3]

By notifiable instrument NI2005-248, the minister approved the *AMA Guides* (5th edition) and the NSW *WorkCover Guidelines* as the medical guidelines for assessing permanent injury.

LEGAL COSTS

Subject to the court's discretion to order otherwise, the *Workers' Compensation Regulation* 2002 provides for successful workers to have costs paid by their employer on a party:party basis at two-thirds of the Supreme Court scale. The court cannot order costs against a worker honestly claiming compensation.

POLICY ISSUES

The ACT workers' compensation scheme works well. Disputes are processed through the Magistrates Court without delay. The ongoing availability of common law is important for many workers, as it provides a means for obtaining closure and proper compensation for pain and suffering. It is, however, likely to continue to come under attack from insurers.

The government recently announced a wide-ranging review of the scheme, into which Alliance members have had input. We suggested a more detailed analysis of the costs of rehabilitation and legal costs, arguing for analysis of legal costs generated by insurers – including the costs of multiple medical assessments – and workers. The government is expected to appoint a consultant by the end of November 2006 and a report is expected in March 2007.

Notes: 1 See section on **Comcare and Military Compensation Schemes**, below. **2** *Civil Law (Wrongs) Act* 2002, s98. **3** This may change with the anticipated application (1 January 2007) of the *Court Procedures Rules* 2006 (CPR) to Magistrates Court matters. Current rules and regulations will be incorporated into CPR.

NEW SOUTH WALES

By Anthony Scarcella

The applicable legislation is the *Workers' Compensation Act* 1987 (WCA), the *Workplace Injury Management and Workers' Compensation Act* 1998 (WIM) and associated regulations.

RELEVANT TRIBUNAL

The Workers' Compensation Commission of NSW (WCC) is made up of the president, a number of deputy presidents, arbitrators and approved medical specialists (AMSs). The president deals only with complex matters and questions of law on appeal. The deputy presidents deal with appeals from the decision of the arbitrators.

AMSs issue binding medical assessment certificates as to whole-person impairment (WPI). As under the *Motor Accident Compensation Act*, assessments of WPI cause great concern because of the apparent inconsistency between AMSs. It amounts to the luck of the draw. In a recent case, due to an administrative error, a worker had the same body system assessed by two AMSs within eight weeks. Despite relying on the same paperwork, one AMS assessed WPI at 12% and the other at 20%!

After attempting conciliation, arbitrators decide claims for weekly payments of compensation, reasonably necessary treatment expenses and lump-sum payments for pain and suffering. The arbitration system is front-end loaded and paper-driven, with leave required to submit further evidence once an application or reply has been filed. Arbitrations are run informally and procedures can be inconsistent – so can results!

Due to these inconsistencies, workers are arguably in the same position as they were under the old Compensation Court sustem when judges had to assess body part impairments *and* pain and suffering.

STATUTORY BENEFITS

Simply put, the WCA and WIM deprive workers of fair and just compensation. Basic benefits for injuries sustained on or after 1 January 2002 are as follows:

- Weekly payments for the first 26 weeks of total incapacity at the worker's award rate, registered or enterprise agreement rate of pay capped at the maximum weekly rate ($1,506.90), and thereafter at the reduced statutory rate ($354.40 gross pw for a worker without dependants) for periods of total or partial incapacity. Overtime, shift-work and penalty rates are not compensated. >>

- Reasonable treatment, rehabilitation, pharmaceutical and medical investigation expenses are recoverable.
- A lump-sum payment is determined by the worker's WPI and paid in accordance with assessment tables for percentage losses of physical and mental function under *AMA Guides* (5th edition) and the *WorkCover Guides for the Evaluation of Permanent Impairment*. There is no entitlement to lump-sum payment for loss of physical function if the permanent impairment is less than 1%; for hearing loss, if less than 6%; or for loss of mental function (primary psychological/psychiatric injury), if less than 15%. To illustrate, 5% WPI amounts to $6,250, 10% to $12,500, 15% to $20,000 and 20% to $27,500 under the s66(2) WCA table.
- If a worker suffers a primary psychological/psychiatric and a physical impairment arising from the same incident, they are entitled to be compensated for one impairment only – that which would yield the most compensation.
- Single and multiple physical injuries resulting from an accident are assessed together to determine the degree of permanent impairment, whereas permanent impairments arising from primary psychological/psychiatric injuries are assessed separately from physical injuries. Secondary psychological/psychiatric injuries are disregarded.
- A worker is entitled to an additional lump sum for pain and suffering only if WPI is at least 10% for physical and 15% for primary psychological/psychiatric injuries. The maximum amount payable is currently only $50,000. Pain and suffering is assessed by an arbitrator in the WCC, using a percentage comparison to 'a most extreme case'. For example, if the worker is assessed as 10% of a most extreme case, the lump-sum entitlement is $5,000.

COMMON-LAW CLAIMS

The legislation reduces the amount of damages and limits the scope available. A worker's 'work injury damages' rights are as follows:

- Damages are awarded *only* for past and future loss of earnings.
- No damages are awarded unless WPI is at least 15% using AMA5 and the *WorkCover Guides*.
- Once the worker establishes a WPI of at least 15%, a notice of claim is served on the insurer and employer, followed by a pre-filing statement that sets out the particulars of the claim and the evidence upon which the worker will rely, including all documents.
- The insurer must respond by serving a pre-filing defence on the worker, setting out particulars of the defence, including all documents.
- Mediation must occur (unless the insurer wholly denies liability) before the claim can progress from the WCC to the District Court. If the claim cannot be resolved, it is determined in the District Court by the worker filing a statement of claim in the same terms as the pre-filing statement.
- Once damages are received, entitlement to any further benefits ceases and any weekly payment made in the past is deducted from the common-law payment. This ridiculous imposition means that severely injured workers who require significant ongoing care and treatment should not access their work injury damages rights. Access to damages is effectively restricted only to that narrow class of workers with a severe injury (15% WPI or more) who require no, or minimal, ongoing care and medical expenses.
- A claim must be commenced within three years of the date of injury. There are mechanisms by which the 'clock can be stopped'.

