Engineers and Workers Compensation

Robert Guthrie
School of Business Law
Curtin University of Technology

Abstract

This article examines aspects of the *Workers Compensation and Injury Management Act 1981* (WA) ('the Act') and its application to engineers and related workers. Some aspects of the Act have particular relevance to the engineering sector, such as the classification of employees and contractors, the liability of principal contractors and the engagement of casual labour.

Introduction

This article examines the provisions of the *Workers Compensation and Injury Management Act 1981* (WA), (the Act) which are relevant to engineers. The first part of this paper sets out the criteria for establishing a claim for compensation and in particular examines those issues which are relevant to the style of business of engineers. The second part of the paper outlines the entitlements available under the Act and considers some provisions which have particular impact on engineers and related workers.

Profile of the industry

For the purposes of this paper the engineering industry is comprised of those businesses which are engaged in a wide range of activities which include (this list is not exhaustive) residential and commercial construction, manufacturing, mining, transport, telecommunications, electricity, gas and water supply and the environment. Assignments undertaken by consultant engineering may involve provision of advice, preparation of feasibility studies, preparation of preliminary and final plans and designs, provision of technical services during the construction or installation phase, and inspection and evaluation of engineering and environmental projects. The principal activities of consultant engineering establishments involve the design and management of: construction and engineering infrastructure projects, environmental projects and industrial processes and equipment. The breadth of engineering activity presents a problem in identifying the profile of the industry in terms of accident rates. Statistics collected by most WorkCover authorities separate data into categories such as mining, manufacturing, electricity, gas and water supply, and construction.[1] There is no single category for the engineering industry. As engineers are engaged in a wide range of activities they may be associated with industries which have a high cost claims rate, such as construction and manufacturing. By the same token, for consultant engineers involved in the preparation of plans and designs the lost time rate may be low.[2]

Making a claim for compensation

Section 18 of the Act provides as follows: 'If the injury of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with Schedule 1.'

This deceptively simple provision is the cornerstone of the Act. In effect, three requirements need to be satisfied before a claim can properly be made. First, it is necessary to establish that the person injured is a 'worker' within the meaning of the Act. Second, it is necessary to establish that the injury or disease suffered is the kind of injury which is compensable under the Act. Third, it is necessary to calculate the entitlements due under Schedule 1 of the Act. These requirements will be dealt with in turn.

Are engineers 'workers' under the Act?

It is a requirement under the Act that employers insure all workers in their employ.[3] Insurance premiums are in general terms calculated having regard to the nature of the industry and the number of

[1] Based on the Australian and New Zealand Standard Industrial Classification (ANZSIC) 1993.
[2] WorkCover Western Australia, *Workers Compensation Statistical Report 1999/00 – 2002/03* (2004) 24.
[3] See section 160.

workers engaged by that employer. Another factor taken into account is that employer's safety record. It follows that it is important to establish who is a worker for the purposes of the Act. Section 5 of the Act defines, among other things, those who are workers for the purposes of the Act. A worker includes a person under a *contract of service*, a casual worker who is employed in the employer's trade or business, a person covered by an industrial award or industrial agreement, and a person employed under a *contract for service*, the remuneration by whatever means of that person so working being in substance for their manual labour or services.

It can be seen that the definition of worker is broad, and covers in the first instance those people who are normally regarded as employees (i.e., persons engaged under a contract of service). The term 'contract of service' has been subject to considerable litigation. The courts are frequently asked to determine whether a claimant is an employee or an independent contractor. The High Court in *Stevens v. Brodribb Sawmilling Co. Pty Ltd*[4] determined that, in order to establish whether a person was an employee, it was necessary to consider a number of indicators. Those indicators are generally used to determine the level of control that the purported employer has over the employee. Some of the determinants of the level of control were noted by the High Court in *Stevens* to include the method of remuneration and the hours of work. Other indicators included the specific terms of the contract, and whether materials and equipment were supplied by one of the parties. The Court also found that the right to hire and fire, the provision of uniforms and the deduction of taxation should be considered in assessing the level of control.

