



## **VICTORIAN NEWSLETTER**

Dear Victorian Member,

Welcome to the first of what is planned to be a bi-monthly Victorian specific newsletter. The format and intention of this newsletter is to provide Victorian specific news in more detail than the format which the National weekly newsletter allows.

This is intended to be a newsletter for Victorian members and as such contributions from all Victorian members is welcomed and encouraged. Please feel free to email any contributions, news, hints or tips or just good old fashioned Victorian gossip. Contributions are welcome to be sent to [D.Purcell@seabrookchambers.com.au](mailto:D.Purcell@seabrookchambers.com.au).

Cheers

David Purcell

## **UPCOMING EVENTS**

|                             |  |
|-----------------------------|--|
| Van Ngugen Memorial Lecture | 1 December 2006                                  |
| ALA Christmas Party         | 13 December 2006                                 |
| State Conference            | 18 & 19 May 2007<br>Sebel Heritage, Yarra Valley |

## **VICTORIAN COMMITTEE NEWS**

After due democratic process the new Victorian committee is now installed. Details of committee members and office bearers are as follows:

### **Victorian Branch Committee from 1 July 2006 to 30 June 2007**

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## **TRANSPORT ACCIDENT DEVELOPMENTS**

### **Private Health Insurance**

Members are advised that the TAC is currently considering its position with respect to re-imbusement to third party private health insurance funds of benefits paid by the fund to its member prior to the TAC accepting liability for a medical condition.

Members are aware that to date; if liability has been in dispute or under consideration; the health fund has been willing to make its contribution to its member for health services required. If TAC liability is then accepted, the health fund has received reimbursement from the TAC.

The TAC is reviewing this position. The Committee understands the TAC is seeking to adopt the approach that it does not have legislative power under the Act to pay to "third parties." We are aware the TAC have meet with the private health funds to discuss the matter.

Under the proposal, once liability for the treatment is accepted, the TAC will then directly pay the service provider; leaving the health fund to seek re-imbusement from the provider.

The Committee is concerned by this proposal. Obviously, it raises considerable administrative difficulties for the health insurers. We are concerned the health insurers will seek to exclude any potential TAC condition from its liability. Clearly, in the situation of urgently required medical treatment when TAC liability is under consideration; the injured person may be unable to access the treatment required at the appropriate time.

This has been raised by ALA's TAC chair; Geraldine Collins, at the Law Institute TAC Litigation Committee. The TAC representatives on that Committee are to report back to that Committee. Information of developments will then be passed onto ALA members.

## **Hospital Report Reimbursement**

Members are advised that the TAC has entered into an agreement with public hospitals for the cost of provision of medical reports for TAC claimants. The agreement stipulates that the hospitals are only to charge \$165 for a medical report requested on behalf of a TAC patient. As a result, the TAC will only reimburse Plaintiff lawyers that amount for such reports.

TAC has advised the LIV Litigation Lawyers Committee that the agreement is common knowledge within hospitals. Plaintiff lawyers should therefore be only charged \$165 by the hospitals. It is recommended that the Plaintiff lawyer specify to the hospital in the letter seeking the report that the patient is a TAC claimant, to ensure the correct amount is charged by the hospital.

Despite this, it appears common practice among various hospitals is to ignore this apparent "agreement". Members are commonly being charged at a rate higher than the purported agreed sum of \$165.

Again, this issue has been raised at the LIV Committee. The TAC representatives are to report back to that Committee on developments. ALA members will be kept informed.

## **Medical Report Reimbursement**

As at 1 November 2006 the TAC has increased the amounts it will reimburse for medical reports. The new schedule is attached.

## **Protocol Review**

ALA and LIV representatives met with the TAC in October to review the operation of the protocols. Agreement has been reached on a number of small changes. Some matters remain the subject of ongoing discussion.

There will be a TAC Litigation at Sunrise Seminar on 24 November 2006. Proposed changes and outstanding issues will be detailed at the seminar. There will also be a review of major transport accident cases of the past 12 months.