LEGAL COSTS

Legal costs and disbursements are regulated by a compensation costs table which sets out maximum amounts for individual activities/events at a less-than-generous scale, even taking into account the recent amendments. Although the separate costs table for work injury damages claims is far more realistic, it has the potential not to reward practitioners for thorough preparation and presentation of workers' cases.

CONCLUSION

The above serves only as a general overview to a very complex scheme, heavily paper-driven, capable of being effective but currently bogged down with appeals with a 12-month waiting list. The assessment of WPI and the apparent inconsistency between AMSs continue to be of great concern. Work injury damages claims can only be brought in a very specific class of case, leaving the severely and catastrophically injured 'on the slow drip'.

NORTHERN TERRITORY

By Allison Robertson

Workplace injury claims in the NT are covered by the *Work Health Act* 1986, together with the *Work Health Court Rules*, *Work Health Regulations* and *Work Health (Occupational Health & Safety) Regulations*. The Act established NT WorkSafe, an administrative and regulatory body, which conducts scheme monitoring, mediation services, incident investigation and OH and S prosecutions, but does not handle claims.

Four insurers (Territory Insurance Office, CGU, QBE and Allianz) privately underwrite policies and handle claims. There are also a small number of self-insurers (major banks, Coles Myer, Woolworths, Catholic Church), and a Nominal Insurer scheme.

Common-law entitlements were completely abolished in the NT from 1 January 1987.

BENEFITS UNDER THE STATUTORY SCHEME

Weekly compensation benefits are available for the duration of total or partial incapacity, calculated by reference to the worker's pre-injury Normal Weekly Earnings (NWE), which are actual earnings (including any regular overtime, penalty rates and certain allowances, as well as the value of certain non-cash benefits). Payment is at full NWE for the first 26 weeks, then 75% of loss of earning capacity (NWE less any actual earnings or assessed capacity to earn), or 150% of Average Weekly Earnings (AWE), whichever is less. NWE and AWE rates are indexed every 1 January.

Medical, hospital, rehabilitation and certain home/vehicle modification and home assistance expenses are recoverable, and lump-sum permanent impairment compensation is available. Death benefits (lump sums and weekly compensation) are recoverable for dependants of deceased workers.

TIME LIMITS

Notice of injury must be given 'as soon as practicable' – failure to give notice can preclude compensation (s80). Providing a claim form to an employer is notice of injury.

The claim must be in the approved form, and unless it is for medical expenses only, must be accompanied by a prescribed medical certificate. The claim is not deemed to have been made until the certificate is provided.

The employer must forward the incident report and claim form to the insurer within 3 working days of receipt; the insurer must make a decision on the claim within 10 working days and accept, dispute, or defer decision for up to 56 days for further investigation. Weekly compensation is payable during the deferral period and is not recoverable by the insurer even if the worker is ultimately unsuccessful.

If the claim is disputed at the outset, or if a dispute arises during the course of a claim, the worker must apply to NT WorkSafe for mediation of the dispute within 90 days. Failure to do so can halt the claim.

Once a certificate of mediation has been issued (after or in lieu of a conference), the worker must lodge an application in the Work Health Court (WHC) within 28 days. Failure to do so can be a bar to proceedings (s104).

Section 182 requires that notice of injury be given before the worker voluntarily leaves employment, and a claim made within six months of injury or of incapacity arising from disease. Failure to comply can be a bar to proceedings, except in the case of mistake, ignorance of disease, absence from the Territory or other reasonable cause.

Either party aggrieved by a permanent impairment assessment must apply to NT WorkSafe for re-assessment by a panel within 28 days of receiving notice of assessment.

PARAMETERS FOR COMPENSATION

Weekly compensation after 26 weeks is capped at 150% AWE (currently $1,558.50 gross pw).

Permanent impairment compensation is capped at 208 x AWE (currently $1,039 pw, so maximum is $216,112) at the time of assessment. Impairments under 5% receive nothing. Between 5% and 14%, a deductible applies. For 15% and above, no deductible applies.

The maximum lump sum for death benefits is 260 x AWE (currently $270,140). Funeral benefits are 10% of annual AWE ($5,402.80) and children's weekly benefit is 10% AWE ($103.90 pw).

ASSESSMENT PROCESS

Insurers determine claims on receipt.

NT WorkSafe conducts mediation and organises panel reviews of permanent impairment assessments if requested by either the employer or worker.

The WHC determines all disputes relating to compensation claims and applications to commute future weekly benefit entitlements. Appeals from decisions of the Court are to a single judge of the Supreme Court, on questions of law only. Further appeal lies to the Court of Appeal.

MEDICAL EVIDENCE

Medical reports are not privileged – all reports must be disclosed to the other party. There is no limit to the number of reports that can be relied upon. Doctors are regularly required to attend court for cross-examination on their opinions.

The *AMA Guides* (4th edition) must be used to assess permanent impairment. If a panel re-assesses permanent impairment following a request from an aggrieved party, the assessment is binding on both parties and is not open to challenge or appeal.

LEGAL COSTS

There are no restrictions on costs and disbursements. The WHC can award party:party costs at an appropriate percentage of the Supreme Court scale – usually 100% unless the value of the award is very small.

Solicitors are entitled to charge solicitor:client costs at any rate, subject to statutory requirements governing costs disclosure and agreements.

Taxation of costs is conducted by a Registrar in the WHC.

CHANGES TO THE SCHEME

No changes are imminent, but uncertainty surrounds the calculation of NWE, particularly given recent Court of Appeal decisions as to whether employer superannuation contributions should be taken into account.[1]

The issue of enabling parties to completely settle claims has also recently been raised by NT WorkSafe; comments have been invited from stakeholders, but it is unclear where this will lead.

CONCLUSION

The NT scheme currently provides very generous income replacement benefits to workers, modest permanent impairment benefits and proper coverage of medical and like expenses.