In *Stevens*, it was observed that even if a person is engaged under a contract stating that a person is to be regarded as an independent contractor, that provision may be disregarded where other factors point to the level of control being sufficient to amount to a contract of service. In other words, even where the contract says that a person is an independent contractor, the courts may find on the facts presented that the person is an employee.

More recently the High Court reconsidered its decision in *Stevens* in a case which has some impact on the engineering area. In *Hollis v Vabu Pty Ltd*,[5] the court considered the work practices and engagement procedures of Vabu Pty Ltd which was a company involved in courier services. Previous decisions involving the same company had determined that the couriers engaged by it were to be regarded as independent contractors. However, the High Court in *Hollis*, consistent with its decision in *Stevens* held that the couriers were dependent on the company for their supply of work and were given direction sufficient to amount to the level of control that would satisfy the requirements of an employer-employee relationship. The importance of *Vabu* to the engineering sphere is that despite the best efforts of some companies to contract out labour so as to reduce exposure to employment laws and regulations, without a change in the level of control the courts are still likely to find the employer-employee relationship exists. The enduring significance of *Stevens* and now *Vabu* is that it is the Court

4 (1986) 63 ALR 513.

5 [2001] HCA 44.

which determines the status of the relationship and that the contractual terms are only one factor in that consideration. In the industries in which engineers are engaged, contractors and casual workers are often central to the engineering activity. Many engineering businesses seek to engage contractors as a normal part of business practice. Establishing whether that contractor has any rights under the Act is critical. One of the chief incentives for contracting out labour is to avoid employment on-costs such as workers compensation insurance. *Hollis* and *Stevens* suggest that some care needs to be taken when embarking on this course.

Significantly the Act also provides an extended definition of worker to cover persons who may not be regarded as working under a contract of service, but who are working under a *contract for service* where they are providing 'in substance their manual labour or services'.[6] This is often referred to as the 'extended definition' of worker for the purposes of the Act. In most instances, engineers are providing their manual labour (in the broad sense) but certainly their skills and services rather than providing materials and equipment. In other words, even if a court were to determine that the level of control over such a person was not sufficient to establish a contract of service, it is almost certain that for the purposes of the Act many contracted engineers could be regarded as workers within the *extended* definition. The implications of the application of the extended definition are that engineering businesses many not be properly insured for workers compensation purposes if they do not include in their premium calculations contract workers (including engineers) who are not providing materials and equipment as part of their contract. More importantly, if such a worker was to make a claim, the end result might be that the company has to pay the claim out of its own resources or at least pay considerable litigation costs in defending a claim.

Engineers as principal contractors

The Act provides under section 175 that a worker may bring a claim against their employer or if the employer is engaged by a principal contractor, the worker may also bring the claim against that principal. The principal in turn has a right to recover any compensation paid to the injured worker from the employer. For the purposes of the worker's claim the principal is deemed to be the employer. Businesses which operate by engaging contractors to perform work, who in turn engage workers, need to be aware of the requirement to contractually protect themselves from claims by their contractor's workers. This may be done by indemnity[7] clauses which require among other things that the employer to provide a current certificate of insurance for all workers to the principal before work commences. It

[6] Section 5.

[7] Indemnity clauses generally involve making good the loss suffered by one person as a consequence of the act or omission (negligence) of another. In practice this means that often a principal will require a contractor to indemnify the principal against any claims which arise out of particular work or construction arrangements. For example, *Jennings Constructions Pty Ltd v Workers Rehabilitation and Compensation Commission* [1998] SASC 6748; *Rehabilitation & Compensation Corporation v J R Engineering Service Pty Ltd and Western Mining Corporation (Olympic Dam Operations) Pty Ltd and Ball* (1995) 180 LSJS 276*; Findlay v Westfield Development Corporation Ltd* [1972] 1 NSWLR 422; *Employers' Mutual Indemnity Association Ltd v K B Hutcherson PtyLtd* [1976] 1 NSWLR 103; *Mahony v J Kruschich* (1985) 156 CLR 527; *Unsworth vCommissioner for Railways* (1958) 101 CLR 73.

should be noted that indemnity clauses are often the subject of litigation and the contractual terms are heavily scrutinised by the courts.

