

Insurance - Workplace Injury Case Note

June 2007

COMPLIANCE WITH PRE-COURT PROCEDURES - THE WORKERS COMPENSATION REHABILITATION ACT 2003 POST BEROWRA HOLDINGS

The introduction of the pre-court procedures under the Workers Compensation Rehabilitation Act and its predecessor WorkCover Queensland Act 1996 was intended to introduce a regime for the speedy resolution of damages claims brought by workers against their employers. The intention was to eliminate the need for matters to proceed to trial in all cases save those where the employer/employers insurer and the worker could not agree mutually acceptable terms.

A person's access to damages is determined by s 237 of the Workers Compensation and Rehabilitation Act. If a person's circumstances fall within the circumstances specified in s 237 then that person can access damages against an employer. Section 237 generally requires a notice of assessment to have been issued by the employer/insurer for an injury arising from the event and if the WRI is less than 20% for the worker to have elected to seek damages. The provision also permits access to dependents of a deceased worker to damages.

Section 250 of the Act prescribes that a worker can only seek damages for the injury if the insurer gives a notice of assessment. Section 275 particularizes the method by which a claimant worker seeks those damages. That is

"Before starting a proceeding in a court for damages, a claimant must give a notice under this section within the period of limitation for bringing an action under the Limitation of Actions Act 1974. The claimant must give notice in the approved form. The notice must include the particulars prescribed by regulation."

The pre-court steps to access damages at first glance appear relatively straight forward. However two apparent difficulties have arisen as a consequence of the introduction of this scheme. The first relates to the inability to comply with these steps within the period of limitation prescribed under the *Limitation of Actions Act*. That is where it is impossible to comply with s 275 within the 3 yr limitation period. The second difficulty relates to failures by the insurer and or claimant to complete the s 250 and s 275 steps properly.

Section 236 of the Workers Compensation and Rehabilitation Act 2003, declares that nothing in the Act affects the limitation provisions under the *Limitation of Actions Act*. Thus the 3 year limitation period applies to workers claims for damages against their employer. The legislation does however prescribe two methods to preserve entitlements to pursue damages notwithstanding the impending expiration of the claimants 3 year limitation period. Section 251 provides those two methods. The first is if there is an urgent need for a proceeding for damages to be commenced the worker may seek leave of the court pursuant to s 298 to start a proceeding which must then be stayed until :

"(a) the insurer gives the claimant a notice of assessment; and

*(b) the claimant – (i) elects to seek damages for the injury; and
(ii) complies with s 295"*

which essentially requires completion of the procedures previously specified for accessing damages and concluding with a compulsory conference .

In the alternative, s 251 enables a claimant and employer/insurer to use the way specified in s 276 to satisfy the requirements of s 302(1)(a)(ii) of the Act and in effect enable a claimant to commence a legal proceeding at a time after the 3 year limitation period has expired. In these circumstances, a defence pleading the Limitations of Actions Act cannot be made where the proceeding is commenced and served within 60 days of the compulsory conference.

The Workers Compensation & Rehabilitation Act gives direction as to the way in which lapse of time under the Limitation of Actions Act can be dealt with, whilst maintaining the pre-court procedures. If the parties complete these requirements correctly then the Act provides the necessary mechanisms to ensure that a claim is not defeated due to time delay which is often caused by delayed recovery from serious injury. The first difficulty created by the introduction of the pre-court procedures is resolved by the Act itself.

The Act however does not resolve what is to happen when s 250 or s 275 of the Act have not been completed correctly or a legal proceeding is commenced in a way not contemplated by the Act. This difficulty has recently been considered by the court in **Phipps v Australian Leisure and Hospitality Group Ltd & Anor** [2007] QCA 130.

In this case a legal proceeding was validly commenced for an alleged unassessed over period of time injury. The proceeding filed also alleged negligence in respect to a specific date injury for which leave of the court had not been obtained. By time of the 3 year anniversary of the injury leave the court had not been obtained for the injury suffered on a specific date, no notice of assessment had issued and completion of s 276 urgent notice of claim had not occurred.