The scheme has been subject to a range of legislative adjustments, most recently with an amendment operative from 26 January 2005, which sought to remove superannuation contributions from the calculation of a worker's NWE. The constitutional validity of the retrospective aspects of the amendment was successfully challenged by a worker in the NT Court of Appeal.[2] The issue is now on application to the High Court for special leave.

Financially, the scheme has stabilised in the last couple of years following the demise of HIH, which underwrote a substantial amount of insurance in the NT. Claim numbers have been on a downward trend for some years, and the scheme returns a modest profit to insurers.

Notes: **1** *Hastings Deering (Australia) Ltd v Smith* [2004] NTCA 13; *Chaffey v Santos Limited* [2006] NTSC 67. **2** *Chaffey v Santos Limited* [2006] NTSC 67.

QUEENSLAND

By Adam Tayler

The applicable legislation is the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA), and the *Workers' Compensation and Rehabilitation Regulation* 2003 (WCRR).

STATUTORY BENEFITS

Recoverable statutory benefits include weekly benefits, medical expenses, hospital expenses, travelling expenses, rehabilitation expenses, caring allowance, lump-sum compensation for permanent impairment, additional lump-sum compensation and compensation upon the death of a worker.

The maximum compensation recoverable is currently $200,000 for weekly benefits and $200,000 for lump-sum compensation.[1]

Weekly benefits

For total incapacity, compensation is payable for a maximum of five years as follows:

- weeks 1 – 26: 85% of normal weekly earnings (NWE);
- weeks 26 – 52: 75% NWE;
- week 52 to end of 2nd year: 65% NWE; and
- end of 2nd year to end of 5th year: if the injury could result in a work-related impairment (WRI) of 15% or greater – 65% NWE; otherwise, an amount equal to the single pension rate.

Medical expenses[2]

Medical expenses payable to a registered medical practitioner are recoverable in accordance with a table of costs including the cost of nursing, medicines, medical or surgical supplies, curative apparatus, crutches or other assistive devices.

Hospital expenses

The insurer must pay the cost of four days' private or public hospitalisation for non-elective hospitalisation or such extended period as previously agreed.[3] Non-elective admission costs must be agreed by the insurer before hospitalisation.

Travelling expenses[4]

The costs of travelling, including ambulance transport, undertaking rehabilitation, attending a medical assessment tribunal (MAT) or being examined by a registered person are recoverable.

Rehabilitation expenses[5]

Rehabilitation costs are payable as reasonably required in accordance with the table of costs.

Caring allowance[6]

A caring allowance can be recovered where care is required on a daily basis for the activities of day-to-day living and is provided in the worker's home on a voluntary basis by someone who is not otherwise receiving compensation.

Compensation for permanent impairment

If a worker suffers permanent impairment as a result of the injury, they are entitled to lump-sum compensation.[7] This is calculated in accordance with a table of injuries contained in the WCRR. If a degree of permanent impairment is assessed, the insurer must also calculate a WRI.

Additional lump-sum compensation[8] can be recovered. Firstly, where the worker has a WRI of 50% or more, excluding psychiatric injuries, they are entitled to up to $182,620 payable on a graduated scale using the WCRR; secondly, where a worker has a WRI of 15% or more, and a moderate-to-total level of dependency on day-to-day care for the fundamental activities of daily living.

Death benefits

The Act allows recovery for funeral and medical expenses relating to the deceased worker[9] as well as compensation for dependants.[10]

Total dependency entitles dependent members to $374,625 and the surviving spouse to $10,000. Further, if any dependant is under age six at the time of death, weekly payments of 8% of Queensland full-time adults' ordinary time earnings (QOTE) are payable while the dependent is under six. If the totally dependent members include a spouse and children under 16 or who are students, an extra $20,000 is payable to the spouse. If the dependent members of the family include a child under 16 or who is a student, then weekly payments of 10% of QOTE are also payable until the child turns 16 or ceases to be a student.[11]

Partial dependency receives a proportionate amount of the lump-sum benefit payable for total dependency.

COMMON-LAW CLAIMS

Common-law damages are available. Although there is no threshold test, where the worker has less than 20% WRI they must choose between lump-sum compensation and pursuing common-law damages. If they accept lump-sum compensation, they cannot pursue damages.

TIME LIMITS

Applications for statutory compensation must be made within six months of the injury.[12] The employer must immediately report all injuries that may result in compensation once they know about the injury.[13] >>

A common-law claim must be commenced within three years of the cause of action arising.[14]

Before court proceedings can be issued, pre-court procedure must be complied with. If that procedure is properly commenced within three years, the limitation period is automatically extended until the procedure is complied with. The final step in the procedure is the issuing of court proceedings and service on the employer within 60 days of an unsuccessful compulsory conference. If proceedings are not issued within 60 days, the claim will become statute-barred.[15]

RESTRICTIONS ON DAMAGES AND LEGAL COSTS

Damages for voluntary assistance are excluded entirely. Recovery of costs is restricted to where damages exceed the mandatory final offer made at the pre-court compulsory conference, unless WRI is 20% or more. Costs are also limited by WCRR, schedule 6.

DISPUTES

Reviews of statutory insurer decisions are conducted by QComp, the workers' compensation regulator. Appeals from QComp decisions can be made either to an industrial magistrate or to the Queensland Industrial Relations Commission (QIRC). Further appeal lies to the Queensland Industrial Court.

Common-law claims for up to $50,000 must be prosecuted in the Magistrates Court; those between $50,000 and $250,000 in the District Court; and those exceeding $250,000 in the Supreme Court.

MEDICAL EVIDENCE

Medical evidence must apply the *AMA Guides* to assessment or otherwise conform with the statutory table of injuries in the WCRR. The WCRA allows for a MAT to decide some medical questions where there is a dispute or a psychiatric injury is involved. There is no appeal from decisions of the MAT; however, judicial reviews of MAT decisions have succeeded using administrative law.

FUTURE OF THE SCHEME AND OVERVIEW

There is currently a proposal to further loosen the criteria for self-insurer licences.

