

The Aggravation of Aggravations



19 October 2016



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Other BJS Staff Members

- Simon Fanning - Director
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- Lorraine Cave - Account Manager
- Jo Lowerson - Account Manager
- Sam La Coste - Assistant Account Manager



Simon Booth

Manager
AEGIS Risk Management Services



Thanks to our partners for today:



Seminar Format

- Committed to getting you out on time
- Save questions for the panel discussion
- Speakers will be available at the end
- Feedback Form



Victorian Ombudsman

Investigation into the management of
complex workers compensation claims and
WorkSafe oversight

September 2016



The Outcome

- Unreasonable decision making by Agents
 - Providing selective information to IME's
 - Dr shopping to get the opinion they want
- Maintaining unreasonable decisions



The Outcome

- Allowing Employers to influence claims and liability decisions
- Making decisions based on making a profit



The Outcome

- WorkSafe Oversight
 - WorkSafe only audited 662 claims. According to the Ombudsman “this is a very small percentage”

WorkSafe’s audits of agent decision-making

39. Prior to 2014-15, WorkSafe audited around 300 claims each year. In 2014-15, this was increased to 662 claims. However, given agents manage approximately 90,000 claims every year, and make over two million entitlement decisions, this is a very small percentage.

The Outcome

- The Balance of Probabilities

Standard of proof and adverse comment

73. In reaching my opinion in this report, the standard of proof I have applied is the balance of probabilities.

Stats & Rats

Confidence Level:

The percentage of all possible samples that can be expected to include the true population parameter



Stats & Rats

Confidence Level (in English):

The probability that the sample utilised is representative of the true population

The larger the sample size, the greater the level of confidence



Stats & Rats

Random Sample:

Involves choosing respondents from a target population at random to minimise bias in a representative sample

The Balance of Probabilities

- 502 complaints received in 2014/2015
 - These complaints initiated the review
- 65 claims reviewed
 - A percentage of which were deliberately taken from the 502 complains above

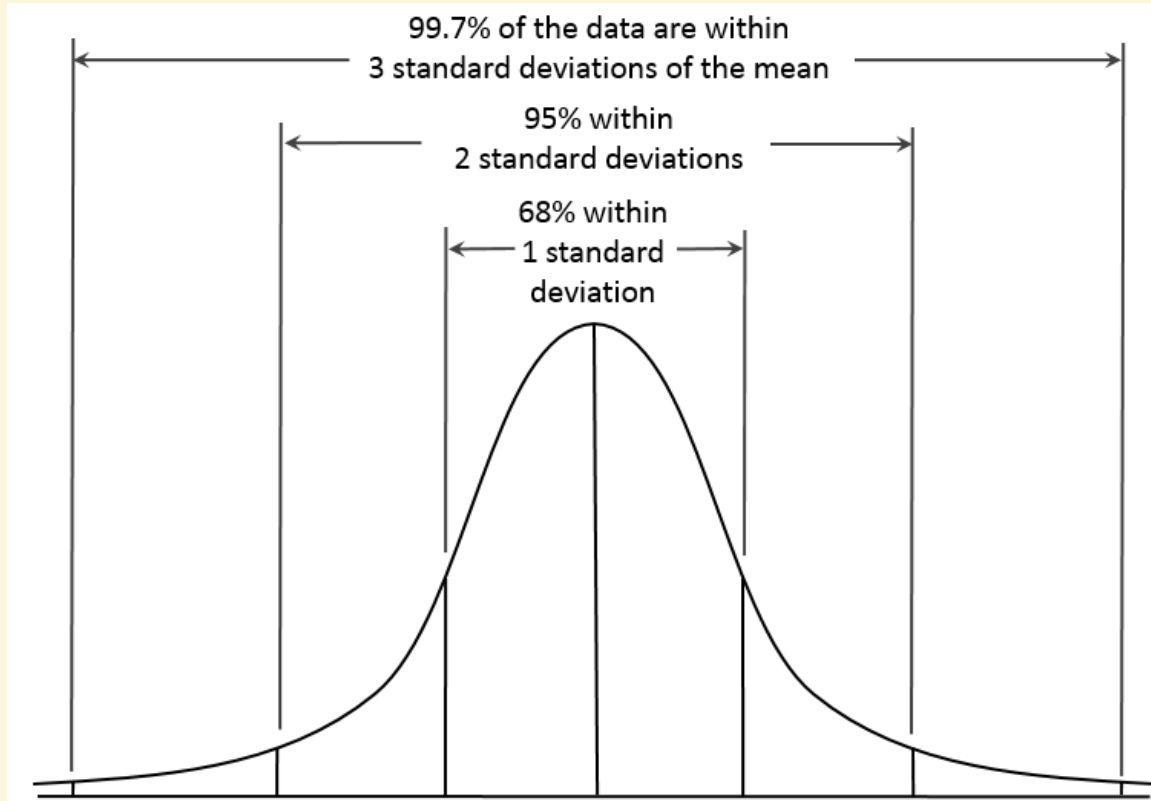


The Balance of Probabilities

- Victorian claims population – 90,000
- Victorian complex claim population – 18,000



