The Reception of Medical Evidence under the *Workers Compensation and Injury Management Act 1981* (WA) Arbitration Service

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Abstract

In Western Australia disputes relating to workers compensation entitlements are determined in accordance with the provisions of the Workers Compensation and Injury Management Act 1981 (WA) *using a process of conciliation and arbitration. Claims are supported using documentary expert medical opinion evidence. Increasingly disputes relate to workplace stress or psychiatric injury and it is anticipated that claims of this type will increase as a consequence of COVID-19 workplace restrictions and changes. This paper considers the arbitration procedures under the Act; the definition on an injury under the Act, and the difficulties, relating to the reception of expert medical evidence in WorkCover arbitrations.*

Introduction

In Western Australia, a Worker's Compensation and Injury Management Scheme exists to help workers return to work successfully following a work-related injury or illness. Under the scheme workers are compensated for lost wages, medical expenses and associated costs while they are unable to work. Matters in dispute relating to workers compensation are determined in accordance with the provisions of the *Workers Compensation and Injury Management Act 1981 (WA)* ('The Act').

Workplace injury claims for both physical and mental injury are determined by WorkCover in accordance with the Workers' Compensation Arbitration Service. This is done through a formal arbitration process conducted in proceedings at which evidence is led and where a legally qualified arbitrator makes binding determinations regarding worker's compensation disputes.

The Workers' Compensation Arbitration Service consists of both full time and sessional arbitrators (assisted by a team of administrative support staff, including conciliators) who determine matters in dispute in accordance with the Act and the *Workers' Compensation and Injury Management Arbitration*

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Rules 2011. Once a dispute is referred to arbitration, arbitrators are prohibited under the Act from attempting to resolve the dispute by conciliation.[2]

However, a dispute **must** firstly have been conciliated by the Workers' Compensation Conciliation Service (or a certificate issued by the Director of Conciliation advising the matter is not suitable for conciliation) before an application can be made to the Arbitration Service. [3]

An appeal from a determination by an arbitrator may be made to the District Court of Western Australia, where a question of law is involved and where defined financial thresholds are met; or where a question of law is involved and, in the opinion of the District Court the matter is of such importance that, in the public interest, an appeal should lie.[4] Historically the number of appeals from an arbitrator's decision is low. In 2019 there were only nine appeals.[5]

Statistically, in the period 2018–2019, the WorkCover Compensation Arbitration Service completed 2079 conciliations and 601 arbitrations. Ninety-seven per cent (97%) of the conciliations are completed within an eight-week period and eighty-four per cent (84%) of the arbitrations are completed within six months. The average cost to complete an arbitration was $8,319.00.[6]

This paper commences with a discussion of the arbitration procedures under the Act; the definition of an injury under the Act, and finally the typical issues, or rather difficulties, relating to the reception of medical evidence in WorkCover arbitrations.

WorkCover Arbitration Procedures

The arbitration procedures are set out in ss 182ZT to 225 of the Act and ss 32 to 63 of the *Workers Compensation and Injury Management Arbitration Rules 2011* ('The Rules'). They generally mirror the provisions as found in the *Uniform Commercial Arbitration Acts*. Specifically, with respect to the Act, s 188 states:

[2] Contra S27D of the Uniform Commercial Arbitration Acts

[3] See Workcover WA, *Workers' Compensation Arbitration Service* < https://www.workcover.wa.gov.au/resolving-a-dispute/workers-compensation-arbitration-service/> (16 August 2020).

[4] *Workers Compensation and Injury Management Act 1981* (WA) s 247(1).

[5] District Court of Western Australia; Civil Decisions, https://www.districtcourt.wa.gov.au/C/courtsDecisions.aspx

[6] WorkCover WA Annual Report 2018/19; https://www.workcover.wa.gov.au/wp-content/uploads/2019/09/WorkCover-WA-201819-Annual-Report-Website-V1.2.pdf.

188. Practice and procedure, generally

(1) An arbitrator is bound by rules of natural justice except to the extent that this Act authorises, whether expressly or by implication, a departure from those rules.

(2) The *Evidence Act 1906* does not apply to proceedings before an arbitrator and an arbitrator —

(a) is not bound by the rules of evidence or any practice or procedure applicable to courts of record, except to the extent that the arbitration rules make them apply; and

(b) is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.