The scheme is performing well and is the most profitable workers' compensation scheme in the country. The majority insurer, WorkCover Queensland, takes a business-like approach to common-law claims and has a history of agreeing on protocols for the conduct of claims with the Alliance. On the other hand, self-insurers are generally difficult to deal with.

Notes: **1** WCRA, s140(1). **2** WCRA, s211. **3** WCRA, ss216(1)(a), (b). **4** WCRA, s219. **5** WCRA, s222. **6** WCRA, s224. **7** WCRA, s178. **8** WCRA, ss192, 193. **9** WCRA, s199. **10** WCRA, s196. **11** 'Student' includes a person under 21 years who is studying full time at a school, college, university or similar institution. **12** WCRA, s131. **13** WCRA, s133. **14** *Limitation of Actions Act* 1974, s11. **15** *Narayan v S-Pak Pty Ltd* [2002] QSC 373.

SOUTH AUSTRALIA

By Ruth Carter

The 1986 *Workers' Rehabilitation and Compensation Act* (the Act) governs workplace injuries in South Australia. Registered employers pay levies annually for claims to be managed by Employers Mutual Limited (EML), the sole agent for the WorkCover Corporation of SA (the Corporation). EML is supported by the sole legal provider, Minter Ellison.

The Corporation is a statutory body managing scheme funds, collecting levies, authorising self-management by exempt employers and setting criteria for claims management standards. EML began operating on 1 July 2006, replacing the four previous insurers. This significant change is part of a long-term review process, which started with a report commissioned from a retired judge of the Industrial Court, Brian Stanley.

Safework SA is a separate statutory body responsible for managing OH and S standards. It audits employers to monitor compliance, prosecutes non-compliant employers, and educates employers and workers in safety and accident prevention.

COMMON-LAW CLAIMS

The Act precludes common-law claims against employers directly. Limited access to common law is available where a third party may be involved (for example, labour hire, work journey). Such actions are subject to the *Civil Liability Act* which caps entitlements. With the Corporation's right of recovery from the common-law outcome limiting any additional benefit to a worker, most are principally recovery actions.

STATUTORY BENEFITS

Under the Act, workers are entitled to claim for injuries 'arising from or in the course of employment'. Generally, claims should be made within six months of injury other than slow onset conditions such as industrial diseases. A worker is entitled to income maintenance at 100% of average weekly earnings (AWE) for the first 12 months of incapacity, reduced to 80% thereafter. Income maintenance is capped at 2 x AWE.

Regulated medical treatment and travel expenses are recoverable, with provision for special approved support services where necessary. Lump sums for permanent impairment are available subject to an injury table which precludes psychiatric/psychological injuries. Special rules limit the scope of compensable psychiatric/psychological injuries. Impairments are assessed using the *AMA Guides* (3rd edition). Multiple injuries are subject to a regulation that effectively reflects a whole-body assessment. If the total impairment exceeds 55% of whole body, the injured worker can obtain an additional payment.

Workers are entitled to rehabilitation and/or return-to-work programs, with support from a rehabilitation consultant following medical clearance. A worker who is unable to return to pre-injury duties may have their employment terminated where the employer is relieved of the obligation to provide duties. The claims agent must then support the worker in seeking alternative employment. If employment is not found, the scheme provides for redemption by consent only of future liabilities, but the sum does not reflect any actuarial entitlement. Entitlements otherwise continue with income maintenance ceasing at age 65.

DISPUTE RESOLUTION

A worker may lodge a notice of dispute in the Workers' Compensation Tribunal within one month of receiving the decision of the compensating authority. The compensating authority has 14 days to consider any new evidence. If it confirms the decision, the dispute is listed before a conciliation officer.

Matters not resolved at conciliation are referred to either arbitration or judicial determination. Appeals from a single judicial officer to the full bench are available, but appeals to the Supreme Court are limited. There is no specific medical panel involved in this process.

Disputes range from assessment of income maintenance and impairment to capacity to engage in rehabilitation and return-to-work programs. Disputed 'stress' claims can involve lengthy hearings as the compensation hurdles are particularly onerous. Medical witnesses are generally reserved for judicial hearings. The tight costs scales encourage a reasonably high settlement rate, often following judicial settlement conferences.

LEGAL COSTS

No costs are recoverable for representing workers unless a dispute is lodged in the Tribunal. A recent Supreme Court decision limiting the ability of solicitors to recover solicitor:client costs from settlement funds on a lien is presently the subject of an application for leave to appeal.

Recoverable representation costs at conciliation and arbitration range from $370 to several more hundred dollars. Disbursements are recoverable at prescribed rates. Recoverable costs at judicial level are linked to the Supreme Court scale, attracting party:party costs capped at 85% of the scale (presently 85% of $255 per hour), with a decreasing scale of costs for counsel attendances, designed to limit trials. Solicitor:client costs are capped at the Supreme Court scale unless leave is given for the matter to be certified as complex. Negotiated settlements are attractive, as most workers have substantial solicitor:client costs.

CHANGES TO THE SCHEME

An employee advocate unit, sponsored by the Corporation, which provided free legal advice and representation, has recently closed. An alternative is being negotiated.

A draft bill to extend coverage for income maintenance to workers over 65 is presently available for comment. This is a small but positive step. Other matters expected to receive attention in the future include the calculation of income maintenance and the status of contractors.

In the current transitional climate, the implications of changes as a result of Judge Stanley's review are as yet unclear.

TASMANIA

By Fiona Walker and Sandra Taglieri

STATUTORY BENEFITS

In Tasmania, the workers' compensation system is regulated by the *Workers' Rehabilitation & Compensation Act* 1988 and the *Workers' Rehabilitation & Compensation Regulations* 2001. The following benefits are available:

Weekly payments of compensation

The payments are subject to step-down provisions. In the first 13 weeks of incapacity, workers are entitled to 100% of their normal weekly earnings (NWE) or ordinary time rate of pay (whichever is greater); then 85% NWE for up to 78 weeks. After 78 weeks, 80% NWE is paid. For partial incapacity, gap payments are made up to these levels of payment.

Weekly payments are recoverable for up to nine years from the date of injury, providing that incapacity is supported by a medical certificate in the appropriate form.