The Balance of Probabilities



The Balance of Probabilities

Required Sample Size [†]								
Population Size	Confidence = 95%				Confidence = 99%			
	Margin of Error				Margin of Error			
	5.0%	3.5%	2.5%	1.0%	5.0%	3.5%	2.5%	1.0%
10	10	10	10	10	10	10	10	10
20	19	20	20	20	19	20	20	20
30	28	29	29	30	29	29	30	30
50	44	47	48	50	47	48	49	50
75	63	69	72	74	67	71	73	75
100	80	89	94	99	87	93	96	99
150	108	126	137	148	122	135	142	149
200	132	160	177	196	154	174	186	198
250	152	190	215	244	182	211	229	246
300	169	217	251	291	207	246	270	295
400	196	265	318	384	250	309	348	391
500	217	306	377	475	285	365	421	485
600	234	340	432	565	315	416	490	579
700	248	370	481	653	341	462	554	672
800	260	396	526	739	363	503	615	763
1,000	278	440	606	906	399	575	727	943
1,200	291	474	674	1067	427	636	827	1119
1,500	306	515	759	1297	460	712	959	1376
2,000	322	563	869	1655	498	808	1141	1785
2,500	333	597	952	1984	524	879	1288	2173
3,500	346	641	1068	2565	558	977	1510	2890
5,000	357	678	1176	3288	586	1066	1734	3842
7,500	365	710	1275	4211	610	1147	1960	5165
10,000	370	727	1332	4899	622	1193	2098	6239
25,000	378	760	1448	6939	646	1285	2399	9972
50,000	381	772	1491	8056	655	1318	2520	12455
75,000	382	776	1506	8514	658	1330	2563	13583
100,000	383	778	1513	8762	659	1336	2585	14227
250,000	384	782	1527	9248	662	1347	2626	15555
500,000	384	783	1532	9423	663	1350	2640	16055
1,000,000	384	783	1534	9512	663	1352	2647	16317
2,500,000	384	784	1536	9567	663	1353	2651	16478
10,000,000	384	784	1536	9594	663	1354	2653	16560
100,000,000	384	784	1537	9603	663	1354	2654	16584
300,000,000	384	784	1537	9603	663	1354	2654	16586

The Balance of Probabilities

- Sample size too small to draw conclusions
- WorkSafe's 662 audited files was "a very small percentage"
- What does that make the 502 complaints?
- What does that make the 65 files reviewed?



The Balance of Probabilities

Bias:

- Sample was chosen from people complaining about the Agents
- Including people who had made “complaints to my office”

Its like determining that Essendon is the most popular AFL team by surveying the Essendon Cheer Squad



Case Study 4



Tell Us Something We Don't Know

- The System is broken
- Everyone outside of WorkSafe could tell you that:
 - Workers
 - Employers
 - Unions
 - Industry Groups
 - Insurers / Agents



Tell Us Something We Don't Know

- Instead of bashing Insurers
- Change the scheme:
 - Let the insurer's insure
 - Let the regulator regulate



What does this mean for Employers?

- Examples were all of poor case management:
 - Taking shortcuts
 - Manufacturing decisions
 - Being lazy
 - Getting frustrated



What does this mean for Employers?

- Some agents are panicking
 - Reversing decisions to avoid conciliation
 - Backing down as soon as they hear the words stress, anxiety, depression
- Increased Financial Penalties
 - Some agents will be less likely to want to:
 - Dispute liability
 - Make adverse decisions on claims



What does this mean for Employers?

- You need to take control of your Workers' Compensation
- Manage your risk
- The point of today's seminar



The Issue with Aggravations

Simon Booth

Manager

AEGIS Risk Management Services



What the WIRC Act 2013 Covers

11 Statement of rights and obligations of workers

A worker—

- (a) is entitled to appropriate compensation under this Act or the **Accident Compensation Act 1985** in relation to an injury to the worker arising out of or in the course of employment; and

What the WIRC Act 2013 Covers

injury means any physical or mental injury and, without limiting the generality of that definition, includes—

- (a) industrial deafness; and
- (b) a disease contracted by a worker in the course of the worker's employment (whether at, or away from, the place of employment); and
- (c) a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease;

What Does This Mean?