Engineers as working directors

Some engineers may chose to establish their own business by making themselves a working director of a small company. Often this style of business is used as a vehicle to obtain contact work, as many principal contract engineering firms require a contractor to be incorporated before they are engaged. At the time of writing the Government has proposed that working directors will not generally be covered as the Act will deem them not to be workers for their own company. In other words, working directors would not, under this proposal, be covered when they are engaged in work which enhances their own business, but which is not part of work performed for another. This might, for example, occur when a director is preparing the accounts of their business, interviewing potential employees or rearranging office furniture. However the proposal is that the Act will allow a claim to be made against a principal with whom the working director's company contracts to undertake work, provided the director is injured when undertaking that work. There have been some concerns expressed about these proposals because they may be very difficult to administer. The provisions operating at the time of writing do allow for a working director to obtain coverage, provided that the director is acting in the capacity of a worker at the time of an injury.[8] Needless to say, the position may be far from clear and working directors would be well advised to take out personal accident insurance to cover any injury which arises whilst engaged in work for their own company or for another company.[9]

Types of disabilities covered by the Act

Broadly speaking, the Act covers two forms of injury. First, the Act covers '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'.[10] This limb of the definition of injury provides coverage for workers who can establish that the injury from which they suffer arose out of an unexpected or unintended event, which brought about a sudden physiological change for the worse. In simple terms, injury by accident occurs where a specific traumatic event can be identified, such as a bruise, a bump, a cut or a broken bone. Such an injury must occur whilst the worker is actively engaged in their work activity, or when the worker is engaged in some activity which is incidental to the employment. The phrase 'in the course of the employment'[11] has been determined by the courts to cover a range of circumstances. For instance, it covers situations where the employer has encouraged, sponsored or promoted a particular activity

[8] In *Alana Holdings Pty Ltd v Findlay* (unreported CM (WA) 87/99 8 February 2000) it was held a director could not recover compensation as she was not engaged as the time of the injury in the capacity of a worker. This was so because of the various taxation arrangements which had been made between the director and the company concerned.

[9] In addition it should be noted that although a personal accident policy is obtained it is often the case that such a policy will include a requirement that the insured pursues all other possible avenues for a claim which in practice means payment under the personal accident policy is only made when it is clear that the workers compensation claim is denied.

[10] Section 5 of the Act.

[11] Section 5 definition of injury.

which may not even be directly related to the business of the employer, but which is a beneficial to employers and workers in terms of morale, corporate promotion or public relations.

There have been cases which establish that an injury by accident in the course of employment has occurred during staff cricket matches, and other social activities. In other words, the definition of what is 'in the course of the employment' will vary having regard to the facts and circumstances of the case, and will depend on the nature of the employer's business and the employer's relationship with their worker. An example which is relevant to the engineering industry relates to the case of *Woolmar v Travelodge Australia Ltd* (1975) 26 FLR 249, where it was held that a worker who was injured at a Christmas party put on by the employer was entitled to compensation as the injuries had been caused whilst she was in the course of her employment. The employer had invited and encouraged the workers to attend although there was no compulsion to do so. This principle would apply generally to most employer-sponsored events where workers are encouraged to attend.

Second, the Act also covers various forms of disease where it can be established that the employment has been a significant contributing factor in the contraction or worsening of a disease. A disease has been regarded as a condition of gradual onset as opposed to an injury, which is characterised by specific identifiable event. In order to establish a claim under the Act it must be shown that the employment contributed to the condition, not simply that the person contracted the condition whilst at work. In most cases, it is more difficult to establish a claim if the condition relates to a disease, rather than an injury by accident.