Medical expenses

There is no monetary limit, but expenses are paid for a period not exceeding ten years.

Permanent impairment

Workers are entitled to a small lump-sum payment if they have suffered a permanent whole-person impairment (WPI) of 5% or more.

TIME LIMITS AND DISPUTES

Injuries must be reported to the employer as soon as practicable and claims lodged within six months of the injury or death. In cases of industrial deafness, if an employee leaves their employment, a claim must be made within six months after termination. Claims for later conditions that develop must also be lodged within prescribed time limits.

The Workers' Rehabilitation and Compensation Tribunal determines workers' compensation disputes. Disputed claims go through a process of an initial referral to the tribunal, teleconferences, conciliation conference/s and, if a claim is still not resolved, the matter proceeds to hearing. At a hearing, the tribunal is not bound by the rules of evidence.

Successful parties in disputed matters that have been referred to the Workers' Rehabilitation and Compensation Tribunal are entitled to 85% of the Supreme Court scale costs from the other party, and to recover disbursements in full. The cost of a legal practitioner attending conciliation conferences on behalf of their clients cannot be recovered, because the government felt that lawyers would hinder conciliation.

COMMON-LAW DAMAGES

Common-law damages are also available, but only in extremely limited circumstances – workers must have 30% WPI or more caused by their employer's negligence. WPI assessments use the *AMA Guides* (4th edition) as modified by the *Tasmanian WorkCover Board Guidelines*, which are even more restrictive than the *AMA Guides*.

Both the inappropriate limit on the recovery of costs and, more importantly, the restriction on common-law damages, severely hinder what a worker should be entitled to recover as a result of their injuries. The government, in March 2006, indicated that it would consider changes to the *Workers' Rehabilitation and Compensation Act*, including the 30% WPI threshold. Alan Clayton has been appointed to conduct the review, which will commence shortly.

VICTORIA

By Andrew Saunders

In Victoria, workplace injuries compensation is governed by the *Accident Compensation Act* 1985 (the Act).[1]

Generally speaking, the Act provides for the following no-fault entitlements: medical and like expenses; weekly payments of compensation; and lump-sum compensation.

It also governs the recovery of common-law damages.

The scheme, known as WorkCover, is administered by the Victorian WorkCover Authority, acting largely through its panel of authorised insurers.

BENEFITS UNDER THE STATUTORY SCHEME

Claimants must, of course, establish that they have suffered a work-related injury. For diseases and aggravations of a pre-existing injury or illness, 'strokes' and 'heart attacks', this means establishing that employment was a 'significant contributing factor' to the injury.

Medical and like expenses

Once a claim has been accepted, a claimant is entitled to 'reasonable' medical and like expenses – defined to include household and occupational and rehabilitation services.

Medical expenses are payable indefinitely, but subject to periodic review.

Weekly payments of compensation

In addition, where an injury results in incapacity, weekly payments are also recoverable.

Following recent amendments, weekly payments are payable for up to 130 weeks and only thereafter if the claimant is, in effect, totally and permanently incapacitated.[2]

Generally speaking, weekly payments are 95% of a claimant's pre-injury earnings for the first 13 weeks and 75% thereafter.[3]

Lump-sum compensation

Lump-sum compensation (for 'pain and suffering') is also payable, but subject to strict eligibility criteria.

The Kennett government created two lump-sum compensation regimes – one for injuries sustained prior to 12 November 1997, and one for injuries on or after that date.

These significant amendments – which mandated exclusive use of the *AMA Guides* (4th edition) and introduced a 10% whole-person impairment (WPI) threshold[4] – had a twofold effect. On the one hand, claimants were no longer restricted to the 'table of maims', meaning that almost any injury or illness was compensable. On the other hand, the thresholds resulted in a significant reduction in both the number of eligible claimants and the value of claims, despite apparently increasing caps.[5]

Injuries sustained before 12 November 1997 are compensated in accordance with a table of maims. There is no threshold and, despite the absence of indexation, significantly greater amounts of compensation are payable.

COMMON-LAW DAMAGES

An injured worker may claim damages at common law in limited circumstances.[6] Specifically, by meeting the so-called 'serious injury test', which provides two alternative tests: a quantitative test – a threshold 30% impairment (assessed using the *AMA Guides*); and a qualitative test – an assessment of the effect of the injury on the claimant's life. Claimants relying on the qualitative test must satisfy an additional requirement – a 40% or greater loss of earning capacity – in order to bring a claim for pecuniary loss damages.

The former assessment is made in the course of a claim for lump-sum compensation (which, until recently, was subject to an irrevocable election – claimants who accepted the lump-sum offer lost their right to damages for pain and suffering). The latter is made on application to the Victorian WorkCover Authority, or if the application is rejected, to the County Court.

The right to sue for damages is subject to a six-year limitation period. The lodgement of either a lump-sum claim or application for permission to bring a damages claim, however, 'stops the clock'.

Awards are capped at comparatively healthy levels, and are subject to a reduction for any no-fault compensation paid:

- general damages: $438,320
- pecuniary loss damages: $1,006,760[7]

TIME LIMITS

Strictly speaking, notification of injury and claim lodgement are subject to strict time limits. In practice, however, non-compliance with the reporting and lodgement requirements is rarely fatal. >>

DISPUTE RESOLUTION

At first instance, disputes under the Act must be referred to the Accident Compensation Conciliation Service, which will convene a compulsory settlement conference.

If the matter remains unresolved, it may be referred to a medical panel – a panel of doctors charged with answering defined 'medical questions'. Panels can entertain most, but not all, disputes arising under the Act. A panel's determination is final and binding.[8]

Alternatively, a claimant may proceed to court. Once there, however, either party may seek a referral to a panel as of right.

The majority of disputes are resolved at conciliation. A significant number of those that are not are referred to the panel. Consequently, few proceed to trial.

