

# Insurer Seminars 2016

# Content

- Dispute resolution model
- Mediation – A Mediator's view
- Conciliation/Arbitration – An Arbitrator's view
- When to come to the Commission
  - Liability v work capacity
- Section 74 notices – tips and traps
- Thresholds and Medical Assessments

# WCC Dispute Resolution Model

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# Our People

## **Presidential Members: 4**

- President,
- 2 x Deputy Presidents, 1 x Acting Deputy President

## **Arbitrators: 19**

- Permanent (7)
- Sessional (12)

## **Approved Medical Specialists: 143**

- Sessional

## **Mediators: 26**

- Sessional

## **Staff: 67**

# Our Jurisdiction

## ARBITRATOR

- Statutory Comp
- Liability
- Quantum

## PRESIDENTIAL MEMBERS

- Arbitral Appeals
- Question of Law
- Strike Out Prefiling Statements

## REGISTRAR

- Small claims
- Injury management
- Procedural issues
- Cost assessments

## APPROVED MEDICAL SPECIALIST

- Assess permanent impairment
- General medical disputes

## MEDICAL APPEAL PANEL

- Medical Appeals

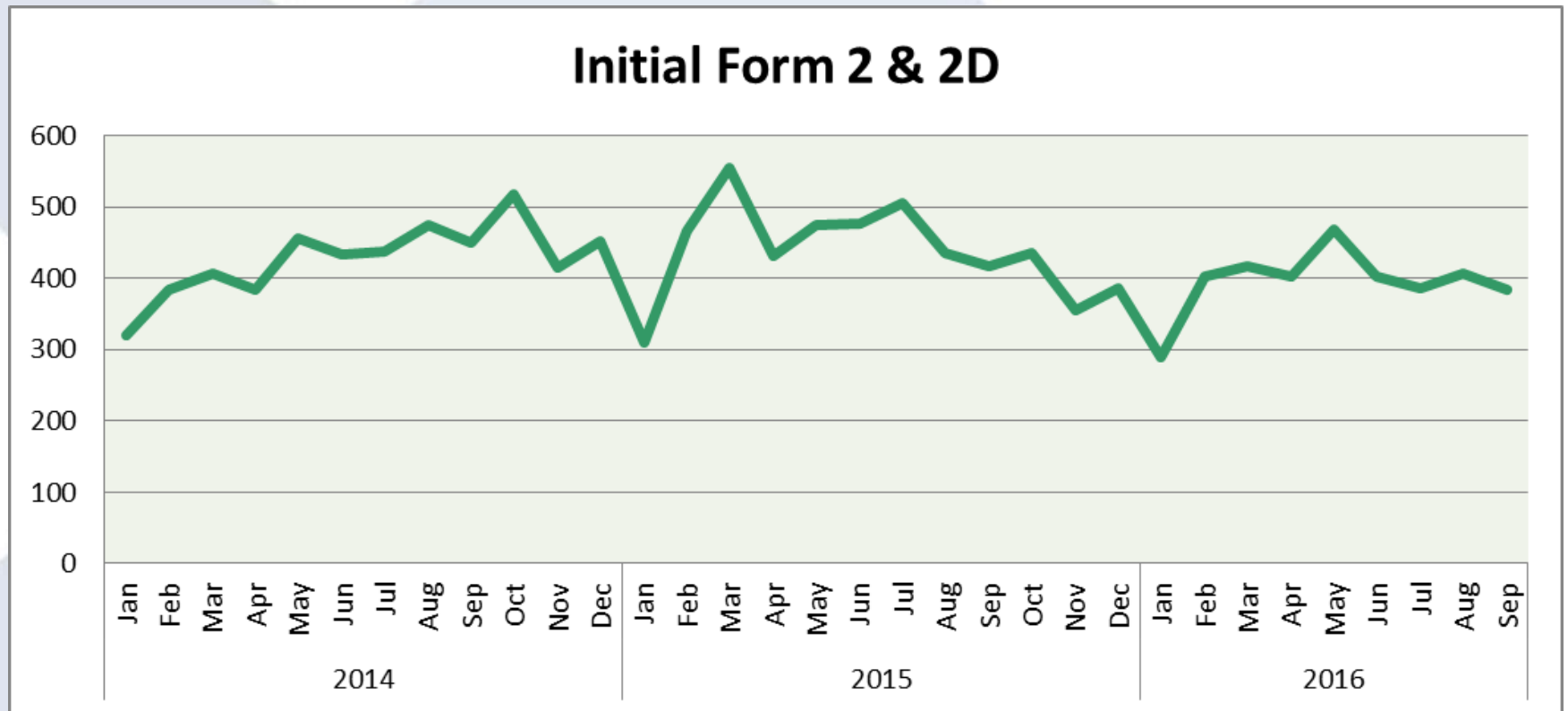
## MEDIATOR

- Common Law Pre-Court mediation

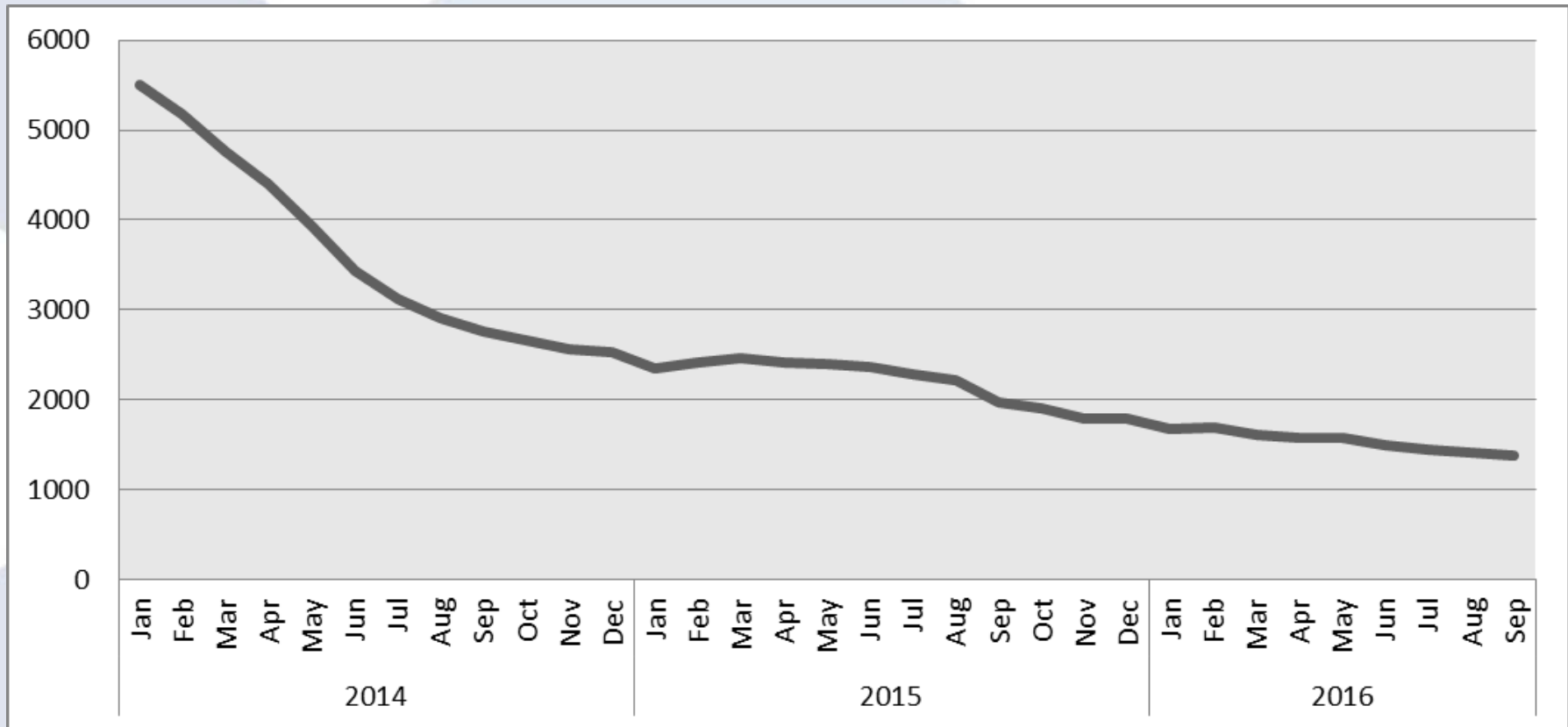
# Lodgments

	2014	2015	2016 (to 30/09/16)
<b>Total Applications</b>	<b>8,002</b>	<b>7,961</b>	<b>5,493</b>
Application to Resolve a Dispute (Form 2)	5,644	5,590	3,773

