




Workers Compensation Update

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Workplace Law Queensland is a division of  msl
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Overview



1. Objectives of the Amendments and the History of *The Workers Compensation and Rehabilitation Act 2003* ("The Act")
2. Achieving the Policy Objectives
3. Operation of the Amendments
4. Strict Liability
5. Workers Contributory Negligence
6. Employer's Duty of Care
7. Damages
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Objectives of the Act



- The Act has been amended in order to maintain WorkCover Queensland's ongoing financial viability, while continuing to maintain access to common law remedies for workers.
- WorkCover claims in Queensland were previously unrestricted in terms of financial payout.
- Previously QLD courts did not have the power to order costs against a worker who makes a unsuccessful claim (excluding fraud claims).

Contributing Factors



1. Increasing number and cost of claims, particularly a disproportionate increase in common law claims compared to statutory claims;
2. Premium income was not keeping pace with net claims growth; and
3. Two consecutive years of negative investment returns due to the global financial crisis.

Achieving the Policy Objectives



1. Harmonizing common law claims brought under the Act with those brought for other forms of negligence under the *Civil Liability Act 2003* (CLA) in terms of liability (duty of care), contributory negligence and caps on general damages and economic loss;
2. Addressing the increased difficulty faced by employers in resisting claims for damages as a result of the QLD Court of Appeal decision in *Bourk v Power Serve P/L & Anor* [2008];
3. Allowing QLD courts to award costs against plaintiffs (workers) whose claims are dismissed;

Achieving the Policy Objectives continued...



4. Increasing the amount of the employer excess to 100% of Queensland Ordinary Time Earnings ("QOTE") or one week's compensation, whichever is the lesser;
5. Employers no longer to insure against their excess;
6. Allowing payments to parents of workers aged under 21 if the worker dies and the parents live interstate; and
7. Allowing self-insurers to take on a higher statutory reinsurance excess in order to lower reinsurance premium.

The Amendments



- Amendments will come into effect as of 1 July, 2010.
- They apply prospectively for injuries sustained or diagnosed after 1 July, 2010.
- Changes regarding determination of negligence will operate retrospectively.

Strict Liability and Contributory Negligence



- Previously, a worker could argue their employer breached their statutory duty in the *Workplace Health and Safety Act 1995*, leading to a 'no fault' win for the worker (e.g. in Bourk's Case).
- Claimants may still plead an alleged breach of statutory duty however this is no longer fully determinative of liability.
- New definitions for 'Duty' and 'Duty of Care' included to assist employers to be aware of their duties.
- Liability: The risk of injury is not considered in isolation and an action taken following the incident to remove risk does not establish liability.
- General principles of liability to be taken into account when looking at the conduct of the worker:
 1. The "but for" test, which queries whether the injury suffered would not have occurred "but for" the actions of the person claimed to be at fault; and
 2. Whether in all circumstances it is appropriate that the liability of the person considered in breach of duty should include the injury that eventuated (causation).

Strict Liability and Contributory Negligence



- Significant change: A claim for contributory negligence can defeat a claim for breach of duty = a worker can be found to be 100% liable for their injury.
- The Court may find contributory negligence if a worker undertakes an activity involving obvious risk.
- Onus of proof in a negligence claim is on the worker to prove causation on the balance of probabilities.
- A worker is prima facie negligent when intoxicated, however this presumption is rebuttable.
- Worker's standard of care is the same as what a reasonable person would take if they were in the same situation.

Damages



- General damages have been amended to mirror with the Civil Liability Act ("CLA") and Regulations ("CLR") in:
 1. Caps implemented on general damages awards; and
 2. Assessment of Damages to be based on the CLA and CLR methodology.
- However, there are certain exclusions to ensure appropriate in workplace context.

Caps on General Damages



Queensland as of 1 July 2010:

General damages for pain and suffering

- Capped at approximately \$300,000.

Damages for Economic Loss: Future Earnings

- Capped at three times QLD ordinary time earnings (QOTE) when calculating annual earnings.
- QOTE is currently \$1,132.10 per week (\$58,869 per annum).
- The maximum annual earnings a court will be able to take into account in calculating loss of future earnings will therefore equal \$176,607 (Three times QOTE).
- In a practical sense this does not change a great deal: there are rarely claims from workers in earning brackets higher than \$170,000.

Assessment and Exclusion of Damages



- General damages are calculated by applying the set Injury Scales Value test (ISV) set out in the CSR. This is designed to promote:
 1. Consistency between assessments of general damages awarded by courts for similar injuries; and
 2. Similar assessments of general damages awarded by courts for different types of injury that have a similar level of adverse impact on an injured person.
- Damages for consortium and servitium now have a threshold.
- Voluntary services of care from an injured worker's family member have been excluded.

Costs



- The lack of a cost deterrent provided incentive for some workers to continue with speculative or unmeritorious claims (as distinct from fraud).
- Therefore the amendments have expanded the range of instances under which a QLD Court can make orders as to costs in workers compensation claims.
- Most significantly, QLD courts can now award costs against workers in circumstances where the claim is unsuccessful.

Costs



- Amendments have been put into place to increase Pre Trial obligations in the hope of reducing legal costs and court delays:
 - Third party obligations have increased. They are now under same obligations as the parties to contribute meaningfully to avoid further delays in the settlement process and higher legal costs for all parties.
 - If a claim is not settled at a compulsory conference; each party must make a written final offer that would dispose of claim.
- 'Offer' has been defined in the Act and can include an offer of \$0

Questions?



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