The claimant delivered a notice of claim 3 years and 10 weeks after the event causing injury. The insurer argued that the claim was statute barred and that no notice of assessment had issued. The claimant applied to the court, which ultimately dismissed the claimant's claim observing that there was failure to comply with the requirements of the *Worker's Compensation and Rehabilitation Act* and invoked the *Limitation of Actions Act*.

On appeal the court set aside the decision to dismiss the proceeding and held that the proceeding commenced by the claimant was valid.

The rationale for this decision is found not in the *Workers Compensation and Rehabilitation Act* itself, but in the decision of the High Court of Australia in *Berowra Holdings Pty Ltd v Gordon* which the court of appeal applied. That is, as sections 237(1), 250(1) and 275 do not expressly state the consequences of non-compliance with those sections, the court has to decide whether the claimant has lost the right to sue for damages. In determining whether that right is lost, the court has to determine whether that right arises under the Act or at common law.

The court of appeal accepted the view of the High Court of Australia that "the workers right to sue an employer for damages 'remains a right sourced at common law'" 1

Thus the *Workers Compensation and Rehabilitation Act* prescribes a set of steps to access that right. What the Act does not do is prescribe what is to occur if those steps are not followed correctly. In such circumstances, the court must look to sources of law beyond the act for a remedy.

In **Phipps**, a proceeding had been issued for the specific date injury but not in compliance with the *Workers Compensation and Rehabilitation Act*. A Notice of assessment had not ever been issued for the injury. The proceeding issued could not be a nullity because the *Workers Compensation & Rehabilitation Act* did not create the right to sue. The right to sue was sourced at common law and arose

independently of the act. The Court of appeal applied the decision it made in Australian Meat Holdings v Hamling that a proceeding commenced in contravention of s 303 of the 1996 act (equivalent of s 296 of WCRA) was not a nullity.

The Court of Appeal also looked to Rule 375 of the Uniform Civil Procedure Rules 1999.

" (1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in a way and on the conditions the court considers appropriate.

(2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started."

Keane JA considered that the effect of Rule 375(2) is to ensure that proceedings commenced which are defective and are capable of being cured by amendment are not a nullity.

The Court of Appeal then had to consider the strike out application made in respect to the proceeding. That is, did non compliance with the procedures under the *Workers Compensation & Rehabilitation Act* make the proceeding one capable of being struck out. The court identified that the only capacity to strike out a proceeding was for abuse of process.

McMurdo J considered that the interests of justice favored proceedings remaining on foot. He balanced the insurers delay in arranging for a notice of assessment to issue prior to January 2006 against the delay caused after January 2006 by the claimant's inability to undertake assessment due to treatment for cancer. He considered that as the claimant's solicitors had been requesting assessment for a considerable period and that the employer was generally aware that proceedings had been intended concerning the July 2003 event.

McMurdo J also warned that flagrant and deliberate disregard for the procedural requirements of Chapter 5 of the *Workers Compensation and Rehabilitation Act* 2003 could result in a proceeding commenced contravening Chapter 5 being summarily dismissed. He also considered that an exercise of discretion to enable proceedings to continue in this case was not the same as an exercise of the power to grant leave to commence a proceeding under s 298 issued "*nunc pro tunc*".

CONCLUSION

This case illustrates

1. Failure to comply with Chapter 5 of the Workers Compensation and Rehabilitation Act 2003 is not an automatic bar to a damages claim due to the absence of an express provision by the legislature to that effect;
2. Proceedings issued with deliberate or intentional disregard for Chapter 5 of the Act may result in proceedings issued being struck out ;
3. Substantial compliance is required not total compliance. However total procedural compliance brings with it the certainty of position for both claimant and employer/insurer

1. Keane JA at para 37

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