The assessment of impairment for lump-sum claim purposes is an exception to the above procedure. Such assessments are carried out by an 'independent impairment assessor' – an accredited specialist nominated by the relevant WorkCover insurer – in the first instance. A claimant dissatisfied with an assessment may then refer it to a medical panel for review.[9]

LEGAL COSTS

In addition to costs awarded by a court, a claimant successfully making a claim for either a lump sum or damages is entitled to a modest additional allowance payable in accordance with ministerial directions.

LEGISLATIVE CHANGE

There are no major legislative changes on the horizon. A significant number of amendments, however, were passed in July 2006.

OVERVIEW

On the whole, the WorkCover scheme operates well at both ends of the spectrum. Generally, workers suffering minor injuries receive fair compensation. Those suffering serious injuries, in most cases, receive something approaching a fair deal. Workers falling somewhere in the middle, however, often miss out, victims of a gradual erosion of workers' rights which has resulted in a weekly payments regime that, for the vast majority of workers, stops at the 130-week mark; a miserly statutory no-fault lump-sum compensation regime; and a threshold test that restricts the right to claim damages, for economic loss in particular, only to the most seriously injured.

Notes: **1** For injuries sustained on or after 31 August 1985. For injuries sustained prior to that date, the *Workers' Compensation Act* 1958 applies. **2** Weekly payments are payable for permanent partial incapacity beyond 130 weeks, but only in limited circumstances. **3** Overtime and shift penalties are included in the calculation of a claimant's pre-injury earnings, but only for the first 26 weeks. **4** The threshold is 30% for claims for psychiatric injuries. **5** Claims are currently capped at a misleading $570,040. A 10% WPI gives rise to an entitlement to $14,810; every percentage point thereafter increases the award by $2,220. A more generous formula applies to injuries assessed at 30% or higher, a less generous formula for psychiatric injuries. A separate scale, based on the table of maims, applies to so-called 'total loss' injuries. **6** For injuries sustained on or after 20 October 1999. The right to sue for injuries sustained between 12 November 1997 and 19 October 1999 was abolished. Claims for injuries sustained before the abolition may still be brought, but subject to a strict limitations requirement. **7** Modest thresholds also apply. **8** Subject to administrative law principles. **9** A different process applies to claims made under the table of maims.

WESTERN AUSTRALIA

By Rob Guthrie

The *Workers' Compensation and Injury Management Act* 1981 (WA) (the Act) provides for compensation in the form of income support, rehabilitation and medical expenses for workers who suffer work-related injuries and disease in Western Australia. The Act was renamed in 2004 to reflect a legislative intention to focus on injury management and return to work. A range of adjustments were also made to weekly payment entitlements and common-law thresholds. On 14 November 2005, key dispute-resolution provisions of the Act became operative.

STATUTORY BENEFITS

As in most Australian jurisdictions, the Act provides for weekly payments for incapacitated workers. 'Injury' includes injury by accident arising out of or in the course of the employment and diseases to which the employment is a significant contributing factor to the onset, recurrence or aggravation of the condition. Weekly payments are paid at average weekly earnings (AWE) up to a limit of twice the ABS average wage (currently $1,609.90). After 13 weeks, this payment is reduced to the award rate, or approximately 85% of the AWE rate if the worker is not under an award. Thereafter, payments are reduced only if the insurer/employer can establish that the worker has the capacity to work. Weekly payments cease once the worker has been paid the prescribed amount. Under the Act, the prescribed amount varies each financial year according to a statutory formula. The current prescribed amount is $152,070. An amount for death and funeral benefits is also prescribed.

The prescribed amount for weekly payments can be extended by a further 75% where the worker can show that s/he is totally permanently incapacitated for work. Medical expenses are paid above weekly payments to 30% of the prescribed amount. The prescribed amount for medical expenses may be extended by up to $250,000 – referred to as 'improved medical benefits' – and applies to workers with particular impairment assessments. Likewise, rehabilitation expenses are payable to an equivalent of 7% of the prescribed amount. An amount of $114,053 is also available for retraining workers who surrender all common-law rights and who have suffered a specified level of impairment.

COMMON-LAW THRESHOLDS UNDER THE ACT

In general terms, as in several other states, common-law rights are retained, subject to strict thresholds. WA has adopted the *WorkCover Western Australia Guide to the Evaluation of Permanent Impairment* – a slightly modified version of the 5th edition of the *AMA Guides* – to assess impairment for the purposes of restricting access to common-law damages.

A worker must establish whole-person impairment (WPI) of 15% or more to commence common-law proceedings. This is assessed by an approved medical specialist (AMS) – a medical practitioner trained in the use of the WorkCover *Guides*. Because the AMS report is not binding on the court, it may find negligence on behalf of the defendant but make no order for damages if the 15% WPI is not established.

Having obtained a report from an AMS establishing 15% WPI, a worker must elect within 12 months of the date of injury or commencement of payments to proceed with a common-law claim. Where the assessment is between 15% – 24% WPI, a court cannot award damages of more than $319,349. Upon electing to proceed with a common-law claim, a worker surrenders all rights under the Act to compensation. If the WPI is 25% or more, the worker does not have to choose and there is no cap on damages. Secondary psychological/psychiatric injuries are disregarded when determining WPI. A worker with 15% WPI who chooses not to proceed with a common-law claim may be entitled to improved medical benefits.

TIME LIMITS

Section 178 requires a worker to report an injury as soon as practicable and, in any event, within 12 months from the date of injury. However, a claim may be made outside this period if it is established that the employer has not been prejudiced by the delay. The employer has the onus of showing prejudice. In addition, workers must in most cases elect to proceed with a common-law claim within 12 months of the date of injury or the commencement of payments. If WPI is 25% or more, proceedings must start within six years of the date of injury.

DISPUTE RESOLUTION

A new system of dispute resolution known as the Dispute Resolution Directorate (DRD) commenced in November 2005. Modelled on the NSW system, an arbitrator first attempts to resolve claims by conciliation and mediation, but if this approach fails, s/he may resolve the dispute by arbitration. A restricted right of appeal, on a question of law, lies to the Commissioner and subsequently to the Supreme Court. In many instances, the appeal to the Commissioner is dealt with on the papers. The essence of the system is informality and the so-called 'front-loading' of applications means that the parties must submit all relevant documents at the time proceedings commence. Arbitrators must be legally trained and legal representation is allowed at all levels of the proceedings. Lay advocates can appear after registering, and both practitioners and advocates are subject to tight cost scales. Extensive rules and regulations now apply to all proceedings.

