WORKPLACE INJURY REHABILITATION AND COMPENSATION ACT 2013

Workers' Compensation

Workers' Compensation – who is entitled to compensation, for what injuries, and what kind of compensation benefits are available?

Summary of the most important principles

1) The most important principle encompassed in the *WIRC Act* of which employers need to be aware is the 'no fault' principle. No fault insurance means the claimant worker is not required to prove the employer was at fault in causing the injury, nor is the worker's entitlement encumbered or reduced if the injury was their fault. The question of fault only becomes relevant if the worker seeks a Common Law lump sum.
2) The second principle that employers should appreciate is that the *WIRC Act* does not require the injury to be solely due to the employment for the worker to access compensation benefits. Employment only needs to be a contributing factor to a sudden onset injury for a worker to claim compensation.

   The definition of injury also includes the aggravation[2], acceleration[3], exacerbation[4], recurrence[5] or deterioration of any pre-existing injury or disease if the employment of the worker has significantly contributed to that aggravation etc.

   This definition entitles a worker to claim and receive compensation if a past work-related or non-work related injury or disease is made worse by the nature of their employment, but only if the employment contribution is significant. The term 'significant contributing factor' has been interpreted by the Victorian Supreme Court as meaning 'not minimal'. This means work does not have to be the only cause or the most important cause. It need only be a contributor that is more than minimal.

   It is this definition of injury which divorces compensation experience from prevention activity. Compensation injuries may not have arisen from an accident nor be due to any inherent risk in the employment which would cause injury to the average employee. If the nature of the employment causes an aggravation of injury to a person who has a pre-existing condition, that person's entitlement is identical to a worker whose injury was entirely due to employment.

[2] Aggravation means made worse than it would have been had the worker not worked.

[3] Acceleration means a medical condition that gets worse quicker than it would have done had the worker not worked.

[4] Exacerbation means the consequences (pain levels etc.) of the condition are worse due to work.

[5] Recurrence means the injury does not get worse but returns to its previous level of incapacity due to work.

The Act itself does not define 'significant contributing factor'. It does state, however, that in determining whether employment was a significant contributing factor to an injury, certain factors must be taken into account – (Sections 40.2, 40.3, Schedule 1, clause 25). They are the:

a) duration of the worker's current employment;

b) nature of the work performed;

c) particular tasks of the employment;

d) probable development of the injury occurring if that employment had not taken place;

e) existence of any hereditary risks;

f) life-style of the worker; and

g) activities of the worker outside the workplace.

Employers should provide information relevant to the above factors to their authorised agent whenever they believe the Agent ought to dispute a claim. Employers should ensure that this information also reaches any independent medical examiner.

Example

A worker has been an asthmatic all their life. They commence employment in a new factory located on the outskirts of town. After a year, the worker is having more frequent and more severe asthma attacks than they have experienced previously. The treating doctor concludes it is due to the pollens contained in the air from the paddocks adjoining the factory. He suggests the worker claim compensation for the days he could not work and the cost of medication necessary to control the asthma.

In this case, work is a significant contributing factor to the aggravation of the worker's pre-existing injury or disease. The worsening would not have occurred had the worker not engaged in their employment. There is no fault on behalf of the employer or the employee, but that is not a requirement. There is no inherent risk in the employment to the respiratory function of a normal worker.

The claim will be accepted because it arose out of the worker's employment. The employment was a significant factor in contributing to the aggravation of a pre-existing disease, and the aggravation has resulted in an incapacity for work.

3) The third important principle is that the worker claiming compensation does not bear the onus of proving the claim. The worker only needs to complete a claim form (including the medical authority) and provide a certificate from a medical practitioner. The Insurance Agent, acting on behalf of the employer, bears the onus of disproving any entitlement.

The burden of that onus makes it difficult to dispute liability. Often, if the dispute relates to medical opinion, the court will be faced with contradictory medical opinions from doctors of equal standing. In such cases they will most often err in favour of the worker.