If members believe that the ALA needs to address any TAC issues, they are encouraged to provide details to Geraldine the ALA spokesperson.

## **ACCIDENT COMPENSATION DEVELOPMENTS**

### **Legal Costs**

The WorkCover legal costs order was gazetted on 10 October 2006. A copy of the order is attached.

## **Summary of amendments to the *Accident Compensation Act 1985***

We are now up to reprint 14 of the ACA following a number of recent amendments.

A summary of some of the recent changes follows, with thanks to Marcus Fogarty of Slater & Gordon for preparation of the summary.

The most recent amendments to the *Accident Compensation Act 1985* were contained in the *Accident Compensation and Other Legislation (Amendment) Bill 2006*. Those amendments include the following:

### **1. Weekly Payments**

- **Extension of Entitlement Period from 104 to 130 weeks**

#### Background

Pursuant to S.93CC(1) of the *Accident Compensation Act 1985* weekly payments ceased after 2 years (104 weeks) unless the worker was assessed as having, and as being likely to continue indefinitely to have, no current work capacity or where a worker with a current work capacity successfully applied for continuation of weekly payment benefits (S93CD(1)).

#### Changes

The second entitlement period referred to in S.93CB(1) of the Act has been extended from 104 to 130 weeks. This means that weekly payments are now likely to be cut off at 130 weeks unless the abovestated test is met ('no current work capacity' etc.). The notice period for a termination has also extended from 4 weeks to 13 weeks.

The changes affect workers with a WorkCover claim that is received by the VWA, agent or self-insurer on or after 1 January 2005.

- **Increase of Magistrates' Court Jurisdiction**

#### Background

The Magistrates' Court has had jurisdiction to determine disputes to up to \$40,000 in WorkCover claims or disputes involving up to 104 weeks of weekly payments of compensation. However, proceedings can be issued in the County Court in relation to disputes involving less than \$40,000 or less than 104 weeks of weekly payments if the issues involve intricate legal argument and the case would be better heard in the County Court.

## Changes

The Amendments have increased the Magistrates Court's jurisdiction to determining disputes involving up to 130 weeks of weekly payments. It should be noted that the \$40,000 limit remains.

- **Weekly Payments for older workers**

### Background

Prior to *Accident Compensation Legislation (Amendment) Act 2004*, workers injured when over 63 years of age at the date of injury, but under 65, could only receive weekly payments until such time as they turned 65 and workers who were injured after turning 65 were only entitled to weekly payments for a maximum period of 52 weeks. This maximum was extended by amendment to 104 weeks of payments.

### Changes

In line with the other changes to the Act, this has been increased to 130 weeks. The weekly payments are calculated at 75% of the worker's pre-injury average weekly earnings (which will be capped) less 75% of their current weekly earnings depending on whether the worker has any current work capacity.

Further changes mean that a worker over the age of 65 will be entitled to a one-off maximum of 13 weeks of weekly payments if the worker is incapacitated as a result of an injury that they had previously received weekly payments for in the last 10 years. It should be noted that the weekly payments will only be made if the worker requires inpatient hospital treatment.

- **Partial return to work benefits – Payment rates for workers who had an entitlement to weekly payments prior to 12 November 1997**

A worker is entitled to weekly payments where the worker does not have a serious injury but is partially incapacitated (not being the period during the first 26 weeks of incapacity). The worker is now entitled to 70% of the difference between pre-injury average weekly earnings and 70% of the worker's notional earnings or the difference between \$953 and 70% of the worker's notional earnings, whichever is lesser.

For any payments to these workers relating to periods before 1 July 2006, weekly payments remain based on 60% of the difference between pre-injury average weekly earnings and 60% of the worker's notional earnings or the difference between \$551 and 60% of the worker's notional earnings, whichever is lesser.