# Lodgments by Month

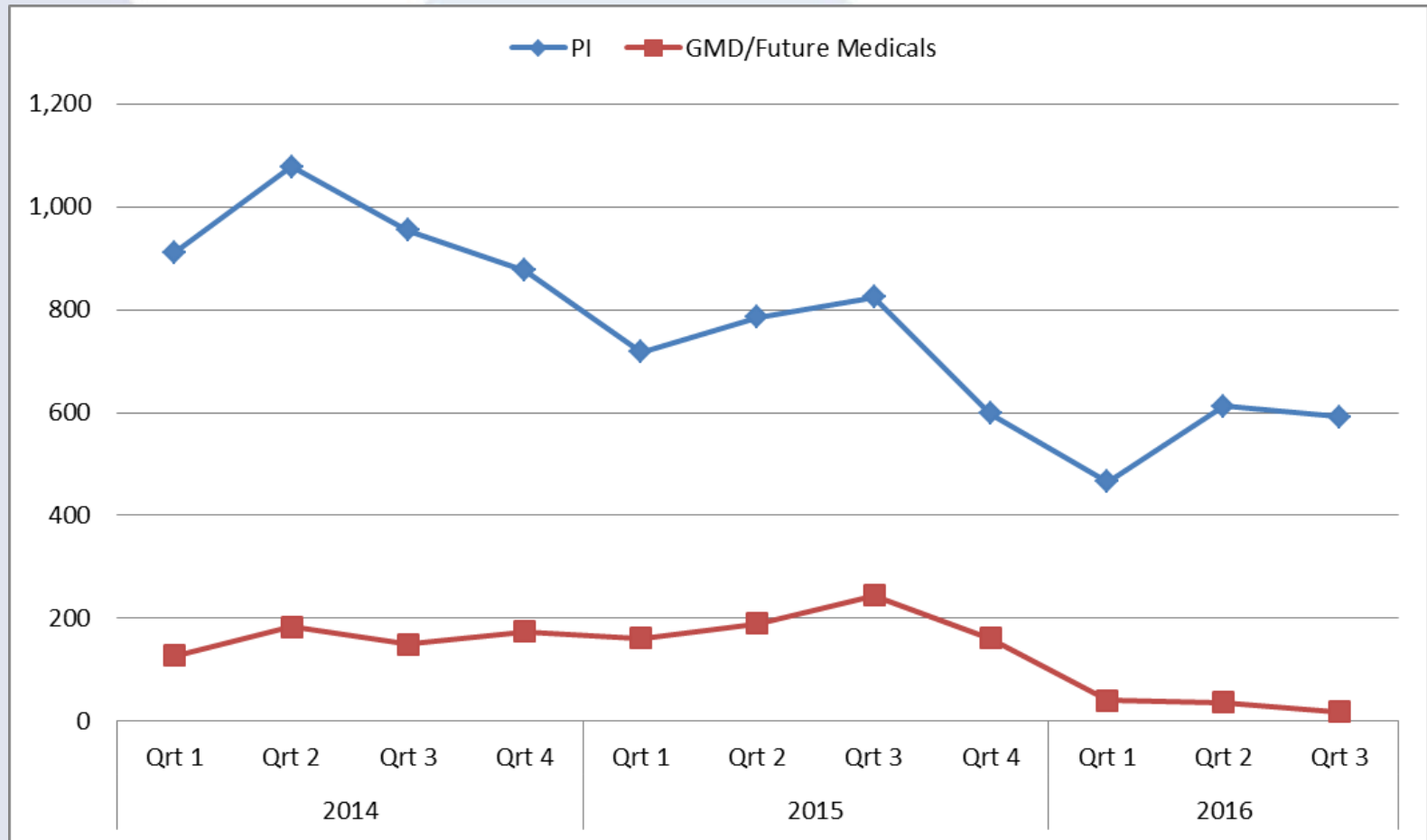


# Matters on hand



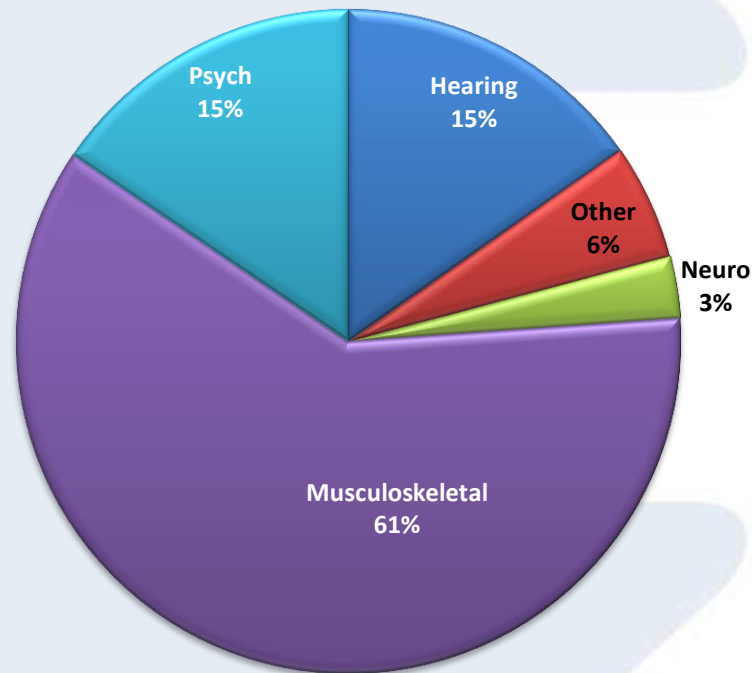


# Medical Assessment Certificates



# Medical assessment by type

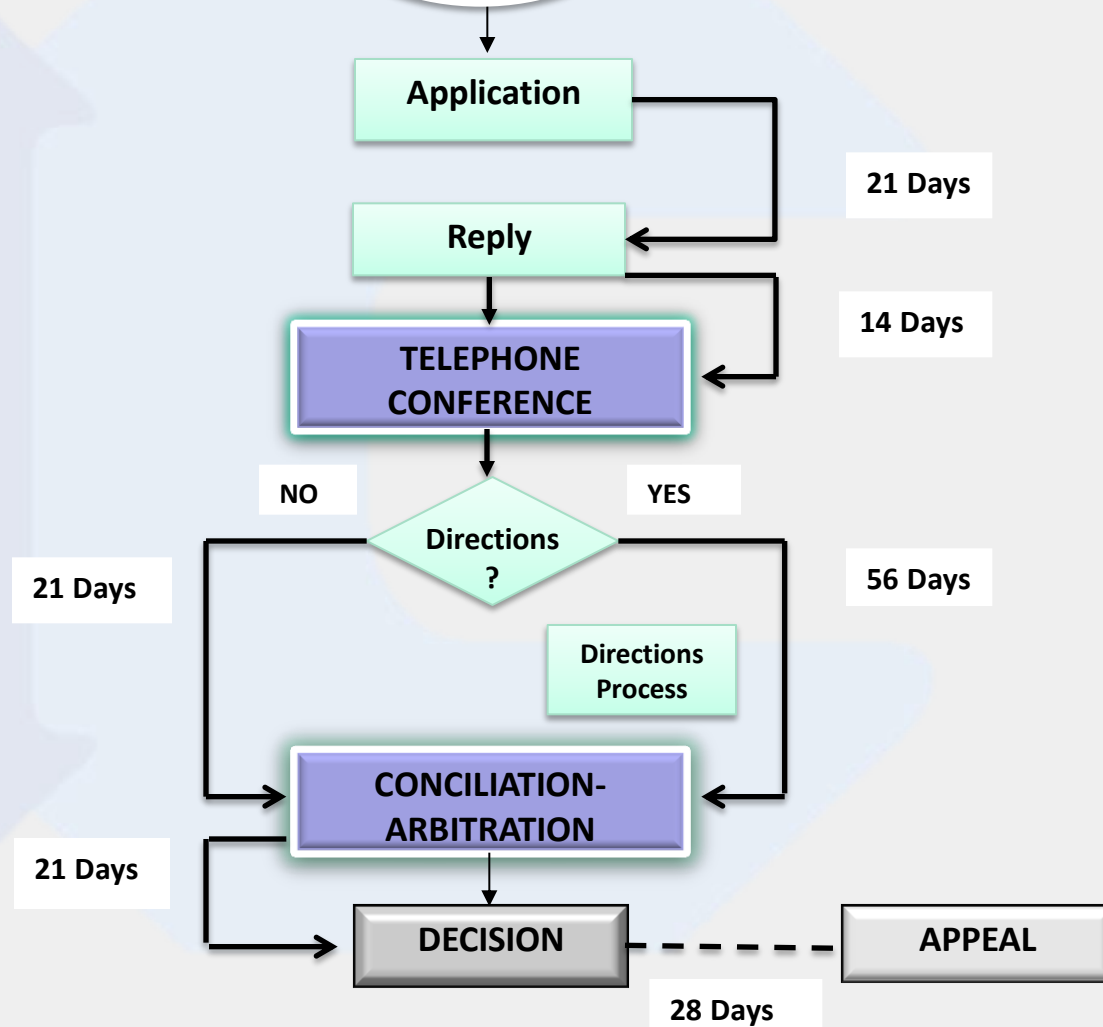