Medical evidence is mostly provided in written form, as is common in most jurisdictions. Where medical issues are in dispute, the

arbitrator may refer them to a medical panel whose certificate is final and binding upon the parties, although subject to challenge on jurisdictional grounds in limited circumstances.

OVERVIEW

The WA compensation system is currently in transition, given that the dispute resolution system has only recently started. However, early indications are that the costs scale is proving challenging for practitioners, and some settlements are taking place outside the system. Complaints have been made about the pedantic nature of the rules and regulations and the heavy burden of filing all documentation. Despite these complaints, there are indications that the Commissioner is asserting a refreshing control over appeals, which had ballooned under the previous system and thrived in an atmosphere of technicality. Much of that technicality has been cut away with the introduction of the AMS as the gatekeeper of the common-law thresholds and the transfer of common-law issues to the District Court.

The irritation of the low-costs scale has to be seen in a context where legal practitioners were prohibited from most levels of dispute resolution under the old system. Furthermore, moves by insurers to seek alternatives to the DRD may have benefits, as they show a shift away from the 'deny and fight' mentality which characterised the old system in which there were no cost penalties for recalcitrant insurers.

It is too early to comment comprehensively on the impact of the 15% WPI threshold on common-law claims although, again, it seems that few workers are establishing the required level in order to proceed. It remains to be seen whether the improved statutory benefits will be accessible.

COMCARE AND MILITARY WORKPLACE INJURIES SCHEMES

By Vince Green

This section covers claims made to Comcare – the body responsible for workplace injuries compensation in the Commonwealth jurisdiction – and claims under the various military workplace compensation schemes.

RELEVANT LEGISLATION

The *Safety Rehabilitation & Compensation Act* 1988 (SRCA) covers Commonwealth government employees, including some classes of injuries to Defence Force personnel, and employees of various licensed corporations such as Australia Post, Telstra and the Reserve Bank.

The *Military Rehabilitation & Compensation Act* 2004 (MRCA), together with the *Military Rehabilitation & Compensation (Consequential & Transitional Provisions) Act* 2004 (CTPA) provides for compensation for 'service' injuries, disease or death on and after 1 July 2004 suffered by Defence Force members.

The *Veterans' Entitlements Act* 1986 (VEA) provides another stream of compensation for certain members of the military with particular service and eligibility requirements.

APPLICABLE PERMANENT IMPAIRMENT GUIDES

Under the SRCA:

- *Guide to the Assessment of the Degree of Permanent Impairment*, 1st ed (Guide I) for permanent impairment claims lodged prior to 28 February 2006;
- Part I of the *Guide to the Assessment of the Degree of Permanent Impairment*, 2nd ed (Guide II) for claims, other than defence-related claims as defined in part XI of the SRCA, for compensation lodged after 28 February 2006; and
- Part II of Guide II for claims for injuries that occurred during military service before 1 July 2004.

Under the VEA:

- *Guide to the Assessment of Rates of Veterans' Pensions*, 5th ed (GARP)

Under the MRCA:

- Under s67, *Guide to Determining Impairment and Compensation* (GARP(M)), for claims under the MRCA on and from 1 July 2004; and
- GARP(M) chapter 25 sets out the process for 'bringing across' impairment points from SRCA to MRCA – that is, military claims involving pre- and post-1 July 2004 claims – Guide II, part II and GARP(M).

BENEFITS RECOVERABLE

Under the SRCA, once liability is established under s14, Comcare is liable to pay compensation if the injury results in death, incapacity for work, or impairment.

Apart from the differences highlighted below, the MRCA provisions largely mirror the classes of benefits under the SRCA. Both the SRCA s25 and the MRCA s75 make provision for interim compensation. However, the SRCA provides for permanent impairment payment by way of a lump sum, whereas the MRCA provides for permanent impairment initially by way of an offer of periodic payment, which can be converted in whole or in part to a lump sum.

SCRA compensation benefits

The types of SRCA compensation benefits available are:

(a) Permanent impairment payments – under ss24 and 27 (once the threshold permanent impairment test is satisfied);
(b) Compensation for loss of or damage to property used by the employee – s15;
(c) Compensation in respect of medical expenses – s16;
(d) Compensation for injuries resulting in death – s17;
(e) Compensation for funeral expenses – s18;
(f) Compensation for injuries resulting in incapacity for work – s19;
(g) Compensation for household services and attendant care services – s29;
(h) Death benefits and funeral benefits – ss17 and 18;
(i) Additional death benefit, which is payable to a surviving spouse and dependent children if the ADF member dies from the injury on or after 10 June 1997 – Defence Determination 2000/1; and
(j) Severe injury adjustment – see chapter 10 Defence Determination 2000/1 for members suffering a 'severe' injury on or after 10 June 1997.

MRCA compensation benefits

Periodic payments and lump sum for permanent impairment (subject to threshold test of at least 10 impairment points: s67) – ss68, 71, 76 and 78.

Under parts 3 – 6, compensation for incapacity for 'service' or 'work' involving concepts of:

(a) normal earnings;
(b) actual earnings;
(c) capacity to earn;
(d) suitable work; and
(e) normal weekly hours.

The MRCA incapacity provisions are, to say the least, complex. Different rules apply to each of the concepts above, depending on whether a person is a:

(a) permanent ADF member;
(b) continuous full-time ADF reservist;
(c) part-time ADF reservist;
(d) part-time ADF reservist who was previously a permanent ADF member;
(e) part-time reservist who was previously a continuous full-time reservist; or
(f) cadet or declared member.

In certain circumstances, eligible claimants can choose to receive special rate disability pension (SRDP) – chapter 4, part 6 of MRCA (but choosing SRDP can be difficult). Independent financial advice is provided before SRDP is granted, and compensation is payable to injured claimants for the cost of obtaining that financial advice – s205.