- **Partial return to work benefits – Payment rates for workers who had an entitlement to weekly payments on or after 12 November 1997**

For workers receiving payments on or after 1 July 2006, they are now entitled to 75% (where a worker does not have a serious injury but is partially incapacitated) of the difference between pre-injury average weekly earnings and 75% of the worker's notional earnings or the difference between \$1,190 and 75% of the worker's notional earnings, whichever is lesser. This has also been increased from 60%. These figures are also applicable to worker's continuing to receive weekly payments after expiry of the second entitlement period of 130 weeks.

However, any payments relating to periods prior to 1 July 2006, remain at 60% (where a worker does not have a serious injury but is partially incapacitated) of the difference between pre-injury average weekly earnings and 60% of the worker's notional earnings or the difference between \$688 and 60% of the worker's notional earnings, whichever is lesser.

## **2. Conciliation Officers**

### Background

It was the duty of the Governor in Council to appoint the Senior Conciliation Officer and other Conciliation Officers.

### Changes

The Amendment Act now means that the Senior Conciliation Officer and other Conciliation Officers are no longer appointed by the Governor in Council. The Minister in charge of the WorkCover portfolio will now be entrusted with this duty.

## **3. Lodging a Dispute at Conciliation**

### Background

Any party to a dispute may refer the dispute for Conciliation by a Conciliation Officer. Currently a conciliation referral must be lodged with the Senior Conciliation Officer by sending or delivering notice in the form approved by the Authority within 60 days after the notice of the decision was given to or served on the worker or claimant.

### Changes

In essence, the above procedure has not changed, save to say that the form is to be approved by the Minister as opposed to the Authority.

#### **4. Compensation for Death of a Worker – Increased Amounts**

The compensatory limits (for death of a worker) in S.92A of the Act have been increased across the board for dependency claims. For example, \$207,390 was payable to a dependent partner where there is no dependent child. This has now increased to \$250,000.

#### **5. Amendments to Medical and Like Expenses**

##### Background

Where a death results from a work-related injury or disease the reasonable costs incurred in Australia of family counselling services provided to family members by a medical practitioner or registered psychologist not exceeding \$1,530 in respect of that death are covered by the VWA.

##### Changes

The Amendments have extended the existing counselling services to family members of a worker who has sustained a “severe injury” and inpatient treatment in a hospital is required. The VWA only covers reasonable costs incurred in Australia of family counselling services provided to family members by a medical practitioner, a registered psychologist or a social worker approved by the Authority. The VWA will not pay costs in excess of \$1,960.

A “severe injury” has been defined to mean:

- Paraplegia
- Quadriplegia
- Amputation of a limb
- Severe burns
- Severe lacerations
- Severe head injury
- Severe eye injury

An exhaustive list is contained in S.99(1A).

#### **6. Amendment to Psychological, Occupational Asthma and Infectious Disease Claims**

##### Background

Psychological injuries have been assessed in accordance with the Clinical Guidelines to the Rating of Psychiatric Impairment prepared by the Medical Panel

(Psychiatry) Melbourne, Victoria, October 1997 and published in the Government Gazette, substituting for the American Medical Association's Guidelines.

Claims relating to occupational asthma and infectious diseases have been assessed in accordance with the 4<sup>th</sup> edition of the AMA Guides. The Guides provide little guidance as to how such conditions should be assessed.

### Changes

The amendment means that for the purposes of assessing the degree of psychiatric impairment the AMA Guides are still to apply, however, subject to the *Guide to the Evaluation of Psychiatric Impairment for Clinicians*.

For occupational asthma claims, the AMA Guides are applicable but are subject to the guidelines of *Impairment Assessment in Workers with Occupational Asthma*. Similarly, infectious disease claims are assessed in accordance with the AMA Guides, but are subject to the *Clinical Guidelines to the Rating of Impairment arising from Infectious Occupational Diseases*.

## **7. Permanent Impairment Claims and effect on common law rights**

### Background

The *Accident Compensation Act* 1985 permits a worker to claim compensation for permanent disabilities and impairments caused by work. Compensation for non-economic loss in relation to injuries occurring on or after 12 November 1997 is governed by s98C and 98E of the Act.