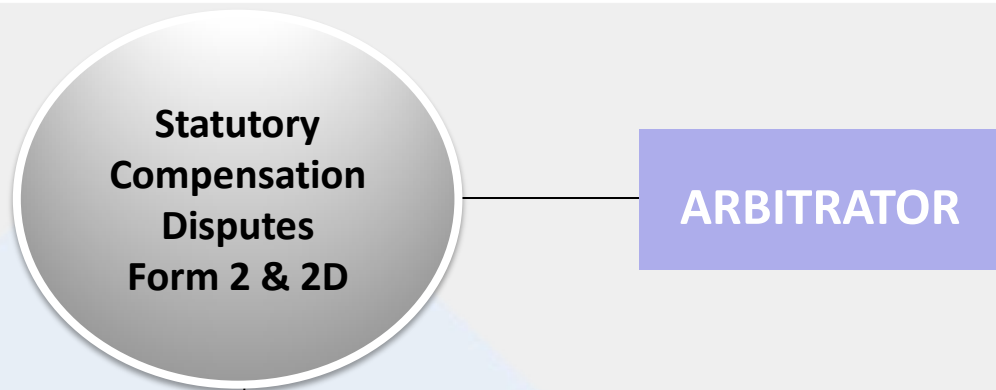
1 Oct 2015 to 30 Sep 2016



# Statutory compensation dispute types

## Referred to Arbitrator

- Liability issues
- Weekly compensation
- Medical expenses
- Domestic assistance
- Property damage
- Compensation for death of a worker



