



Workers Compensation independent review office

WORK CAPACITY UPDATE

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PREVIEW

1. General Francisco Franco and Merit Review
2. Substantial Compliance with Guidelines
3. PIAWE and Salary Sacrificed Superannuation
4. WPI after *Hallmann v National Mutual Life*
5. High Court decision: *Kendirjian v Lepore*

"You are the slave of what you say and the master of what you do not."

- Gen Francisco Franco, Dictator

NEW MERIT REVIEWS USER GUIDE

Aug 2016 changes added clauses **8.20** to **8.24**
enabling *potential* publication of decisions by the
Authority

WHY PUBLISH DECISIONS?

1. Enhance transparency, and accountability.
2. Provide guidance and education to workers, insurers, representatives and all scheme stakeholders.
3. Assist improving claims management, decision making and minimise disputation in the scheme.

THE UNSPOKEN BENEFIT

Publication allows decisions to be compared for **consistency** and **quality**.

A frequent complaint acknowledged by the recent ***Report # 60*** of the ***Upper House Standing Committee on Law and Justice*** was secrecy of decision-making. This led to unpredictability of merit review outcomes.

SELECTIVE AND INSCRUTABLE

We are yet to see full publication of merit review decisions – they continue to be selective in what they do publish and inscrutable about what they do not publish.

Most would regard this as unsatisfactory, unless they had the perspective of Generalissimo Franco.

2. SUBSTANTIAL COMPLIANCE

The new ***Guidelines for claiming workers compensation***, effective from 1 August 2016, introduced the concept of “substantial compliance” (see page 6). The Guidelines say this:

If a worker, employer or insurer provides information or takes action that is substantially compliant with these guidelines, but it is a ***technical breach*** of these guidelines, then the information or action remains valid unless a party has, as a result of that breach:

- been misled
- been disadvantaged, or
- suffered procedural unfairness.

DELEGATED LEGISLATION?

Interestingly the next sentence is in the following terms:

*This does not affect the obligation on workers, employers or insurers to **comply fully with all applicable workers compensation legislation.***

WIRO 517; 917; 2817

It appears that “***all applicable workers compensation legislation***” does not include delegated legislation, since the Guidelines, which are described as delegated legislation, can be breached as long as the breach is only “technical.”

3. PIAWE AND SALARY SACRIFICE

Section **44E(2)** is in the following terms:

*(2) A reference to ordinary earnings does not include a reference to any **employer** superannuation contribution.*

WIRO 3017

Salary sacrificed superannuation payments cannot be disregarded when calculating PIAWE, since they are amounts **immediately payable to the worker, but for his/her direction to the employer otherwise**. They are not the same as payments mandated by the SGC which are exempt from PIAWE calculation by virtue of section 44E(2).

3017 CONTINUED

In this case both the Insurer and the Merit Review Service took the view that section 44E(2) does apply to salary sacrificed contributions, so I quoted at length from the *icare PIAWE Handbook* which sets out at pages 30—31 precisely why this is erroneous.

ICARE *PIAWE HANDBOOK*

Relevantly at pages 30-31 the ***PIAWE handbook*** makes the straightforward observation that salary sacrificed amounts should be included in a worker’s “base rate of pay” for the purposes of calculating PIAWE. Section 44E(2) is irrelevant.

4. WPI AFTER *HALLMANN*

In WIRO recommendation **2517** the following appears:

10. The applicant made the general submission that the Insurer made the work capacity decision “without an assessment of percentage whole person impairment (WPI).” Restated later, the applicant says that “[t]he work capacity decision from the Insurer assumes that I did not qualify [as a worker with ‘high needs’], without there being a recent report on this issue.”

11. The submission by the worker is misconceived, since it assumes an obligation on the part of the Insurer to prove his case, whereas the onus lies the other way around. In addition, it assumes that the Insurer is unable to make a work capacity decision unless there is supporting evidence that the applicant does not have high needs.

12. This argument was settled by the Supreme Court decision of ***Hallman v The National Mutual Life Association of Australia Ltd*** [2017] NSWSC 151, in which Wilson, J made the following remarks in a case dealing with the former wording of the Act which required a 30% threshold for a determination that a worker was “seriously injured”:

40. The plaintiff asserts that, to make a determination that a worker is not a seriously injured worker, the insurer must be positively satisfied that the worker's whole person impairment is not more than 30%. This, however, inverts the language of the provision. What is required is a state of satisfaction that the degree of permanent impairment is likely to be more than 30%.

41. The insurer is entitled, and in specific instances required, to conduct a work capacity assessment unless “satisfied” that the level of impairment “is likely to be more than 30%.”

.....

43. It is not necessary for the decision maker to reach a state of satisfaction about the worker’s level of impairment as a prerequisite to the conduct of a work capacity assessment.

13. It is beyond dispute that the upshot of her Honour's commentary is a requirement in the legislation for the worker to prove to the satisfaction of the insurer that he/she is a worker with high needs. If there is no such proof, it is up to the worker to seek and obtain evidence to convince the Insurer.

5. *KENDIRJIAN V LEPORE*

High Court decision *Kendirjian v Lepore* [2017] HCA 13 (29 March 2017). An important decision, and dangerous for some. The Court of Appeal had held that the plaintiff had exaggerated or misstated the extent of his medical condition. (See: High Court judgment at paragraph 20, per Edelman, J.)

This very exaggeration or misstatement had led the defendant to make an offer of \$600,000 and had also induced the plaintiff's lawyers to advise him that it ought to be met with a counter offer in a much higher amount. [The plaintiff actually alleges he was not even told about the offer, which was dismissed by his lawyers without taking his instructions – they dispute this.] When the case didn't settle and ran, the credit of the plaintiff was questioned by the primary judge and his verdict was around \$300,000.

The successful plaintiff then sued his lawyers in negligence. The Court of Appeal held that both the solicitor and the barrister were immune from suit, but the High Court determined otherwise. In doing so they purported to follow an earlier decision of *Attwells v Jackson Lawyers Pty Ltd* [2016] HCA 16.

Just think about the ramifications of this decision. A plaintiff is held to have exaggerated his symptoms, thereby inducing a high offer of settlement, but when he gets a verdict lower than his fraudulently inflated expectations and lower than the offer based on the exaggerations, he now finds himself well rewarded by the High Court of Australia who see no problem in sheeting home liability to the lawyers.

Had the judge at first instance given the plaintiff \$600,000 or more, would that have made any difference, especially if the defendant had successfully appealed on quantum? Have a look at the decision and see if you can determine how it is not a Rogue's Charter. If you can you'll be doing better than me.

“Everybody has a right to be stupid, but some people abuse the privilege.”

- Joseph Stalin, Dictator

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