When the worker's level of impairment has been finally assessed, the worker is currently required to elect whether to accept a no-fault permanent impairment payment or proceed with a common law damages claim. A worker will effectively terminate or at least diminish their entitlement to pursue a common law damages claim if they elect to receive a no fault permanent impairment payment.

### Changes

The amendments to the Act will allow a worker to receive their 98C/E entitlement without extinguishing any of their rights to pursue a claim at common law.

The amendments mean that where a worker's response is received on a 98C/E claim on or after 1 June 2006, payment is to be made upon acceptance of the assessment/s and calculation even though the worker has elected to not receive the payment. Payment will be made unless a serious injury application has been lodged before Royal Assent.

It should be noted that if the worker obtains a common law lump sum at a later date, the amount paid in impairment benefits will be offset against any common law award.

## Serious Injury

In respect to serious injury applications, the good news for practitioners in this area is that there is life after Barwon Spinners<sup>1</sup> and a number of Court Of Appeal decisions involving section 134AB of the accident Compensation Act are now starting to flow.

Recent decisions of interest include:

**Grech v Orica Australia** (31 August 2006): a decision which goes some way to breathing life in to gradual process injuries (but sadly too late for Mrs Gledhill). In particular Ashley J discusses the distinction between identification of a compensable injury its consequences.

**Ansett Australia v Taylor** (31 August 2006): Justice Ashley decides that the acceptance of a claim for permanent impairment pursuant to section 98C is not determinative of causation at the serious injury stage but is strong evidence that the VWA accepts causation.

**State of Victoria v Rattray** (7 July 2006): a discussion regarding suitable employment. The court confirmed the Barwon Spinners approach, that is, that the test is whether suitable jobs exist, not whether such jobs are available.

**Dwyer v Calco Timbers** (8 September 2006): the judgment involves a discussion about the test for scarring and disfigurement.

Members should also be aware of the recent ruling in Raeburn v Tenix involving the deduction of compensation from Judgments and how the system of statutory offers may apply. Maarten Vlot of Clark & Toop provides the following case note.

### **Raeburn -v- Tenix Defence Systems Pty Ltd**

In a ruling delivered on 20 October 2006, His Honour Justice Cummins of the Supreme Court considered the operation of the Statutory Offer and Counter Offer procedures provided for in section 134AB(12)(b) of the Accident Compensation Act. His findings bring great uncertainty to Plaintiffs in the recovery of legal costs in successful common law procedures. Practitioners are warned to consider the effect of this ruling carefully.

In order to recover legal costs, a plaintiff must be awarded at least 90% of the amount of his statutory counter-offer. Justice Cummins considered that the correct

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<sup>1</sup> Barwon Spinners Pty Ltd v Podolak [2005] VSCA 33 (25 February 2005)

interpretation of the act is that the 90% should not be calculated on the sum awarded at verdict by the jury, but on the judgment sum as ordered by the trial judge after deduction of all workers' compensation payments received by the Plaintiff.

The effect is that at the time of making the statutory counter-offer the Plaintiff's solicitors must predict into the future the likely period that the Plaintiff would remain on compensation payments and the likely date of trial and then to deduct the likely future compensation entitlements of any statutory counter-offer made. This is not only impossible, but clearly leads to absurd results.

The Plaintiff received a verdict in his favour of \$450,000 plus \$20,000 interest from the jury after three weeks of hearing in the Supreme Court. Despite the verdict in his favour, it can hardly be considered a successful outcome when he has to bear his own legal costs.

The ruling is currently on appeal.

### **County Court Cases**

There are also now many County Court decisions of some interest. Members are reminded that the WorkSafe website now contains a useful link to all unreported cases in which the VWA is involved.