# Medical disputes

## **Referred to Approved Medical Specialist**

### Binding assessment

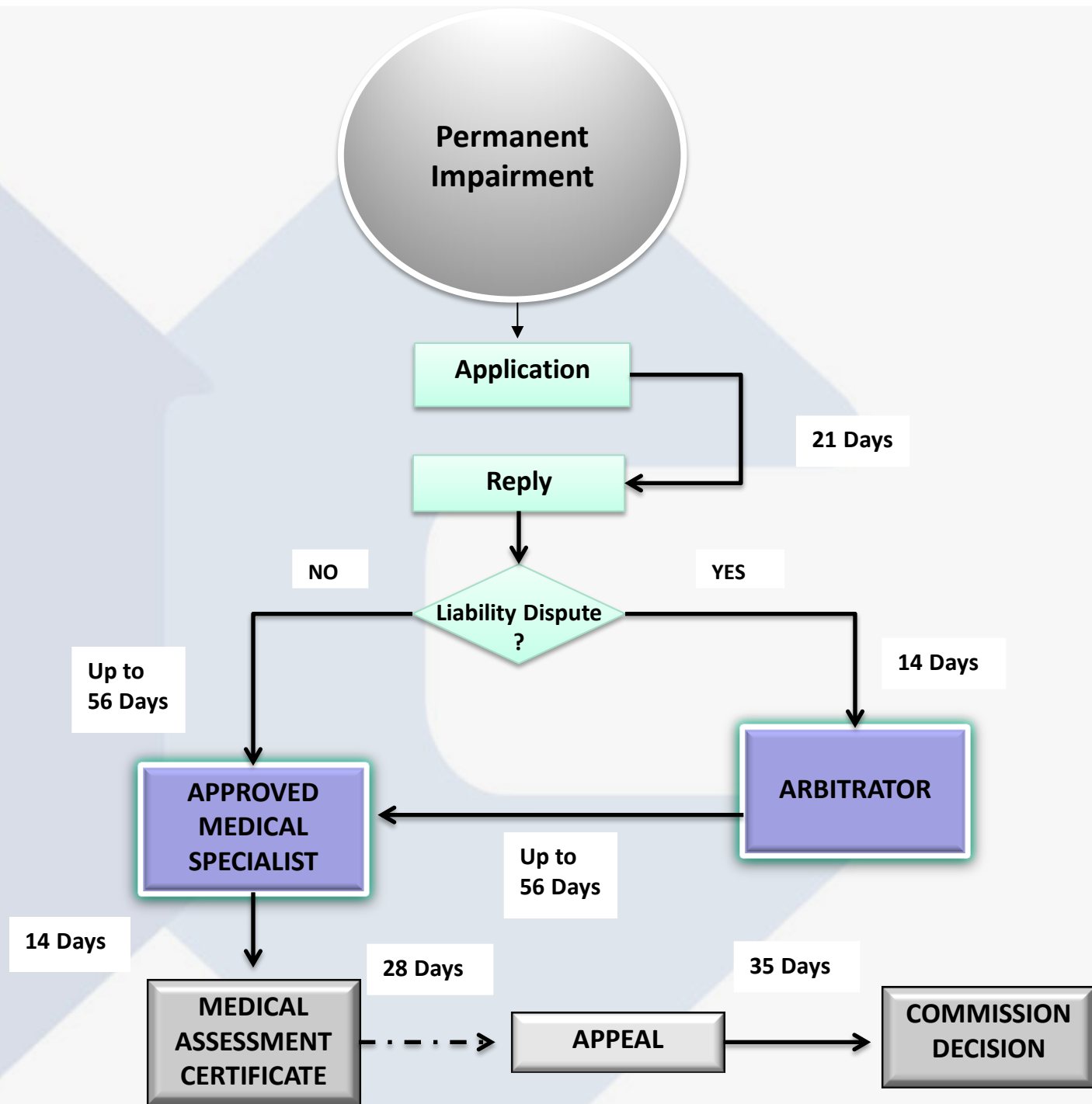
- Quantum of permanent impairment
  - whether permanent
  - whether fully ascertainable
  - degree of permanent impairment
  - proportion due to previous injury or pre-existing condition
  - nature and extent of hearing loss

# Medical disputes

## **Referred to Approved Medical Specialist**

### Non-binding opinion

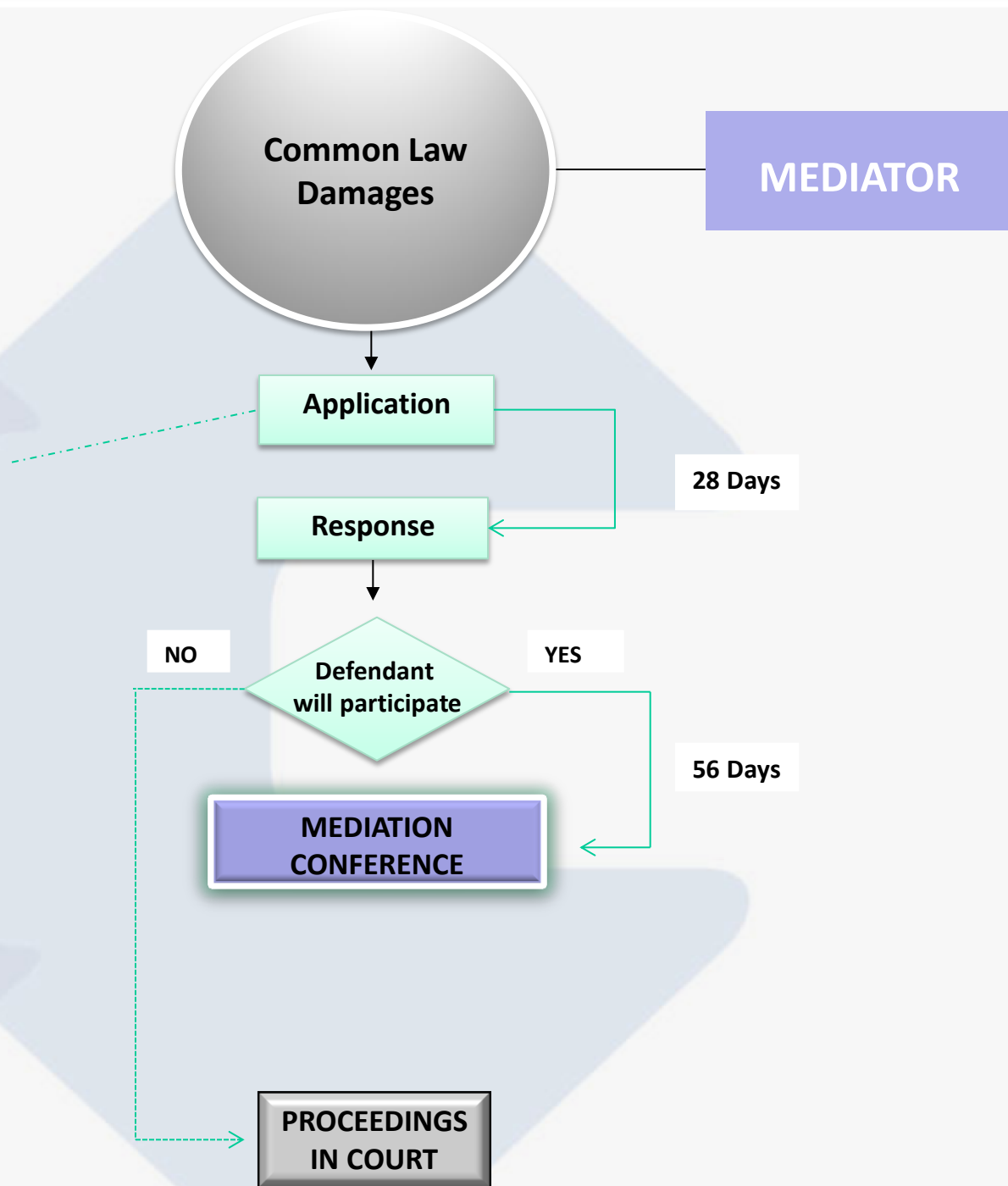
- Future medical treatment
- General medical issues
  - fitness for employment
  - aetiology of condition
  - prognosis