- Pre-existing injuries can become your problem
- Non-compensable injuries can become compensable injuries



What Can You Do?

- Recruitment Process
- Pre-employment medical assessments
- Section 41



Section 41 of the WIRC Act 2013

41 Pre-existing injury or disease

- (1) Subsection (2) applies if it is proved that, before commencing employment with the employer—
 - (a) a worker had a pre-existing injury or disease of which the worker was aware; and
 - (b) the employer in writing—
 - (i) advised the worker as to the nature of the proposed employment; and
 - (ii) requested the worker to disclose all pre-existing injuries and diseases suffered by the worker of which the worker was aware and could reasonably be expected to foresee could be affected by the nature of the proposed employment; and
 - (iii) advised the worker that subsection (2) will apply to a failure to make such a disclosure or the making of a false or misleading disclosure; and
 - (iv) advised the worker as to the effect of subsection (2) on the worker's entitlement to compensation; and
 - (c) the worker failed to make such a disclosure or made a false or misleading disclosure.
- (2) If this subsection applies, any recurrence, aggravation, acceleration, exacerbation or deterioration of the pre-existing injury or disease arising out of or in the course of or due to the nature of employment with the employer does not entitle the worker to compensation under this Act.

SECTION 41 | BJS INSURANCE BROKERS

Kim Cunningham - Senior Associate, Workplace Relations

October 2016

HOW SECTION 41 OPERATES

- Work-related recurrence, aggravation, acceleration, exacerbation or deterioration of a pre-existing medical condition
- Non-disclosure by the employee of the pre-existing condition
- A complete defence to a claim but only if specific criteria are met

MEETING THE CRITERIA OF SECTION 41

- Comprehensive Pre-Employment Health Declaration:
 - In writing
 - Tailor-made to the position
 - Details the physical and non-physical requirements of the role
 - Explains how section 41 operates
 - Requires a disclosure of existing and pre-existing injuries

IT'S ALL IN THE TIMING

- All job applicants
- What not to do

DEFENDING A CLAIM UNDER SECTION 41

- Role of supervisors
- Disputing the claim

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P2 GROUP

**Understanding the
Inherent Requirements
of Job – How they can
WORK for YOU**



Presenter: Paul Marsh

P2 Group CEO and Occupational Therapist

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Documenting the Inherent Requirements of a Job

- Analysed and developed by an Occupational Therapist with an expertise in workplace practices:
 - Occupational interview with relevant managers and workers to establish scope of role
 - Observation and participation in work tasks for analysis of physical, cognitive, psychosocial and environmental requirements
 - Photography of key tasks to enhance documentation
 - Organisational review to ensure customisation and congruency with internal requirements
- Provide a clear analysis of the reasonable expectations required of a worker completing the role, ensuring that these domains are measurable
 - Physical
 - Cognitive
 - Psychosocial
 - Environmental
- Focus on the key aspects of a role; the core 80% and capture the maximal demands of a role rather than the standard prerequisites

Understanding the Inherent Requirements of a Job

Document:

- Key task requirements
- Physical demands
- Cognitive demands
- Environmental demands

SECURITY OFFICER - FREQUENCY OF PHYSICAL DEMANDS

Physical Demands	Never 0%	Occasional 1- 33%	Frequent 34- 66%	Constant 67-100%
Sitting		✓		
Standing				✓
Walking				✓
Steps/stairs			✓	
Climbing	✓			
Balancing	✓			
Looking Up		✓		
Looking Down			✓	
Forward Bending		✓		

SECURITY OFFICER – ENVIRONMENTAL AND ORGANISATIONAL FACTORS

Environmental and Organisational Factors	
Heat	Not subject to extreme heat. Outside weather conditions will affect working conditions.
Cold	Not subject to extreme cold. Outside weather conditions will affect working

SECURITY OFFICER – COGNITIVE AND BEHAVIOURAL DEMANDS

Essential Tasks	Attention / Concentration	Interaction with Others	Level of Responsibility	Problem Solving	Decision Making
1. Secure / unsecure campus	Medium	Low	High	Medium	Medium
Comments: Workers follow set procedures. Complex decisions are deferred to the security manager or the relevant authority.					
2. General patrol	Medium	Low	High	Medium	Medium

environment noise. No hearing
le phone.