There are a number of specific conditions which are now subject to special rules under the Act. In relation to conditions which arise from stress, the Act provides that these conditions are only compensable where it can be shown that they do not arise from industrial relations circumstances, such as dismissal, transfer, failure to obtain promotion, etc. However, if the worker establishes that the employer's behaviour has been harsh and unreasonable in relation to those circumstances, the worker is able to make a claim for stress related conditions.[12] A worker making a so-called stress claim needs to show that a diagnosis has been made (such as anxiety, depression etc) and then establish that that condition has been caused or contributed to by work. Even if the worker suffers a stress related condition from a number of causes the claim will be established if work is shown to be a significant cause of the condition. Stress claims are the most complicated, costly and lengthy compensation claims. Significantly stress claims are the highest cost claims and are frequently recorded in so called 'white collar' industries.[13]

Entitlements under the *Workers Compensation and Rehabilitation Act 1981* (WA)

The Act creates two forms of entitlement, namely: payment for incapacity for work, which is made by weekly payments, and where the injury sustained is permanent, lump sum payments. In most cases,

[12] *Catholic Care v Wrafter* (unreported CM (WA) 60/96 28 October 1996).
[13] WorkCover Western Australia, above n 3, 33-35, 38-39.

claims for compensation are made under sections 18, 21 and 58 of the Act. These sections provide that where a worker suffers an injury, the worker is entitled to compensation in accordance with Schedule 1 of the Act. That schedule provides that where the worker can establish an incapacity for work, they are entitled to weekly payments of compensation for duration of that incapacity up to a limit of the 'Prescribed Amount' (as at July 2004, about $140,000). Where the worker is fit to return to work these weekly payments cease or are reduced according to the worker's earnings.

The Prescribed Amount is pivotal in the Act. It is the base for the maximum amount of compensation available in relation to weekly payments, medical expenses and rehabilitation allowances. The worker who requires medical treatment is entitled to payment of medical expenses up to the equivalent of 30%, and rehabilitation allowances up to 7% of the Prescribed Amount. These sums are cumulative, so that taken together, an injured worker is entitled to a maximum of weekly payments of approximately $140,000, a maximum of medical expenses of approximately $42,000 and rehabilitation expenses up to approximately $10,000.[14]

If a worker suffers a permanent impairment of function to the limbs, spine or the senses, a payment is available under Schedule 2, which sets out a table of injuries that attract a lump sum payment. The amount payable will depend on the assessment given by a specialist. If a worker elects to take a lump sum under Schedule 2 all other entitlements to compensation cease.[15]

Calculation of weekly payments

Schedule 1 of the Act provides the formula by which weekly payments of compensation are to be calculated. New provisions apply to the calculation of weekly earnings as from January 2005. For the purposes of calculating weekly earnings, workers are categorised into groups. The first group are those workers whose weekly earnings are calculated by reference to an industrial award. These workers are entitled to receive their average earnings for the first 13 weeks, based upon a calculation which averages their earnings over the preceding 13 weeks. Weekly payments will include overtime, bonuses, allowances and other over-award or service payments. In other words, for the first 13 weeks, they will receive roughly their usual pay. Obviously, some difficulties occur where a worker has not been employed for 13 weeks. In these circumstances the insurer will calculate an average payment having regard for what the worker may have earned. The Act now provides that the average weekly earnings may not exceed more than twice the national average weekly earnings as calculated by the Australian Statistician.

[14] In limited circumstances it is possible under sections 84E and clauses 17-19 of Schedule 1 to apply for an extension of the prescribed amount for weekly payments up to a further 75% of the prescribed amount, and likewise the payment of additional medical expenses up to an additional $250,000. Medical and rehabilitation expenses continue to be paid even if the worker has returned to work, but payment of these expenses is dependent upon the treatment being reasonable and associated with the work injury.