# Work Injury Damages Mediation

- Compulsory pre-court process in WCC
- Defendant must participate unless wholly disputes liability
- Mediator appointed from WCC Panel





# Questions?

# Mediation in the Commission – A Mediator's View

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# Resources

- *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)
- Registrar's Guideline for Standards of Conduct during Proceedings in the Workers Compensation Commission (February 2011)
- Registrar's Practice Guide for Work Injury Damages in the Workers Compensation Commission (September 2016)
- "Practical Ethics for Government Lawyers" (20 September 2013)
- *Aiton Aust P/L v Transfield P/L* [1999] NSWSC 996  
*Einstein J, Supreme Court NSW, 1 October 1999*

# WCC Mediation Process

- Mediators must use best endeavours to bring parties to agreement (s318B(1) of 1998 Act)
- Process model for mediation:
  - Introduction and explanation of process
  - Parties statements
  - Joint statement discussions
  - Private sessions, if required
  - Final joint session
- Where no agreement reached, Certificate of Final Offers issued (s318B(2) of 1998 Act)

# Mutual Expectations

- Encourage a fair, unbiased and informal process with the parties
- Identify issues, develop options, consider alternatives
- To maintain constructive, purposeful and open negotiation
- Strongly endeavour to reach agreed outcome to permanently resolve the claim

# Mutual Expectations

- Personal attendance by the parties
- Opportunity for negotiation
- Fulfills statutory objective

# Expectations of Parties

- The Registrar's Guideline for Standards of Conduct:
  - To adhere to the instructions of the client
  - To behave courteously and respectfully
  - Not to knowingly misrepresent facts
  - Not to engage in any element of abuse of process
  - Not to unnecessarily or unreasonably hinder or detract from earliest finalisation of a claim



# Preparation: A Key

- You can prepare by pre-mediation negotiation
- Use the statutory mediation process as the catalyst for this
- Time spent preparing for mediation mirrors much of the work involved in litigation
- Be ready to make a brief opening summary

# Preparation: A Key

- “Envision” a claimant’s profile and perspective
- Claimant’s preparation should include same consideration of insurer’s perspective
- Mutual empathy and respect

# The Value of Personal Attendance

- Mediation is not “negotiation in a vacuum”
- Provides a “feel” as to any potential litigation outcome
- Provides a mutual “reality check” for both sides
- Enhances permanent settlement prospects

# The Value of Personal Attendance

- Enhances goodwill
- Shows good faith and is respectful
- Likely first time that the parties have personally convened
- Likelihood of settlement rate is higher
- Quality of instruction improves and is more timely

# The Inherent Value of a Settlement

- “Three C’s” of mediation:
  - **Control**
  - **Confidentiality**
  - **Closure**

# The Inherent Value of a Settlement

- Insurer benefits :
  - additional option for dispute resolution
  - circumventing court delays
  - potential early settlement
  - closure of claims files
  - savings in claims-handling costs
  - Litigation and executive file management costs curtailed
  - Outcome certain

# The Inherent Value of a Settlement

- Settlement happens later anyway – about 70% of matters that do not settle at mediation will go on to settle but with “litigation trail” - cost/time/energy
- Recent WCC statistics:
  - Approximately 69% of matters have settled over a ten year period
  - The average duration is about 3.9 hours

# Some Tips, Traps and Reminders

- Each case must be treated on its own merits or removed from other influences external to the case at hand. To do otherwise engages the “trap” of a mediation not being engaged upon in “good faith”
- Note that the mediation between the worker and employer must still proceed in WCC unless the defendant declines participation on the basis of fully disputing liability (s318A(3) of 1998 Act)
- Experience indicates that many matters involving “third parties”, and where the third party has attended (not compelled to do so, but invited), have resulted in settlement, or much earlier closure



# Some Tips, Traps and Reminders

- As part of preparation, ensure that you have full, unfettered authority to settle within the dynamics of mediation negotiations
- Also, as part of preparation, where “authority” may need to be checked/affirmed, ensure that the designated officer keeps an “open mind” and remains readily available
- A distinct negative in these scenarios is that any non-attending officer has not been advantaged with personally witnessing the active dynamics and processes of negotiations in “live action” at the mediation

# Some Tips, Traps and Reminders

- Do not be shy about “energising” the mediation. Actively engage, or invite the Mediator to participate with you or to convene ongoing and continuing joint or private sessions
- If your client-insured wants to attend a mediation, that is distinctly encouraged. There are many claims where the employer may materially assist you as insurer at the mediation
- Equally, the employer readily at hand at the mediation may provide additional options or solutions for a settlement beyond the fiduciary considerations, which may be the keys to a resolution
- After all, a resolution embraces everybody, as equally, a non-settlement has implications for everybody