Where a claimant receives superannuation from a fund to which the Commonwealth has contributed on their behalf, s134 of the MRCA reduces their incapacity payments by the amount of that contribution.

Medical treatment under s13 MRCA includes:

(a) hospital and attendant care;
(b) compensation for loss or damage to medical aids; and
(c) providing diagnostic counselling services.

Under chapter 3 MRCA, rehabilitation benefits include:

(a) rehabilitation programs;
(b) assistance in finding suitable defence or civilian work; and
(c) assistance in moving from the defence service to civilian life.

Death benefits are covered by chapter 5 of MRCA. >>

VEA compensation benefits

Under the VEA, claims can be made for:
(a) pensions – s14;
(b) attendant allowances – ss98 and 111;
(c) disability pension for injury or disease – ss14 and 19;
(d) war widows' or orphans' pension for death – ss14 and 19;
(e) white and gold cards for medical treatment; and
(f) other minor benefits.
No lump sums are payable under the VEA.

COMMON-LAW DAMAGES

Both the SRCA (s45) and the MRCA (s389) provide an employee with a right to bring an action for damages against an employer. This is restricted to claims for non-economic loss only where the quantum of damages is $110,000 or less.

Before instituting an action for damages as an alternative to seeking compensation under ss24 and 27 of the SRCA, or the relevant MRCA provisions, compensation must be payable under ss24, 25 or 27 of the SRCA. Specifically, the SRCA requires a whole-person impairment threshold of 10% under Guide I and Guide II before compensation is payable, save for those few instances such as hearing loss, fingers, toes, taste and smell impairments, which have a 5% threshold. The relevant provisions of MRCA are ss68, 71 or 75.

Neither the SRCA nor the MRCA prohibits common-law damages actions against third parties – ss50-52A of the SRCA; ss391-403 of the MRCA.

Section 45 SRCA and s388 MRCA permit dependency actions against the employer.

TIME LIMITS FOR REPORTING AN INJURY TO AN EMPLOYER AND LODGING CLAIMS AND/OR INITIATING PROCEEDINGS

Section 53 of the SRCA requires an employee to give notice of an injury in writing to the relevant authority as soon as practicable after s/he becomes aware of the injury. There do not appear to be any time limits on lodging the actual claim. It is very common in Defence compensation matters for claims to be made many years after the injury.

TIME LIMITS IN COMMON-LAW PROCEEDINGS AGAINST AN EMPLOYER

If an employee elects to sue the relevant authority under s45 of SRCA or s329 of MRCA, the relevant state or territory limitation period will apply from the date that the right of action commences; that is, from the point in time that the employee elects to institute the proceedings. Similarly, state procedural and substantive law with respect to restrictions on general damages will apply – subject to the overriding maximum statutory cap of $110,000 referred to above.

THRESHOLDS TO STATUTORY COMPENSATION

Significant hurdles must be overcome to claim statutory compensation against the Commonwealth, particularly under the MRCA.

Liability hurdles

Under both the VEA and MRCA, an employee must first satisfy the relevant statement of principle for liability before their claim can be accepted. Statements of principles are legislative instruments made under the VEA (and applicable under the MRCA), which 'will exclusively state what factors must exist to establish causal connection between particular disease, injuries or death and service' (explanatory memorandum).

If the injured Defence employee does not satisfy the relevant statement of principles in accordance with the medical diagnosis, liability will not be accepted, irrespective of the contents of the employee's own medical reports.

Effectively a liability threshold test not applicable under the SRCA, the statement of principles place Defence personnel injured after 1 July 2004 at a significant disadvantage compared with other Commonwealth employees and, for that matter, with their own position prior to that date.

Minimum impairment hurdles

10% SRCA and 10% MRCA – save for the 5% thresholds
(see **Common-law damages,** above).

ASSESSMENT PROCESS

The SRCA assessment is a three-tiered process:

1. lodgement of a primary or original claim with the relevant department or authority;
2. an internal reconsideration or review, if dissatisfied with primary decision; and
3. review by the Administrative Appeals Tribunal (AAT), if dissatisfied with reconsideration.

The time limit for steps 1 to 2 is 30 days (usually quite easy to extend). The time limit for steps 2 to 3 is 60 days (not as easy to extend).

Under the MRCA, the claimant can either:

- seek a reconsideration under s349 of the MRCA (similar to the SRCA procedure) by another delegate of the Military Rehabilitation and Compensation Commission (MRCC); or
- seek a review by the Veterans' Review Board (VRB) under s352 of the MRCA.

Section 349 MRCA reconsiderations have the same time limit as do s62 SRCA reconsiderations. However, there are three important differences between these reviews:

1. Applications for review to the AAT to set aside a reconsideration determination under s349 have the same 60-day time limits as the SRCA procedure.
2. Section 352 reviews appear to involve, in practice, a two-tiered process. When an application for review is made to the VRB, a MRCC delegate will decide whether to carry out a reconsideration on its own initiative under s347 of the Act. If no reconsideration is conducted, or if it does not change the original determination, the matter proceeds to the VRB. If dissatisfied with the decision of the VRB, an application for review to the AAT can be made by lodging a written application at the registry of the AAT within three months of receiving notice of the VRB's determination and reasons. The AAT's discretion to grant extension of time to apply for review can be exercised for up to 12 months from the date of the VRB decision (compared with the unlimited discretion if s349 reconsideration is chosen).
3. A very significant cost consequence flows from the choice of review procedure. An employee who chooses s349 internal review will be entitled, if successful in the AAT, to seek an award of legal costs (ss357, 358 of the MRCA). But where the employee chooses the VRB s352 review/reconsideration path, s359 of the MRCA will preclude the AAT from awarding legal costs to the successful employee. Of course, there is no power for the AAT to make a costs order in the AAT against an unsuccessful applicant.

Appeals from the AAT lie under s44 of the *Administrative Appeals Tribunal Act* to a single judge of the Federal Court within 28 days, subject to extension by the court at its discretion.

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