[15] These payments are set out on the WorkCover website at http://www.workcover.wa.gov.au/Information/RatesFeesPayments/PrescribedAmount.htm

After 13 weeks, the worker who is covered by an award will no longer be entitled to receive the overtime, bonuses, allowances, and over-award or service payments. Therefore, after 13 weeks, payments for workers covered by awards will be reduced, because these payments additional to the base award rate will not be taken into account. These provisions will affect engineering workers who are covered by an award.

If an award does not cover the worker, they fall into the second category of workers who are covered by some other form of agreement. Many engineers work under common law contracts, which are not registered industrial awards or agreements, but contracts between the employer and the worker. These contracts are enforceable, but special provisions apply to the calculation of weekly payments. For the first 13 weeks, the worker will be paid their average weekly earnings calculated over the last 12 months to a maximum of twice the national average weekly earnings per week. After 13 weeks, the worker will receive 85% of this amount. In other words, for most engineers their weekly payments will be capped at twice the national average weekly earnings per week. If they are incapacitated for more than 13 weeks, their weekly payments will be reduced, usually to a figure of 85% of twice the national average weekly earnings per week. In general terms this means that whichever category an engineer falls under there will be a drop in pay as most engineers have an income in excess of twice the national average weekly earnings.

A key area for engineers is the calculation of compensation payments for part-time and casual workers. In general terms, whilst the hours and working conditions for these classes of workers may be similar, the distinction often drawn between the two is that casual workers have no expectation of continued engagement. Each engagement is considered to be a fresh contract. As a consequence of the uncertainties of casual work, employees are often paid at higher rates than part-time workers. When injured, part-time workers are paid pro-rata that which is due to a full time worker. For example a part-time worker on 20 hours would get 50% of the payment due to a full time worker on 40 hours.[16] A casual worker is only paid a fraction of their earnings as a ratio of 52. Therefore a casual worker employed for 4 weeks over a holiday break who becomes injured may only be paid 4/52 of the full time wage.[17] Casually engaged engineers who become incapacitated for an extended period will suffer significant loss of earnings given the calculation applied to casual workers – this may be critical if the engineer is engaged by a number of employers.

Making a claim

Workers make a claim for compensation by giving their employer notice of an injury in writing. The claim must be accompanied by a medical certificate that certifies the nature of the injury and sets out whether the worker is incapacitated, and if so, for what estimated duration, and whether or not the injury requires treatment and/or rehabilitation.

[16] Clause 12 of Schedule 1 of the Act.
[17] Clause 14 of Schedule 1 of the Act.

As soon as practicable the worker must indicate to the employer how and where the injury arose, and when the injury occurred.[18] In addition, the standard 'accident report form' requires the worker to give details of any relevant past medical history, and witnesses to the cause of the injury (if appropriate). Workers are also required to provide a medical authority to the employer so that the employer or its insurer can obtain additional medical opinion.

The worker is required to forward the claim form to the employer. The employer must send the claim form and medical certificates to its insurer within 3 days.[19] The insurer is obliged to advise the worker on the progress of the claim within 14 days. Such advice may consist of a notice which denies the claim, approves the claim, or advises the worker that more time is necessary to investigate the claim.

Insurers

In Western Australia, employers are able to insure through a range of private insurers. As noted above, it is compulsory for an employer to obtain insurance. However, larger employers are able to apply to self-insure if they are able to deposit with WorkCover a bond sufficient to meet claims.[20] The granting of self-insurer status exempts the employer from the obligation to hold a current insurance policy. Some large engineering firms have opted for self-insurance, requiring them to manage their own claims and employ sufficient expertise to understand the sometimes complex issues involved in claims. WorkCover is the government department which administers the Act and oversees the operations of insurers. Employers who fail to insure may be liable to a penalty and, in any event, are liable to pay compensation under the Act to the worker.

Workers compensation insurers have a contractual right of subrogation under the policy of insurance. Subrogation essentially means that the insurer 'stands in the shoes' of the employer, and takes over and manages any claim made against the employer. It also allows the insurer to represent the employer at all levels where any dispute about a claim takes place. In effect, the right of subrogation ensures that the insurer has the management of the claim and that the employer is not required to investigate the claim or make any decisions on the merits of the claim.