# Good Faith and Model Litigants

- All parties should have a genuine commitment to mediation if it is to have any chance of success
- The NSW courts and the NSW Government encourage adherence to a Model Litigant Policy
- It is strongly emphasised, as it relates to government agencies as litigants and to their representatives

# Good Faith and Model Litigants

- “Practical Ethics for Government Lawyers” (20 September 2013) contains the model litigant emphasis:
  - To resolve disputes with minimum delay
  - To not rely on “technical defences” where unjustified
  - To avoid litigation where possible and use all means of alternate dispute resolution
  - To not contest liability in a matter when clearly only issues of quantum or costs are in dispute

# Good Faith and Model Litigants

- There is an active obligation to negotiate or mediate in “good faith” which embraces an obligation to negotiate:
  - With an open mind
  - With a willingness to consider options for resolution that emerge
  - With a willing to give consideration to put forward real and constructive options
  - But is not “positional or pre-conceived” bargaining (*Aiton Aust P/L v Transfield P/L*)

# Good Faith and Model Litigants

- It is well for all parties to remember, insurers and claimants and representatives, that mediation not only engages the resources of the individual parties, but the resources and efforts of WCC itself – all in the interests of the earliest closure (to the benefit of the parties) of WID claims
- The insurer's trusteeship in their engagement within WCC mandated mediations, is a very important, valuable, and valued one

# Questions?

# Conciliation/Arbitration – an Arbitrator's view

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# Resources

- *Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act), Chapter 7, Part 9*
- *The Practice of the Conciliation/Arbitration Process in the Workers Compensation Commission*

<http://www.wcc.nsw.gov.au/Legal-Links-and-Tools/Rules-practice-directions-and-guidelines/Pages/Guidelines.aspx>

- *Model Litigant Policy for Civil Litigation*

<http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/model-litigant-policy.aspx>

# The telephone conference

The purpose of the telephone conference is:

- to explore resolution of the dispute (Rule 15.3 (d));
- to ensure parties understand the nature of the proceedings and to explain any aspect of the procedure for resolving the dispute (Rule 15.3 (a) & (b));
- if all issues in dispute are settled, to determine how the matter is to be finalised, and
- if all or some issues are not settled, to clearly identify the issues remaining in dispute and to ensure the matter is ready for the next phase.

# Before the telephone conference

- Review the settlement recommendations made
- Discuss the recommendations with the employer
- Make sure that a legible list of payments is available
- Provide instructions about how many weeks of compensation have been paid and about PIAWE

# Before the telephone conference

- Please try to attend
- If you can't, be available for the duration of the conference or ensure that someone who can give instructions is
- Ensure that the legal practitioner who will appear is sufficiently experienced

# At the telephone conference

- The telephone conference is intended to resolve some or all of the issues
- The issues are those in the s74 notice
- “Previously unnotified matters” may only be dealt with if it is in the interests of justice to so do (s289A(4) of the 1998 Act)

# At the telephone conference

The Arbitrator will assist the parties to narrow the dispute by identifying:

- the positions of the parties on the issues in dispute
- strengths and weaknesses
- barriers to agreement and ways to overcome them
- practical solutions

# At the telephone conference

If all of the issues are not resolved, the Arbitrator may

- hear submissions and give a decision at the telephone conference (or shortly after)
- make directions for submissions and determine the matter on the papers
- list the matter for conciliation/arbitration (at a location suitable to the worker)

# At the telephone conference

- The Arbitrator is obliged to conciliate
- Don't assume the matter will be listed for conciliation/arbitration
- If your instructions are “maintain the dispute” your representative will be asked to phone you



# Directions for Production

- Arbitrators have limited power to order directions for production – rule 13.4
- Seek the documents you need, to make a soundly based decision when determining liability
- Generally, a request for documents made after the ARD was filed is too late

# The conciliation/arbitration

- As with the teleconference, please attend the con/arb if possible
- If not, be available for the whole 3 hours
- Invite the employer

# The conciliation/arbitration

- The role of the Arbitrator is to facilitate settlement discussions
- The Arbitrator does not have jurisdiction without conciliation (s355 of the 1998 Act)
- Negotiation and conciliation are different

# The conciliation/arbitration

- Consider the preliminary comments made by the Arbitrator
- Carefully consider the advice you've been given
- Provide instructions promptly

# The conciliation/arbitration

- The Commission allocates adequate time to conciliate and arbitrate on the same day
- If the matter doesn't resolve, the Arbitrator will
  - identify the factual and legal issues resolved and those still in dispute
  - identify the evidence to be relied on
- Don't assume all late documents will be admitted

# The conciliation/arbitration

- Oral evidence is only allowed if the Arbitrator considers it is necessary to reach a decision
- Submissions are usually oral though may be written
- If the decision is oral, the reasons will be recorded and the orders given in writing
- A written decision will be sent ASAP, usually within 21 days

# Questions?

# When to come to the Commission?

## - Liability v Work Capacity Decisions

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# Weekly Compensation

## Entitling Provision

- If total or partial incapacity results from an injury, compensation shall include weekly payments during incapacity (s 33)

# Current Work Capacity – s 32A

## **No current work capacity**

- Means “present inability... worker is not able to return to work, either in... pre-injury employment or in suitable employment”

## **Current work capacity**

- Means “present inability... worker is not able to return to... pre-injury employment but is able to return to work in suitable employment”

# Entitlement Periods

## First Entitlement Period

- 1 – 13 weeks (s 36)
- Means aggregate period not exceeding 13 weeks (s 32A)
- “No current work capacity” or “current work capacity”

## Second Entitlement Period

- 14 – 130 weeks (s 37)
- Means aggregate of 117 weeks after expiry of first entitlement period (s 32A)
- “No current work capacity” or “current work capacity”

# Entitlement Periods

## ‘Third’ Entitlement Period

- After 130 weeks (s 38)
- A worker who is assessed by the insurer as:
  - Having “no current work capacity” and likely to continue indefinitely
  - Having “current work capacity”, RTW not less than 15 hrs. p/w and earning at least \$155 p/w and likely to continue indefinitely (s 38(3))
  - ‘Workers with high needs’ (>20%: s32A) and has current work capacity (s38(3A))
  - ‘Worker with high needs’ includes ‘worker with highest needs’ (s 32A)

# WCD - Legislative Definitions

## **Work capacity decision (s 43(1))**

- Decision about “current work capacity” (s43(1)(a))
- Other work capacity decisions contained in s 43(1)(b)-(e)
- Section 43(1)(f) – any other decision that affects entitlement to weekly payments on the basis of decision in (a)-(e)