Members should be encouraged to ensure that the defendant is accountable in respect to video surveillance, as the following summary from Liberty Sanger's office at MBC sets out in respect to the decision of Judge Higgins in De Menna;

### **Nando De Menna v Tescol-Two Pty Ltd and Victorian WorkCover Authority**

Practitioners may find the ruling of His Honour Judge Higgins in the above-mentioned case regarding the provision of video surveillance material in S134AB matters of some use.

### **Background**

The plaintiff, a 55-year-old male, sustained injury in the course of his employment with the defendant as a truck driver. The plaintiff's job was to deliver various roofing parts to commercial and domestic properties. He sustained injury when levering an extremely heavy pack off the back of his truck. The lever and/or the pack jolted causing injury to his left shoulder and neck region.

He made application pursuant to s134AB of the *Accident Compensation Act 1985* for a Serious Injury Certificate relying on paragraphs (a) and (c) of s134AB(37).

### **Use of Video Surveillance**

During cross-examination the defendant played a video of the plaintiff walking along the street. In his later judgement His Honour found that the video showed:

- the plaintiff swinging his arms freely and jogging five to six steps;
- the plaintiff then turning his head almost fully to the right to wave to his wife;
- that this mobility was contrary to the plaintiff's evidence that he could not run, move his arms freely to any real extent or turn his head fully to the right side.

In his judgement Higgins J noted that in the video "there were aspects which were adverse to the plaintiff."

After the video had been shown, counsel for the plaintiff, Mr Hore-Lacey QC, made a request for further information to be provided to the plaintiff. Relying upon *Alcoa of Australia v McKenna* (2003) V.S.C.A 182, Higgins J ruled that the defendant "produce any further surveillance material which was in the possession of the defendant and which related to the plaintiff's neck condition". In his ruling Higgins J stated this was "with a view to ensuring fairness".

It is of note that in his judgement His Honour made obiter comments indicating that it might still have been open to a court to draw an adverse inference should the defendant have failed or refused to produce the remaining surveillance material in the absence of a ruling from His Honour.

As a result of Higgins J's ruling the defendant provided the plaintiff with dates of surveillance and provided the second tape to the Court. In his judgement His Honour made the following findings regarding the footage shown on the second video:

- that the plaintiff was seen to place his right hand across his body and hold his neck;
- that he then used his right hand to remove a letter that he then transferred into his left hand;
- that he again placed his right arm on the left side of his neck as if in pain.

In his judgement, His Honour stated that, "the second video strengthens his [the plaintiff's] credibility and indicates restrictions in activities which he may be able to perform" and that the video "clearly supports the plaintiff's claim" and "demonstrates significant disability".

In his judgement Higgins J noted that "nowhere in the material is there any indication or suggestion that the vocational experts have had the opportunity prior to the hearing to view the second video, which clearly supports the plaintiff's case,

and which I would have thought would be relevant to an assessment as to whether suitable jobs exist which the plaintiff could perform.”

Further, Higgins J stated, “had the application not been made by Mr Hore-Lacey, the Court would not have been cognisant of a second video film which, in my view, clearly supports the plaintiff’s claim. Put shortly, the “mischief” identified by the Court in *McKenna’s case* could have resulted in the Court being misled insofar as the nature and extent of the plaintiff’s symptoms are concerned”.

## **Judgement**

Higgins J granted leave to proceed pursuant to s134AB (a) and (c).

## **Comments**

It is therefore worthwhile in all s134AB applications pursuant to the Accident Compensation Act (and s93 applications pursuant to the Transport Accident Act) to seek full production of video surveillance material in cases where the Defendant seeks to rely upon such surveillance.

It is also worthwhile bearing mind the obligations imposed on the VWA pursuant to section 134 AB, that is, to provide all material in the defendant’s possession and upon which it intends to rely as part of the response material rejecting serious injury. Tim Tobin SC has recently persuaded Judge Smallwood to refuse to allow video surveillance to be played to the court in circumstances where the surveillance log but not the tapes were supplied as part of the 134AB response material. Indeed the worker had seen the video’s when cross examined on them during Magistrate’s Court proceedings.