By completing an 'employer report form' an employer makes a claim for indemnity from their insurer. Indemnity means that the insurer will, if the employer has complied with the policy, cover the costs of any claim under the Act made against the employer by the worker. Where an employer ceases to exist by reason of death or liquidation, the worker has a right to claim directly against the insurer.

In the case of self-insured employers, claims are administered through a combination of in-house compensation claims officers and lawyers, who assist with decisions in relation to liability.

Other considerations

[18] Section 84I.
[19] Section 57 of the Act.
[20] See section 161.

Workers who sustain an injury under the Act are generally subject to considerable scrutiny. Insurers are entitled to refer workers to a medical practitioner to obtain an opinion as to whether or not the worker remains incapacitated for work. Workers must attend that appointment although they are entitled to seek alternative medical advice from their own practitioner.[21] In addition, in many circumstances workers may be referred for inclusion in a rehabilitation program and are required to cooperate with the program.[22]

Where the worker unreasonably refuses to undergo a medical examination or to participate in a rehabilitation program, their weekly payments may be ceased or reduced. The emphasis under the Act is to return the worker as quickly as possible to their employment. Section 84AA provides that the employer must hold open the worker's position for a period of 12 months and must accept the worker back at their place of employment provided that the worker is able to perform their pre-accident employment or some other employment for which they are suited.

Workers will lose their entitlement to weekly payments of compensation where they submit a fraudulent claim, fail to cooperate with medical examinations or rehabilitation programs, or fail to return to work when they are fit to perform their pre-accident duties.

In most cases where the worker has been off work for an extended period, the insurer will refer the worker to a specialist medical practitioner who will assess the worker's permanent injury. The worker is entitled to obtain an alternative opinion from his or her own practitioner. Often, the assessments made by the specialists can be reconciled and the percentage agreed upon. Some caution is required in the calculation and acceptance of a lump sum payment under the Act because acceptance of a lump sum will end the worker's entitlements under the Act. Where a worker has ongoing medical requirements, or wishes to pursue a course of rehabilitation, it is unwise to accept a lump sum payment without seeking legal advice.[23]

Conclusions and some specific issues for engineers

Engineers can expect to be covered for most injuries which take place in their work place. Two structural issues are relevant in the industries in which engineers operate. First, the casualisation of labour. Increased use of casual engineering contract professionals may provide flexibility for the employer in managing hours of work and work/construction schedules. Workers may also benefit from these arrangements. However, for a casual worker who is disabled at work the calculation of weekly payments may present some difficulties. As has been noted, casual workers will be entitled to much reduced compensation payments due to the fact that the calculation of payments will be on a ratio of their time worked as a proportion of the year. In many cases casual workers have a number of contracts or projects on foot and an injury may incapacitate them from all forms of work. Unfortunately

[21] Sections 64 and 65.
[22] Section 157.
[23] This is referred to as redemption by payment of a lump sum in lieu of ongoing weekly payments and all other entitlements.

payments of compensation will only be due from the employer at the time of injury and this may represent a fraction of the worker's overall earnings.

A second structural issue is that of contracting out. The recent decision in *Vabu* suggests that contracting out of workers may need special care and more than simplistic changes to contractual terms will be required to free the employer of the obligations of the *Workers Compensation and Injury Management Act 1981* (WA). Likewise, those engineers who operate as working directors of their own companies need to very carefully consider appropriate personal accident insurance as the Act may in the future no longer cover them for work which they perform as part of their company's operations which are not part of the work they are engaged to do for others. In any event, the cases decided under the provisions current at the time of writing create some uncertainty for working directors. Larger businesses which engage contractors to do engineering work need to be aware of the issues arising out of the deemed employer status which attaches under section 175 of the Act. Care is needed to ensure that those who they contract with hold current workers compensation certificates for their workers. Finally, contractual arrangements for indemnity need to be carefully structured and understood.

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