Do Not Document:

- Organisational policies and procedures
- Organisational values and conduct
- Productivity rates and performance

The Importance of Understanding the Inherent Requirements of a Job

- Documenting and understanding the Inherent Requirements of the Job for key roles within an organisation places employers in a unique position to take control over many costly aspects of their workforce
- Furthermore, employers who equip themselves with robust and strategic inherent requirements documentation broaden their workforce management pathways and ensure their legislative compliance
- Under **Section 22 of the Occupational Health and Safety Act (2010)** an employer must, so far as is reasonably practicable monitor the health of employees and keep information and records relating to the health and safety of employees and employ or engage persons who are suitably qualified in relation to occupational health and safety to provide advice to the employer concerning the health and safety of employees

Utilising the Inherent Requirements of a Job

By effectively and systematically identifying and understanding the demands of a role, employers are empowered to:

- Employ the right people for the job by enhancing their pre-employment practices
- Reduce WorkCover premiums by creating effective and sustainable return to work plans and strategically managing cases
- Minimise the operational implications of injury management by efficiently returning workers to their pre-injury duties
- Effectively balance workplace demands with the capacity and experience of workers, especially in the ageing workforce space
- Strategically manage worker who are unable to meet the physical, cognitive, psychosocial and environmental demands of the role
- Analyse and improve workplace practices

Q&A



Presenter: Paul Marsh P2 Group Director and Occupational Therapist

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Disclosure of Pre-existing Conditions

Scott Williamson

19th October 2016



Disclosure of Pre-Existing Conditions

- Employers can protect themselves against claims for compensation by workers who aggravate pre-existing conditions or diseases that were not disclosed when the worker was engaged under Section 41 of the Workplace Injury Rehabilitation and Compensation Act
- To successfully rely on Section 41, it is essential that employer documentation strictly complies with every element of the provision and a detailed job description is provided to potential new employees
- If section 41 is not utilised by an employer, the general rule is that the employer takes the worker as it finds them and will be liable to pay compensation for any recurrence, aggravation, acceleration, exacerbation or deterioration if employment was a significant contributing factor.

Disclosure of Pre-Existing Conditions

- It is rare for a claim to be rejected pursuant of section 41. The reasons for this include:
 - ➔ The employer's pre-employment documentation does not comply with section 41
 - ➔ Lack of information regarding the worker's pre-injury medical conditions
 - ➔ Failure by the worker to provide an accurate history to the independent medical examiner
 - ➔ Failure of the employer to provide pre-employment documentation or advise of information they have regarding a pre-existing condition
 - ➔ Failure of the Eligibility Officer to check whether the worker was asked to disclose any pre-existing condition

Disclosure of Pre-Existing Conditions

- Allianz has had a number of cases where the non-disclosure was discovered after the claim was accepted and we have been able to subsequently terminate these claims pursuant to section 41.
- The following three scenarios show one successful and two unsuccessful application of section 41.

Disclosure of Pre-Existing Conditions

- **Scenario A – Stress claim**

Worker employed at a residential facility for troubled youths. Employer requested disclosure of pre-existing conditions in accordance with section 41. Worker did not disclose significant history of mental illness. Worker's mental illness is aggravated following threats by youth. Worker should have foreseen that his pre-existing condition could be aggravated by employment of this type. Claim terminated pursuant to section 41.

Disclosure of Pre-Existing Conditions

- **Scenario B** – Worker makes claim for arm injury

Employer requested disclosure of pre-existing conditions in accordance with section 41. Worker did not disclose pre-existing back problem. Claim could not be rejected under section 41 as undisclosed injury different to the claimed injury.

Disclosure of Pre-Existing Conditions

- **Scenario C** – Worker employed by insurance company as a Case Manager

Worker did not disclose pre-existing left shoulder condition but this did not prevent her from performing her normal duties. Worker was speaking to an injured worker in reception when he suddenly grabbed her arm causing an aggravation of the shoulder condition. The claim could not be rejected under sections 41 as the incident was unexpected and the worker could not reasonably have been expected to foresee that employment of this type would aggravate the condition.

Panel Discussion

- Bill de Vos facilitator
- Panel members:
 - Simon Booth, Aegis Risk Management Services
 - Kim Cunningham, M+K Lawyers
 - Paul Marsh, P2 Group
 - Scott Williamson, Allianz Insurance
 - Craig Salter, Action OHS