(3) An arbitrator may inform himself on any matter as the arbitrator thinks fit.

(4) An arbitrator may —

(a) receive in evidence any transcript of evidence in proceedings before a court or other person or body acting judicially and draw any conclusion of fact from the transcript; and

(b) adopt, as the arbitrator thinks fit, any finding, decision, or judgment of a court or other person or body acting judicially that is relevant to the proceeding.

(5) To the extent that the practice and procedure of an arbitrator are not prescribed under this Act, they are to be as the arbitrator determines.

Unlike commercial arbitration, hearings before a WorkCover arbitrator are conducted in private unless the arbitrator conducting the hearing decides that it should be conducted in public. [7] If an arbitrator thinks it appropriate, the arbitrator may conduct all or part of a proceeding entirely on the basis of documents without the parties or their representatives or any witnesses attending or participating in a hearing. [8]

With respect to representation, a party to the proceeding may appear in person or may be represented by a legal practitioner or a registered agent. [9]

In terms of the arbitrator's decision, subject to the Act, an arbitrator may make such decisions as the arbitrator thinks fit. An arbitrator may confirm, vary or revoke a direction of a Conciliation Officer under ss 182K(2) or (4) or 182L(2).[10]

[7] *Workers Compensation and Injury Management Act 1981 (WA)* s 199.

[8] Ibid s 198 (3).

[9] Ibid s 195 (1).

[10] Ibid s 211.

With regard to the reasons for an arbitrator's decision [11] the decision:

(a) need only identify the facts that the arbitrator has accepted in coming to the decision and give the reasons for doing so;
(b) need only identify the law that the arbitrator has applied in coming to the decision and give the reasons for doing so;
(c) need not canvass all the evidence given in the case; and
(d) need not canvass all the factual and legal arguments or issues arising in the case. [12]

The arbitrator may make orders with respect to costs in accordance with pt 10 of the *Workers Compensation and Injury Management Arbitration Rules 2011.*

The Definition of 'Injury' Under the Act

The threshold issues for the arbitrator are whether the injury is compensable and if it arose out of the course of the employment. The relevant legal principles with respect to the definition of 'arising out of… the employment' and 'in the course of employment' will not be discussed in this article but have been detailed in a number of cases including *Education Department of Western Australia v Morgan* [13] and *Kavanagh v The Commonwealth.* [14]

Section 18(1) of the Act provides that if an injury to a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with sch 1. The term 'injury' is defined in s 5 of the Act to mean: [15]

(a) a personal injury by accident arising out of or in the course of the employment, or whilst the worker is acting under the employer's instructions; or
(b) a disease, because of which an injury occurs under section 32 or 33; or
(c) a disease contracted by a worker in the course of his employment at, or away from, his place of employment, and to which the employment was a contributing factor and contributed to a significant degree; or

[11] Ibid s 213 (4).

[12] The principles in relation to a workers compensation arbitrator's duty to give adequate reasons for decision have been set out in numerous cases, including *Nardi v Department of Education and Training* [2006] C22-2006 at [26] to [31].

[13] [2000] WASCA 291.

[14] (1960) 103 CLR 547.

[15] The provisions in the Act essentially mirror those found in s 5A of the Commonwealth *Safety, Rehabilitation and Compensation Act 1988.*

(d) the recurrence, aggravation, or acceleration of any pre-existing disease where the employment was a contributing factor to that recurrence, aggravation, or acceleration and contributed to a significant degree; or

(e) a loss of function that occurs in the circumstances mentioned in section 49, but does not include a disease caused by stress if the stress wholly or predominantly arises from a matter mentioned in subsection (4) unless the matter is mentioned in paragraph (a) or (b) of that subsection and is unreasonable and harsh on the part of the employer;

Section 5(4) of the Act in turn relevantly states:

(4) For purposes of the definition of *injury*, the matters are as follows —

(a) the worker's dismissal, retrenchment, demotion, discipline, transfer or redeployment; and

(b) the worker's not being promoted, reclassified, transferred or granted leave of absence or any other benefit in relation to the employment; and

(c) the worker's expectation of —

(i) a matter; or

(ii) a decision by the employer in relation to a matter,

referred to in paragraph (a) or (b).

