



## Précis Paper

### Workers Compensation Reforms in NSW

A thorough overview of the 2012 and 2015 amendments to the workers compensation scheme in NSW and the key changes of which practitioners should be aware.

#### **Discussion Includes**

- Overview of amendments
- Workers excluded from the amendments
- Changes to workers' weekly entitlements and lump sum payments
- Work capacity decisions
- New rights and benefits introduced in 2015
- Recent judicial decisions
- Advice for practitioners

# Précis Paper

## Workers Compensation Reforms in NSW

1. In this edition of BenchTV, Lucinda Gunning (Associate, Carroll & O'Dea, Sydney) and Jaimee Burke (Solicitor, AR Conolly & Company) discuss recent reforms to the workers compensation scheme in NSW.

### Overview of the Reforms

2. The *Workers Compensation Legislation Amendment Act 2012* (NSW) and *Workers Compensation Amendment Act 2015* (NSW) amended the NSW workers compensation scheme. Although the scheme has been amended many times over the years, these particular reforms are far-reaching and have resulted in practitioners needing to retrain. The reforms were introduced to address a significant deficit in the old scheme, however there were some early indications that the reforms went too far as the scheme swung back into surplus very quickly after the amendments were implemented. Ms Gunning emphasised that it is very important for practitioners to be aware of the changes that were introduced, and when each change took effect.
3. There are several categories of workers who have been specifically excluded from the 2012 and 2015 changes: coal miners, fire fighters, paramedics and police officers.

### 2012 Amendments

4. The 2012 changes were far-reaching and included the following reforms:
  - A change in the way in which workers' weekly benefits were calculated and the entitlement period.
  - Medical benefits remained relatively similar but there was a cut-off point for how long a person was entitled to receive medical benefits.
  - Changes to lump sum compensation were introduced to require a minimum whole person impairment of 11 percent.
5. The 2012 amendments also included a change to nervous shock provisions, which were wound back. Relatives of injured workers are now precluded from bringing a claim for nervous shock. Injured workers who suffer from nervous shock, for example when seeing the death of a colleague, will still qualify.
6. In addition, the scope for making journey claims was reformed in the 2012 package. Prior to the changes, workers could make a claim for workers compensation if they were injured on

a journey to or from work. Now, however, a journey claim must have a real and substantial connection to employment. This new test was considered in *Field v Department of Education and Communities* [2014] NSW/WCCPD 16. There, Mr Field, a casual relief teacher, was given late notice that he was required to attend a school at Lakemba. Because of the late notice, he was rushing to arrive at the school in time, and was injured en route, about 100 metres away from the school. In this case, it was found that there was sufficient connection between the injury and the employment to satisfy the "real and substantial connection" test.

7. The 2012 amendments also brought about changes to workers who suffered from a stroke or heart attack. Section 9B of the *Workers Compensation Act 1987* now provides that no compensation will be payable in respect of defined heart attack and stroke injuries, unless the nature of employment gave rise to a significantly greater risk of the worker suffering the injury. The provision was considered in *De Silva v Secretary, Department of Finance, Services and Innovation* [2015] NSW/WCC 279. In this case, the worker was not in a particularly high stress job, but was travelling away from home because of his employment. The worker suffered from sleep apnoea, and the evidence was that had he been at home, his wife would have noticed the attack that he had had in the middle of the night and sought immediate medical assistance. The Workers Compensation Commission found that the fact that the worker was alone in a hotel room overnight itself posed a significantly greater risk, and thus the test was satisfied.

#### 2015 Amendments

8. The 2015 changes included the introduction of the *State Insurance and Care Governance Act 2015* (NSW). This Act split what was previously WorkCover into three different functions: the State Insurance Regulatory Authority; icare (the insurer component); and Safe Work NSW, which looks after the safety of workers.
9. Death benefits were also amended as a result of the 2015 reforms, and the amount payable increased dramatically. The current amount payable is approximately \$765,000, as opposed to approximately \$500,000 prior to the changes being introduced. The changes to death benefits took effect for workers who died at work on or after 5 August 2015.
10. Some additional benefits were given back to workers in the 2015 reforms. Workers can now claim retraining costs from insurers, and there was a large increase in the lump sum compensation available for permanent whole person impairment. Restrictions on medical expenses were also wound back.