## **Not work capacity decision (s 43(2))**

- Decision to dispute liability for weekly payments
- Decision that can be subject of a medical dispute (s 319)

# WCD – Commission Jurisdiction?

- Section 43(3)
- No jurisdiction to determine any dispute about a work capacity decision
- Cannot make decision inconsistent with a work capacity decision
- Jurisdiction not excluded for matters that could be the subject of a work capacity decision if there is no decision

# When to issue a s74 notice

- Injured person is not a worker
- Injury does not arise out of or in the course of employment
- Injury was on a journey with no real or substantial connection to employment
- Psychological injury caused wholly or predominately by reasonable actions of employer
- **Worker has fully recovered from the effects of the injury**

# Questions?



# Section 74 – Tips and Traps

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# Preliminary

- The Commission's main function is to resolve disputes between injured workers and employers/ insurers.
- Before a matter can be referred to the Commission, the insurer needs to have either:
  - disputed liability for the claim (wholly or in part), or
  - failed to determine the claim as and when required by the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) or,
  - In relation to a lump sum claim, made an offer of settlement to the worker as and when required by the 1998 Act and one month has elapsed since the offer was made

# Time to determine medical expenses claims

- An insurer has 21 days after a claim is made for medical expenses to determine the claim by accepting or disputing liability (s279 of the 1998 Act).
- However, an insurer can provisionally accept liability for medical expenses for up to \$7,500 or such other amount as may be specified by the Workers Compensation Guidelines (s280 of the 1998 Act)
- Provisional acceptance does not constitute an admission of liability (s280(2) of the 1998 Act).

# Time to determine lump sum claim

- an insurer must determine the claim within the later of either:
  - 1 month after the degree of permanent impairment first becomes fully ascertainable, as agreed by the parties or as determined by an AMS, or
  - within 2 months after the claimant has provided to the insurer all relevant particulars about the claim

(s281(2A) of the 1998 Act)

# Time to determine lump sums

- An insurer can seek relevant particulars within 2 weeks of having received the lump sum claim and this includes arranging a medical examination  
(ss 282(1) and 282(3) of the 1998 Act)

# Time to determine weeklies

- For weekly compensation, insurer must commence:
  - provisional weekly payments within 7 days of initial notification of the injury, unless the insurer has a “reasonable excuse” for not commencing payments: s 267(1) of the 1998 Act
  - “reasonable excuse” – see *Guidelines for claiming workers compensation*, page 11

# Time to determine weeklies

- The insurer has 21 days to determine a claim for weekly compensation (s 274 of the 1998 Act)
- Section 274(2) enables the insurer to accept liability on a provisional basis for up to 12 weeks
- Provisional acceptance extends the time that can be taken for the claim to be determined (s 274(3) of the 1998 Act)
- So, instead of having 21 days to determine a claim for weekly payments an insurer can take up to 12 weeks, provided it is paying weekly compensation on a provisional basis

# Notification of Dispute

- Matters must be previously notified as disputed before they can be referred to the Commission for determination (s289A of the 1998 Act)
- Insurers notify dispute by issuing a notice under s74 of the 1998 Act or s54 of the 1987 Act



# Section 74 notices

- Section 74 notice should contain:
  - a concise and readily understandable statement of the reasons the insurer disputes liability
  - the issues relevant to the decision
  - refer to the sections of the legislation on which the insurer relies to dispute liability
- A s 74 notice does not apply to a dispute based on a work capacity decision of an insurer under Division 2, Part 3 of the 1987 Act (s 74(6))

# Tips when issuing s74 notices

- Preparation of evidence
  - Use provisional liability sections
  - Gather evidence
  - Medical examinations
  - Consider what is the type of injury alleged

# Preparation of evidence

- Consider using the provisional liability provisions to give you time to properly investigate a claim and to make a soundly based decision
- Before making your decision, ensure you have obtained all the relevant evidence, including where applicable:
  - clinical notes
  - signed witness statements
  - an independent medical report
  - wage material from the employer

# Medical examinations

- If you are having the worker medically examined, send your doctor the evidence relied upon by the worker and the clinical notes (if relevant) as well as any previous Medical Assessment Certificates and Certificates of Determination

# Injury

- Consider if the worker's medical evidence supports an allegation of a personal injury or a disease injury, or a consequential condition
- If you are not sure, ask the worker (or his or her solicitor) because the questions you ask of your doctor and the investigations you make will differ for each type of claim

# Common Drafting Errors

- Drafting errors in s 74 notices often occur in relation to :
  - Sections 4 and 9A of the 1987 Act
  - Consequential conditions
  - Medical claims
  - Psychological injury defences under s 11A of the 1987 Act

# Sections 4 and 9A

- Once an injury has been admitted as having occurred, if subsequent information is received suggesting that the effects of that injury have ceased, then the dispute is not one arising under ss 4 or 9A
  - It is an error to state “your employment is no longer a substantial contributing factor to the injury”
  - Remember: s 9A is not applicable to a disease injury

# Consequential conditions

- If impairment of a body part is claimed as having arisen as a consequence of an injury, ss 4 and 9A of the 1987 Act are not relevant to dispute liability - the dispute relates to issues of causation: see *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463 and *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCPCPD 8
- It is an error for an insurer to allege that the notice and claim provisions have not been complied with in relation to a consequential condition, if those provisions have been met in relation to the injury



# Medical expenses

- Section 60 requires that the medical or related treatment is “reasonably necessary” “as a result of an injury”.
- The test of causation for treatment pursuant to s 60 is “as a result of” - see *Murphy v Allity Management Services Pty Ltd* [2015] NSWCCPD 49 at [57] – [58]. The test is not whether the injury is the main or substantial contributing factor to the need for treatment
- A useful discussion on the concept of “reasonably necessary” is set out in *Diab v NRMA Ltd* [2014] NSWCCPD 72

# Section 11A

- The insurer has the onus of proof to establish a s 11A defence
- It is only available if the injury was wholly or predominantly caused by “reasonable action” of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal or provision of employment benefits
  - specify from the list in s 11A what is being relied upon
  - Set out the relevant facts on which you rely

# Section 74 attachments

- An insurer must attach certain documents (s73 of the 1998 Act)
- Clause 41 of the Workers Compensation Regulation 2016 states these include:
  - medical reports
  - certificates of capacity
  - clinical notes
  - investigators' reports
  - rehabilitation reports
  - health service reports