Out of, or in the course of, the worker's employment

The most significant historical change to Victorian compensation law occurred when the word 'and' which once connected the two conditions 'arising out of' and 'in the course of employment' was changed to the word 'or'. Effectively this meant only one of these conditions had to be met, not both. If a heart attack occurred at work, it was incurred in the 'course of employment' and was therefore compensable. It wasn't necessary to show the heart attack arose out of the worker's employment: only that work had contributed in a minimal way.

To solve this problem, the requirement that work be a 'significant contributing factor' was introduced in 1992. Now the fact that an injury or disease occurs at work is not sufficient to secure compensation unless it can be shown that the activities of work 'significantly contributed' to the aggravation etc. (but not necessarily the underlying condition). However, the Hegedis decision determined that if an injury was instantaneous, it was not necessary to show work was a significant factor.

Employment

Employment includes the whole ambit and scope of employment. A worker is engaged in their employment if:

- they are present at the workplace;
- having been present, they are absent on an authorised recess;
- they are engaged in training they are expected to attend as part of their employment at a school or place for that purpose;
- they are engaged in travel for the purpose of their employment;
- the worker is in attendance at a place to receive a certificate or treatment, or to receive a payment under the *WIRC Act*.

Excluded Claims

The *WIRC Act* 2013 excludes specific injuries from being

compensable. In summary these are:

- journey accidents between place of residence and place of employment.
- recess injuries which result from the worker taking an abnormal risk:
  - injuries resulting from the worker's serious and willful misconduct.[6] Compensation is still payable if the worker is killed or seriously and permanently disabled.
  - road accidents while travelling in the course of employment where the worker has committed a serious offence under the *Road Safety Act.*[7]

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[6] Serious and willful misconduct does not include failure to obey rules or safe procedures but would include assault, intoxication, committing a crime etc.

[7] A serious offence would be culpable driving.

> road accidents where the worker has committed drink or drug driving offences results in reduced weekly compensation.[8]
> if the worker is engaged in activities which they know not to be connected to the employer's trade or business.
> if the claim is for a mental injury and the stress arose from a reasonable decision of the employer which was carried out in a reasonable manner. A list of reasonable management actions is defined in the Act but the reasonable action is not limited to the actions included in the list.
  - appraisal of the worker;
  - counselling the worker;
  - suspension or stand down of a worker;
  - disciplinary action taken in respect of the worker's employment;
  - transfer of the worker's employment;
  - demotion, redeployment or retrenchment of the worker;
  - dismissal of the worker;
  - promotion of the worker;
  - reclassification of the worker's employment position;
  - provision of leave of absence to the worker;
  - provision to the worker of a benefit connected with the worker's employment;
  - training of a worker in respect of the worker's employment;
  - investigation by the worker's employer or any alleged misconduct of the worker or any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness;
  - communication in connection with an action mentioned in any of the above paragraphs.
> a deliberately or willfully self-inflicted injury.
> if it is proved the worker was aware of a pre-existing injury prior to commencing employment and failed to disclose that injury to the employer but only if:
  - the employer had provided the worker with a written description of the tasks and nature of the employment;
  - had made a written request of the worker to disclose any pre-existing injury or disease;
  - had advised the worker in writing that failure to disclose would result in loss of entitlement to compensation.
> The worker is not entitled to compensation for any aggravation, acceleration, exacerbation, recurrence or deterioration of that undisclosed injury.[9]

» A claim that is made after 30 days from the date the worker was aware of injury where the worker has not entered the injury in the injury register nor notified the employer.

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[8] The workers weekly payments reduce on a scale commensurate with the Blood Alcohol Reading ceasing entirely above 0.24%.

[9] If a worker does disclose an injury it must not be taken that the employer is entitled to withdraw an offer of employment. Only if the injury prevents the worker actually performing the work might the employer legally deny employment. Advice should be sought prior to any decision.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced health, safety and wellbeing and workplace relations advisors can assist members with a range of health, safety, wellbeing, employment, human resources and industrial relations issues.

Our experienced health, safety and wellbeing and workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide health, safety and wellbeing consulting and training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Advice Line on **(03) 8662 5222.**