#### Changes to Weekly Entitlements and Lump Sum Payments

11. The changes to weekly entitlements was a complicated area in the 2012 reforms. Workers injured prior to 1 October 2012 but not receiving benefits immediately prior to that date were transitioned onto a new scheme on 1 January 2013. This is the scheme that now applies to everyone except the categories of exempt workers mentioned above. Weekly rates are now more generous to workers, in that the payment rate is based on a percentage of pre-injury average weekly earnings, which can include overtime for the first 52 weeks of payments.
12. The difficulty regarding weekly benefits changes was the changeover period for workers in receipt of weekly benefits immediately prior to 1 October 2012. Those workers were to be transitioned by a work capacity decision, issued by an insurer. These decisions created two classes of workers - those who were transitioned very quickly and those who had to wait for a transition further down the track. Those workers who were not yet receiving weekly benefit payments may have had to bring claims in the Workers Compensation Commission based on two different tiers of payments.
13. Changes were also introduced in 2012 in relation to lump sum payments. Workers who made a claim for lump sum payments after 19 June 2012 now need to reach a level of 11 percent whole person impairment to be able to receive lump sum compensation (as opposed to a previous level of only 1 percent). This applies regardless of the date of injury.
14. Workers are also no longer entitled to make deterioration claims – this means that workers must think carefully about when to bring a claim so as to capture their true state of health.
15. Ongoing entitlements have also been affected. The entitlement to weekly benefits has been tied to whole person impairment in that there is now a cut-off period of 260 weeks of payment for workers who are 20 percent whole person impairment or less. Workers who are 10 percent or less whole person impairment are only entitled to medical expenses for two years after receiving their last weekly benefit. This increases to 5 years for 11 to 20 percent WPI and indefinitely for 20 percent and above.

#### Work Capacity Decisions

16. A work capacity decision is a decision issued by an insurer about the worker's capacity to earn. The decision does not have to reflect their true earnings at the time the decision is handed down. Once a decision is issued that makes findings about what the level of potential earnings for the worker is, there is no recourse to the Workers Compensation Commission from an unfavourable work capacity decision. Instead, there is an internal review process followed by a merits review process.

17. Until recently, there was no funding for lawyers to provide advice on work capacity decisions. Division 3A, Part 17 was introduced into the *Workers Compensation Regulations 2016* (NSW) which now enables practitioners to recover costs in merit reviews of work capacity decisions.
18. The case of *Sabanayagam v St George Bank Limited* [2016] NSW WCC PD 3 considered work capacity decisions. Prior to this case, insurers were issuing work capacity decisions under the guise of notices under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). A s 74 notice is a written decision from the insurer declining a claim for either weekly compensation or medical expenses or both. The Workers Compensation Commission has jurisdiction to determine disputes in relation to s 74 notices, but has no jurisdiction to review work capacity decisions. In order to set strict rules regarding which decisions were reviewable, the Commission made clear that a work capacity decision must be very clear in its intent and must comply with a number of formatting requirements set out in the guidelines and the legislation.

## **BIOGRAPHY**

### Lucinda Gunning

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Lucinda Gunning was admitted to the profession in 2010. Lucinda graduated with Honours from the University of Tasmania in 2009 and has worked for over 6 years at Carroll & O'Dea Lawyers. She is now an Associate on the Compensation Team at Carroll & O'Dea specialising in personal injury, workers, disability and victims compensation. Additionally, Lucida publishes and presents on current topics in her areas of practice.

### Jaimee Burke

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## **BIBLIOGRAPHY**

### Cases

*Field v Department of Education and Communities* [2014] NSW/WCCPD 16

*De Silva v Secretary, Department of Finance, Services and Innovation* [2015] NSW/WCC 279

*Sabanayagam v St George Bank Limited* [2016] NSW WCC PD 3

### Legislation

*Workers Compensation Legislation Amendment Act 2012* (NSW)

*Workers Compensation Amendment Act 2015* (NSW)

*Workers Compensation Act 1987* (NSW)

*State Insurance and Care Governance Act 2015* (NSW)

*Workers Compensation Regulations 2016* (NSW)