Section (5) further provides:

(5) In determining whether the employment contributed, or contributed to a significant degree, to the contraction, recurrence, aggravation or acceleration of a disease for purposes of the definitions of injury and relevant employment, the following shall be taken into account —

(a) the duration of the employment; and

(b) the nature of, and particular tasks involved in, the employment; and

(c) the likelihood of the contraction, recurrence, aggravation or acceleration of the disease occurring despite the employment; and

(d) the existence of any hereditary factors in relation to the contraction, recurrence, aggravation or acceleration of the disease; and

(e) matters affecting the worker's health generally; and

(f) activities of the worker not related to the employment.

As can be seen from the above, both the definition of injury and the compensable causes of injury under the Act are extremely broad. Historically the majority of workplace injury disputes related to physical injury. The medical diagnosis of a physical injury and the capacity of a worker to undertake a return to the workforce, engage in alternate work or undergo retraining in a suitable occupation is often problematic for an arbitrator with no medical background.

Further in recent years there has been an increase in the number of workers compensation disputes relating to workplace stress or psychiatric injury.[16] According to Safe Work Australia's Key Work Health and Safety Statistics 2018, the number of serious work place related claims in Australia totalled 106,260 in the 2016-2017 financial year with some 6675 claims (6%) attributable to mental stress. [17] WorkCover WA, in its Statistical Note 2016,[18] stated that in the period 2012 to 2016 the number of work-related stress claims increased by 25%. In 2015–2016 there were 547 stress related claims lodged. The top three industries involving stress related claims were: Health Care and Social Assistance (25%); Public Administration and Safety (24%); and Education and Training (16%).

In terms of the causes of stress related claims, WorkCover in its Statistical Note states that 39% of the claims are caused by work pressure; 23% by harassment and bullying, 19% by exposure to a traumatic event, 14% by exposure to workplace violence and 5% to other causes.

With respect to WA public sector stress related claims, the statistics determined from the 2018 Insurance Commission of WA Annual Report notes:

> Although mental stress claims represent 9.1% of new workers' compensation claims in 2018, the estimated cost of mental stress claims for WA public sector agencies was 23.2% of the total estimated claims cost. The average estimated cost of mental stress claims received by RiskCover in 2018 was approximately $65,882 compared to $56,319 in 2017 (2016: $50,000). The cost of mental stress claims continue[s] to increase and is well above the average cost of other workers' compensation claims due to the complexities of the injury and returning an individual to their pre-injury work environment.[19]

It is anticipated that the effect on the workplace of COVID-19 related issues will also result in an increase in workers compensation stress and psychiatric injury claims.

Research carried out by Relationships Australia in April this year in response to COVID-19 issues found that recent workplace changes have had a major impact on Australia's mental health. Data collected

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[16] Safe Work Australia, *Work-related Injury Fatalities – Key WHS Statistics Australia 2018* (31 October 2018) < https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2018>; Safe Work Australia, *Costs of work-related injuries and diseases - Key WHS statistics Australia 2018* (23 August 2018) < https://www.safeworkaustralia.gov.au/book/costs-work-related-injuries-and-diseases-key-whs-statistics-australia-2018>; Safe Work Australia, *Work-related injury and disease - Key WHS statistics Australia 2018* (31 October 2018) < https://www.safeworkaustralia.gov.au/book/work-related-injury-and-disease-key-whs-statistics-australia-2018> (14 August 2020).

[17] Safe Work Australia, *Key work health and safety statistics Australia 2018* (4 October 2018) < https://www.safeworkaustralia.gov.au/book/key-work-health-and-safety-statistics-australia-2018>(14 August 2020).

[18] WorkCover WA, *Stress Related Claims: Statistical Note October 2016* (October 2016). <https://www.workcover.wa.gov.au/content/uploads/2016/11/Stress-Related.pdf>. (15 August 2020)

[19] Insurance Commission of Western Australia, *Annual Report* (2018), 58 <https://www.icwa.wa.gov.au/__data/assets/pdf_file/0023/20759/2018-Insurance-Commission-of-Western-Australia-Annual-Report.pdf>

through the Relationships Australia monthly survey, indicated extensive mental health effects caused by changes to the nature of work, the working environment and people's workload. The research indicated that people from all aspects of the Australian workforce were feeling the effects of the COVID-19 workplace restrictions and changes.