In respect to expert medical evidence in serious injury applications, Judge Wodak has recently ruled that medical reports will not be accepted into evidence from medico-legal examiners unless the examiner has agreed to be bound by the County Court expert witness Code of Conduct. It is essential that examiners are provided with the Code and return a signed acknowledgement agreeing to be bound by it, if their report is to be relied upon.

The recent decision of Millane J in Cockerill-Wright should also serve as a timely reminder to all Plaintiff practitioners of the importance of checking the date that the response to a serious injury application is due. In the Cockerill-Wright case the solicitors for the VWA wrote to the Plaintiff’s solicitors advising of their calculation as to the 120 day upon which its client was due to provide the response to the serious injury application. In fact the calculation was wrong. The Defendant solicitors duly rejected serious injury on the last day of their calculation, which in fact was 121 days after receipt of the application. The Plaintiff issued a serious injury application challenging the rejection. In fact the Plaintiff had a deemed serious injury but in following (erroneously) the time line as set out by the

Defendant solicitors, did not make a statutory offer or issue common law proceedings as it should have on the basis of a deemed serious injury. Judge Millane ruled that the ACA says what it says, that is, that the determination date is 120 days after the application is received. Her Honour ruled the Plaintiff had a deemed serious injury once the time for the Authority to provide its written advice had expired.

## **VICTORIAN NEWS**

Congratulations to former State President Simon Garnett on his appointment as a Magistrate, and to former member Michael McGarvie as CEO of the Supreme Court.

### **2007 Victorian State Conference**

Whilst it may seem like a long way off the 2007 Victorian State Conference will be here before we know it!

This annual conference is the premier event for Victorian lawyers with a social justice focus and excellent educational and networking opportunities. The conference program is currently being developed and is guaranteed to offer a comprehensive overview of developments in the law over the past 12 months, delivered by experts and leading practitioners. A conference brochure with details of the full program is due out in early February. Look out for the brochure but before then mark the dates of Friday 18 May and Saturday 19 May 2007 in your diary as this is a conference you won't want to miss.

In addition to boasting an excellent program the 2007 Victorian State Conference will be held at a new venue – the Sebel Heritage Yarra Valley. Nestled in rolling hills within the magnificent Yarra Valley wine region, the Heritage is only 40 minutes from Melbourne's CBD. The Sebel Heritage Yarra Valley opened in April 2002 and was named "Best New Hotel" at the inaugural HM Awards in Australia, New Zealand and the South Pacific for 2003. Hotel guests have access to the Jack Nicklaus designed "Signature" championship golf course, the Heritage Retreat, the Heritage Dayspa, the Bella Restaurant, the Lodge Bar and the conservatory.

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### **Changes to ALA website – new content**

The National office is currently modifying the website to add a "News & Resources" menu option. This section will only be accessible to members and will contain information relevant to each of the States and Territories. Contained within the "Victorian Resources" section will be much practical, useful information. This information will include up-to-date litigation tables, the most recent indexed



benefits for the statutory schemes, full copies of the TAC protocols and relevant ministerial directions/guidelines, Centrelink information, recent case notes, etc.

All members are encouraged to contribute information for posting on the website. Please forward any relevant information and documents to John McPherson at [JohnM@ardmc.com.au](mailto:JohnM@ardmc.com.au)

Look out for the Victorian Resources content section on the ALA website in the next 2 months.

### **Alliance formed with the Victorian Criminal Defence Lawyers Association**

On 28 August Eva Scheelinck, CEO, attended the AGM of the Victorian Criminal Defence Lawyers Association (CDLA) in Melbourne. The key item of business at the AGM was to form a formal alliance with ALA. This motion was passed unanimously by all present. The CDLA will maintain its identity for the next twelve months, but will be aligned with ALA. After twelve months a review will occur with a view to ultimately dissolving the CDLA and having them become a part of ALA.