BJS Insurance Group Workers' Compensation Breakfast Seminar – Summary of Presentations

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THE AGGRAVATION OF AGGRAVATIONS

Workers' Compensation claims can significantly increase an Employer's premium; this is especially frustrating when the injury is related to a pre-existing condition that was not work related. At the recent BJS Workers' Compensation Breakfast Seminar, our presenters outlined how aggravations of injuries are claims under the WIRC Act 2013. Section 41 of the Act was identified as a means for reducing the likelihood of an Employer's premium being impacted by an aggravation. The processes that need to be put in place for this to be successful were outlined in detail.

The key points from the presentations are provided below:

THE VICTORIAN OMBUDSMAN'S REPORT

Simon reviewed the Victorian Ombudsman's Investigation into Workers' Compensation and identified that:

- The sample size utilised by the Ombudsman (65 claimants) was too small to draw the conclusions listed in the report. To draw any significant conclusions with a degree of confidence between 1,300 and 1,500 claims would have needed to be reviewed.
- The sample utilised by the Ombudsman was deliberately biased, the sample included claimants who had called her office to make complaints.
- The lack of sufficient sample size and the deliberate bias of the sample make drawing any realistic conclusions from the investigation impossible.

The report highlighted examples of poor claims performance and, despite the validity issues relating to the investigation, some WorkSafe Agents are already reversing decisions and backing down on strategies even when the Agent has managed the claim appropriately. In addition, the regulator has increased penalties for Agent decisions overturned at Conciliation so we expect that they will be less likely to push claims for noncompliance. We can expect to see another 12 to 18 months of this before hopefully things return to normal.

THE ISSUE WITH AGGRAVATIONS

Simon identified that the definition of injury under the WIRC Act 2013 included a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.

As such, if employers do not work to protect their business, a worker's pre-existing injury can become the employer's problem and non-compensable injuries can become compensable injuries.

Simon pointed out that that employers need to look at their recruitment processes, ideally having all prospective employees undertake a pre-employment medical assessment, and at a minimum utilising Section 41 of the WIRC Act 2013 relating to disclosure of pre-existing injuries.

Simon Booth
AEGIS Risk *Management Services*
Manager | Workers' Compensation

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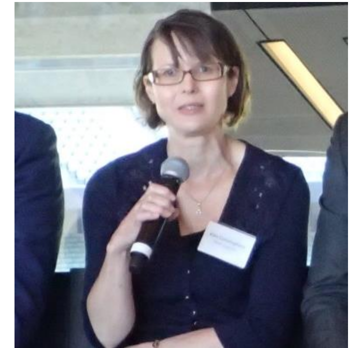
How Section 41 operates and using it to protect against WorkCover claims



Kim Cunningham
M+K Lawyers
Senior Associate | Workplace Relations

Kim outlined how an employer can set up its pre-employment processes to defeat potential WorkCover claims.

What employers should focus on are:

1. Preparing detailed pre-employment documentation for job applicants specific to each advertised role.
2. The importance of identifying the physical and non-physical requirements of the position.
3. Knowing when and how to defend a WorkCover claim under section 41.

Understanding the Inherent Requirement of Job

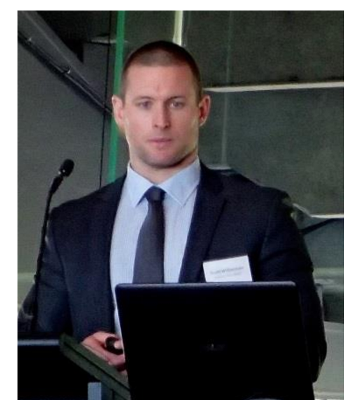
Paul Marsh
P2 Group
Joint CEO

Paul Marsh spoke about the importance of documenting the Inherent Requirement of Job as part of best practice.

Specifically, employers learnt:

- What is an Inherent Requirement of Job document and how it differs from a Position Description.
- The importance of having a suitably qualified healthcare professional conducting the assessments and document.
- Why you need to explore the cognitive/behavioural as well as the physical requirements of the job.
- The powerful ways employers can use such assessments including, but not limited to:
    - Pre-employment assessments
    - Return to work plans
    - Termination of employment
- How these documents assist employers to meet their OHS obligations, specifically around S22 of the VIC OHS Act and the duty of employers to monitor the health of their staff.

Disclosure of Pre-existing Conditions



Scott Williamson
Allianz Insurance
Dispute Resolution Manager
Victoria Workers' Compensation

Scott discussed Section 41 from an Agent's perspective:

- Employers can protect themselves against claims for compensation by workers who aggravate pre-existing conditions that were not disclosed when the worker was engaged under section 41 of the Workplace Injury Rehabilitation and Compensation Act
- It is rare for a claim to be rejected pursuant of section 41. The reasons 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 advice of information they have regarding a pre-existing condition
    * Failure of eligibility officer to check whether the worker was asked to disclose any pre-existing condition
- Employers can protect themselves even if an employer misleads or doesn't fully disclose the extent of their injury under section 41 of the Workplace Injury Rehabilitation and Compensation Act.
- If section 41 is not utilised by an employer, the general rule is that the employer takes the worker as they find them and will be liable to pay compensation for any recurrence, aggravation, acceleration, exacerbation or deterioration if employment was a significant contributing factor.

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The slides from the BJS Workers' Compensation Breakfast Seminar
can be accessed here

M+K Lawyers – Core Policy & Procedure Package
can be accessed here

A new version of M+K's Managing Serious Injuries and Fatalities – A Safety Guide
is now available on the website and can be accessed here