The data indicated that while the mental health outcomes from COVID-19 have varied in severity, the impacts have been widespread with 87% of respondents reporting a significant change (across all industries) to their workplace since the COVID crisis began. Further, 63% agreed these changes have had an impact on their mental health. The report concluded that across every industry, workers agreed that there have been significant changes to their workplace which have affected their mental health.[20]

Medical Expert Opinion

However, an employer's liability with respect to mental illness is not strict. For a mental injury claim to be compensable, an employee must prove that the employment contributed to the injury to a significant degree. Put another way, in the case of mental injury or diseases caused by stress, the evidence must show that there was something associated with the employment which significantly contributed to the stress.[21] This is done through the tendering of expert medical opinion by each party together with the tendering of oral evidence by the parties. In WorkCover arbitrations the expert medical opinion evidence is submitted by way of an expert report, but the experts do not appear before the arbitrator.

It is **not** the expert's role to determine whether a worker has a valid claim under the *Act.* Medical opinion is restricted to whether the medical condition could have resulted from the incident reported by the worker and the consequential ability of the worker to perform their work duties. That is a full capacity for work, some capacity for work or no capacity for any work.

On occasions, an expert medical report will state that the author is aware of and has complied with the Federal Court *Expert Evidence Practice Note* (GPN-EXPT)[22] but this in not mandatory. In recent years, some assistance with respect to relevant medical information has been provided with the publishing of the WorkCover WA Guidelines for the Evaluation of Permanent Impairment Fourth Edition, (December 2016). [23]

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[20] "Have the COVID-19 workplace changes affected people's mental health?" https://www.relationships.org.au/news/media-releases/have-the-covid-19-workplace-changes-affected-peoples-mental-health (18 August 2020).
[21] *Comcare v Martin* [2016] HCA 43 at 45.

[22] https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt.
[23] Available at https://www.workcover.wa.gov.au/wp-content/uploads/2014/09/December-2017-WA-Guidelines-web-New-dual-logo.pdf (18 August 2020).

Although WorkCover arbitrators are exposed to a wide range of medical information and have a wide discretion to inform themselves as they see fit [24] it must be remembered that an arbitrator is not a medical expert nor a specialist decision maker of the kind considered in *R v Milk; Ex parte Tomkins* [25] or *Keller v Drainage Tribunal and Montague.*[26]

As noted above, arbitrators are not bound by the rules of evidence and are required to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms and to determine disputes in a manner that is 'fair, just, economical, informal and quick'[27].

However, with all workplace compensation arbitrations, arbitrators are presented with numerous medical and other reports, which together with the legal submissions constitute hundreds of pages. Some of these reports are referred to in the party's submissions and many not. It is not uncommon (but in reality, more usual) that there is a significant conflict in the medical evidence.

In one of the writer's arbitration determinations it was stated:[28]

> With respect to determining this matter quickly, as with most arbitrations of this type I have been presented with numerous medical and other reports, comprising some 250 pages in total. By way of example the Applicant's bundle of documents contains 96 pages of medical reports alone. Some of these reports are referred to in the parties' submissions but many are not. Similarly the Respondent simply states at paragraph 20 of its submission that; "He has filed medical evidence to show that he is totally unfit for work" and it has been left to me to verify this by reference to these reports.

Unfortunately, medical experts do not appreciate that medical reports are not always written for a legal 'audience' and more often than not, assessment of imprecise language is necessary to try and discern the meaning and merit of the medical evidence. This difficulty was noted in the arbitrator's comments in *Department of Education v Azmitia:* [29]

> In the medical reports tendered by both parties there is often esoteric medical terminology and without assistance from counsel I have found the interpretation of the prognosis and symptoms at times difficult.

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[24] *Workers Compensation and Injury Management Act 1981 (WA)* s 188(3).

[25] [1944] VLR 187 at 197.

[26] [1980] VR 449 at 453.