# Section 74 attachments

- This applies to any report that is relevant to the claim to which the decision relates, whether or not the report supports the reasons for the decision

# Questions?

# Thresholds and the Medical Assessment Process

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# Permanent impairment assessments

- Critical to most awards of compensation
- Disputes about permanent impairment are one half of the Commission's jurisdiction
- 42% of disputes at the Commission involve an assessment of permanent impairment
- Permanent impairment linked to other forms of compensation

# Thresholds

## **Lump sum compensation (s 65, s 65A, s 66, s 67, Sch. 6 Pt 6 cl 9)**

- >10% WPI: all impairments (except exempt workers)
- 15% WPI: primary psychological injury

## **Domestic assistance (s 60AA)**

- 15% WPI



# Thresholds

## **Commutation of liability (s 87EA)**

- 15% WPI

## **Work injury damages (s 151H)**

- 15% WPI

# Thresholds

## **Weekly compensation (s 32A, s 38, s 39)**

- >30% WPI: worker with highest needs
- >20% WPI: worker with high needs
- >20% WPI: compensation after 5 years

## **Medical expenses (s 59A)**

- 10% WPI or less: up to 2 years compensation
- >10%-20% WPI: up to 5 years compensation
- >20% WPI: compensation after 5 years

# Permanent impairment disputes

## Section 319:

**"medical dispute"** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:

- (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
- (b) the worker's fitness for employment,
- (c) the degree of permanent impairment of the worker as a result of an injury,
- (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,
- (e) the nature and extent of loss of hearing suffered by a worker,
- (f) whether impairment is permanent,
- (g) whether the degree of permanent impairment of the injured worker is fully ascertainable.

# Permanent impairment disputes

## Section 319:

**"medical dispute"** means a dispute between a claimant and the person on whom a claim is made about any of the following matters or a question about any of the following matters in connection with a claim:

- (a) the worker's condition (including the worker's prognosis, the aetiology of the condition, and the treatment proposed or provided),
- (b) the worker's fitness for employment,
- (c) the degree of permanent impairment of the worker as a result of an injury,**
- (d) whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality, and the extent of that proportion,**
- (e) the nature and extent of loss of hearing suffered by a worker,**
- (f) whether impairment is permanent,**
- (g) whether the degree of permanent impairment of the injured worker is fully ascertainable.**

# Referral of permanent impairment

Section 321 of the 1998 Act – in practical terms:

- **(1)** – there are 3 bodies that can refer a dispute – a Court, the Commission, or the Registrar, depending on the type of dispute.
- **(2)** – the parties may agree on an AMS, or the Registrar may choose (usually the latter).

# Referral of permanent impairment

Section 321 of the 1998 Act – in practical terms:

- **(3)** – limits on referral powers – an arbitrator cannot refer an assessment of WPI – it must be ‘remitted’.
- **(4)** – limits on referral – matters cannot be referred where liability is in dispute.

# Drafting the referral

- Referrals are drafted by Commission staff
  - Where matters have been before an arbitrator, the referral will reflect the orders made
  - Where a matter proceeds straight to an AMS, the referral will be based on the Form and the medical evidence provided by both parties
- A draft copy will be sent to the legal representatives – objections within 3 days

# Attending the medical assessment

- The appointment will be arranged close to where the worker lives
- The insurer must meet the reasonable costs of the worker attending a medical examination, including wages, travel and accommodation
- Where the worker is unable to travel unescorted, this extends to costs for the worker's escort



# The medical assessment

**Section 324 of the 1998 Act** – the AMS may:

- a) consult with any medical practitioner or other health care professional who is treating or has treated the worker, and
- b) call for the production of such medical records (including X-rays and the results of other tests) and other information as the approved medical specialist considers necessary or desirable for the purposes of assessing a medical dispute referred to him or her, and
- c) require the worker to submit himself or herself for examination by the approved medical specialist.

# AMS powers

- Require the worker to submit for an examination
  - In practice, all but very unusual matters involve a medical examination
  - The consequence of a failure to attend is the potential to suspend payments
- Call for the production of documents
  - Where necessary to assess the worker

# The medical examination

- The AMS assesses the worker “in accordance with” the workers compensation guidelines
  - 4<sup>th</sup> edition
  - AMA 5
  - Means “in conformity with and not otherwise”
- A worker is entitled to bring a support person, but that person must behave appropriately
- Where required, the Commission will arrange an interpreter

# Medical Assessment Certificate

## **Section 325 of the 1998 Act requirements:**

- Matters referred for assessment
- Assessment with respect to those matters
- Reasons for assessment
- Facts on which the assessment is based

**The above is a “statutory obligation to give reasons”**

# The status of a MAC

## **Permanent impairment MAC:**

- Conclusively presumed to be correct and binding on the parties
- Is the basis of an award made by the Commission for lump sum compensation

# Medical Appeals

## **What is appealable?**

- Only matters “conclusively presumed to be correct” – that is assessments of WPI

## **Important sections**

- Section 327 – grounds of appeal, time limits, role of gatekeeper
- Section 328 – procedure on appeal and powers of an Appeal Panel

# The grounds for appeal

**Section 327(3)** – four grounds for appeal:

- a) Deterioration
- b) Additional relevant information
- c) Incorrect criteria
- d) Demonstrable error

# Limitations

## **General:**

- You cannot appeal a general medical dispute
- You cannot appeal where a Certificate of Determination has been issued

## **Time:**

- Appeals on “error” grounds (c) and (d) must be made within 28 days



# Medical Appeal procedure

## **Form 10 – appeal against a MAC**

- Notice of opposition within 21 days

## **Gatekeeper decision:**

- One of the grounds of appeal must be “made out”
- Gatekeeper will also consider whether special circumstances justify an increase in the appeal period, where required

# Gatekeeper decision

## Possible outcomes:

- Grounds of appeal made out – appeal proceeds to an Appeal Panel
- Grounds of appeal not made out – appeal not to proceed
- Matter referred for further assessment or reconsideration (s 329)

# The Appeal Panel

## **Powers and procedure in section 328:**

- Constituted by 1 Arbitrator and 2 AMSs
- AMSs will have the requisite training and experience in the body part/s being assessed
- Arbitrators contribute legal and procedural knowledge, AMSs medical

# Procedure on Appeal

## **Preliminary review:**

- All matters have a preliminary review – this involves consideration of the files and submissions and a telephone discussion

## **Possible outcomes:**

- Decision “on the papers”
- Re-examination by an AMS
- Oral hearing
- Call for production of documents
- Call for further submissions

# Questions?