[27] *Workers Compensation and Injury Management Act 1981 (WA)* s 3 (d).

[28] The names of the parties and any identifying decisions number are confidential unless the determination is reported in an appeal decision.

[29] *Department of Education v Azmitia* [2014] WADC 85.

> At first sight from time to time the language used in the medical reports appears to be equivocal or conjectural but upon careful consideration this seems to be more the typical modes of expression used by doctors.

Additionally in considering the relevant weight to be given to medical reports, where the arbitrator is relying significantly on the information being provided by persons being assessed, it is well known that doctors sometimes receive and report subjective histories incorrectly or inaccurately.[30]
At the same time in *Pacific Industrial Company v Jakovljevic* [31] it was stated that the Act expects an arbitrator to determine the conflict in medical evidence; 'Whenever and wherever possible.' However these words do not render much assistance to arbitrators in view of the issues mentioned above.

In another of the author's WorkCover arbitration determinations the author stated

> This has been a difficult arbitration. Arbitration is not an inquisitorial process and the obligation is on the parties to provide sufficient evidence and advance the relevant arguments (See *Mayne Nickless Ltd t/as Wards Express v Mayne* (unreported, SCWA, Lib No. 960736C, 19 December 1996).

In reviewing, and upholding the arbitrator's decision, O'Neal DCJ in the Western Australian District Court noted: [32]

> Given the volume of medical and other evidence tendered and never referred to again, the illegibility of some documents, the difficulties of assessing medical evidence without any assistance from any medical expert, and limited argument addressing the evidence in real detail, the arbitrator's description of the arbitration as 'difficult' might be described as stoical.

The Essential Requirement of a Medical Expert Opinion Report

Medical experts, like any other expert proffering an opinion, must sufficiently reveal the reasoning, based on his or her expertise and experience, and the assumptions and inferences leading to the conclusions. It was held in *Makita (Australia) Pty Ltd v Sprowles* [33] that expert evidence must explain how the expert's special knowledge applies to the facts and matters assumed to produce the opinion.

[30] Ibid.
[31] Citation Number - C19-2007; Date of decision - 24 April, 2007.

[32] *Thomas v Chandler Macleod* [2015] WADC 78 at 9.3.
[33] [2001] NSWCA 305.

Specifically with respect to medical opinion evidence, in *Pollock v Wellington* [34] it was held that the process of inference by which an opinion is reached, must be expressed in a manner that permits the conclusion to be scrutinised and a judgment made about its reliability. That is:

(a) Before an expert medical opinion can be of any value, the facts upon which it is founded must be proved by admissible evidence and the opinion must be founded on those facts.
(b) A court ought not act on an opinion, the basis for which is not explained by the witness expressing it.
(c) Unless the process of inference by which an opinion is reached is expressed in a manner which permits the conclusions to be scrutinised and a judgment made as to its reliability, the opinion can carry no weight. [35]

Unfortunately, the criteria in *Pollock v Wellington* are rarely applied if at all understood.

Conclusion

The Workers Compensation Arbitration Service provides a speedy and effective resolution of workers compensation disputes. However, the interpretation and relevance of expert medical opinion evidence featuring esoteric terminology, particularly with respect to psychological injury, and the usual conflict in opinions, create significant difficulties for arbitrators. The common law principle that workers compensation arbitrators are required to determine conflicts in medical evidence 'wherever and whenever possible' is not helpful.

Those engaged in writing expert medical opinions to assist in arbitration determinations need to be informed that the reports are essentially 'medico- legal' reports which will be examined by a diverse, non-medical audience and the report is a significant (actually crucial) item of evidence in court or arbitral proceedings and will be subjected to close scrutiny. [36]

Finally it is suggested that the adoption of a mandatory requirement that the content of expert medical opinion reports comply with directions similar to those required in Administrative Appeal Tribunal review hearings relating to workers compensation claims brought under the *Safety, Rehabilitation and*

[34] (1995) 15 WAR 1.
[35] These principles are also discussed in *McKay v Commissioner of Main Roads* [No 3] [2010] WASC 232.
[36] See '*How to write a medico-legal report'*; Australian Family Physician,
Volume 43, No.11, November 2014, Pages 777–779.