

# Workers Compensation Seminars

November 2015

# Workers Compensation Seminar - 2015

9:00-9:45 Practice and Procedure – Part 1

9:45-10:30 Practice and Procedure – Part 2

10:30-11:00 *Morning tea*

11:00-11:30 Arbitral Appeals

11:30-12:00 Medical Appeals

12:00 *Close*

# PRACTICE AND PROCEDURE

## Part 1

# Overview

- Our People
- Practice and Procedure
  - Lodgments
  - Matters on Hand
  - Forms Update
  - Supporting Documents
  - Late Documents
  - Witness Statements
  - Worker Statement
  - New Rules
  - Support
- Workers Compensation Amendment Act 2015
- Future Directions

# Our People

## **Presidential Members: 4**

- President, Deputy Presidents, Acting Deputy President

## **Arbitrators: 23**

- Permanent
- Sessional

## **Approved Medical Specialists: 149**

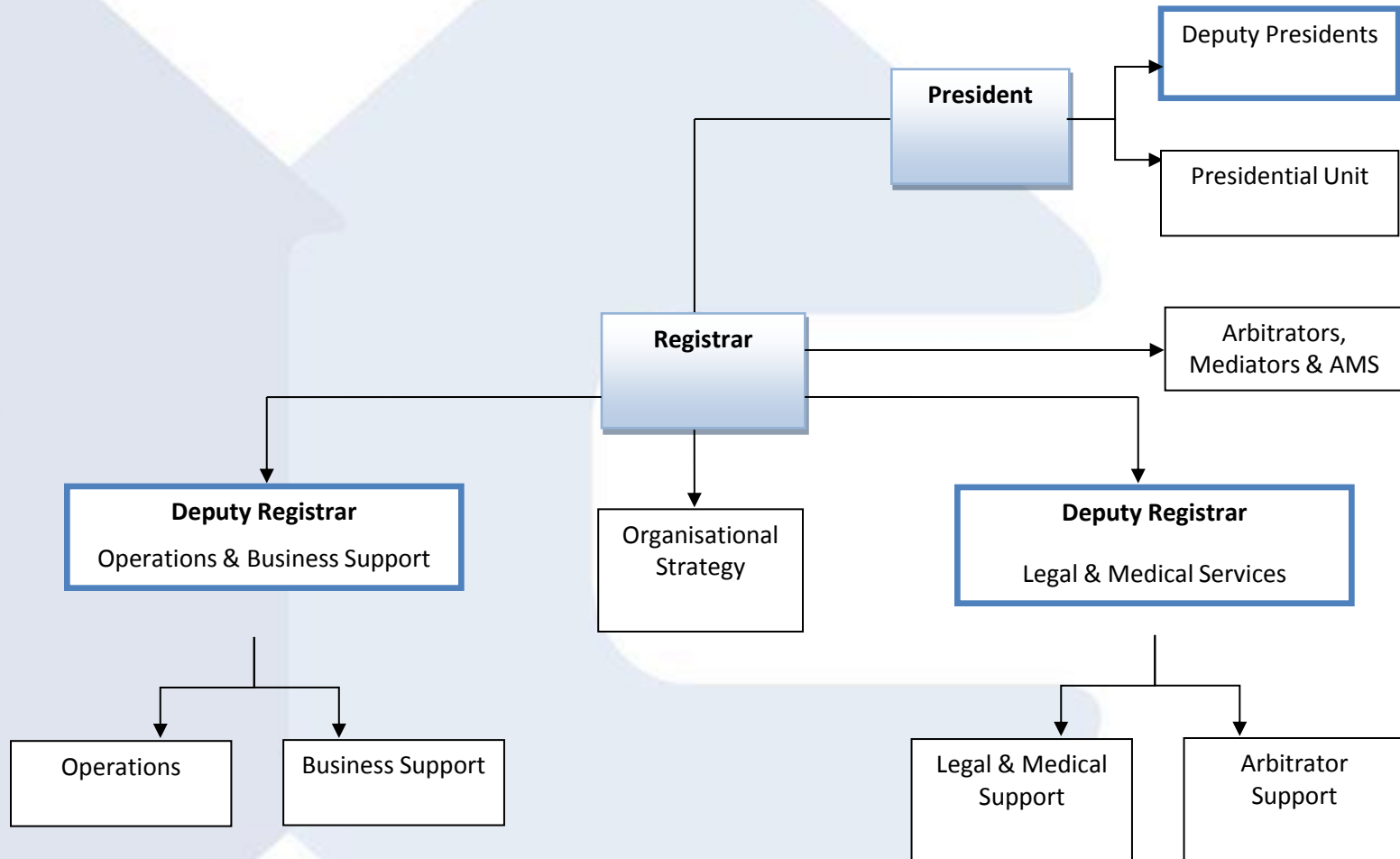
- General medical disputes
- Permanent impairment assessments

## **Mediators: 27**

- Sessional

## **Staff: 69**

# Our People



# Our People

## **Arbitrator recruitment**

- Completed 30/06/15
- Reduced by one-fifth
- 3 Senior Arbitrators; 6 in-house Arbitrators; 13 sessional Arbitrators
- 2 new appointments

## **AMS recruitment**

- Completed 26/10/15
- No reduction
- 149 appointments; 31 new appointments

# Our People

## Staff

- Organisational realignment
- Reduced by one-third
- Stage 2 of organisational realignment



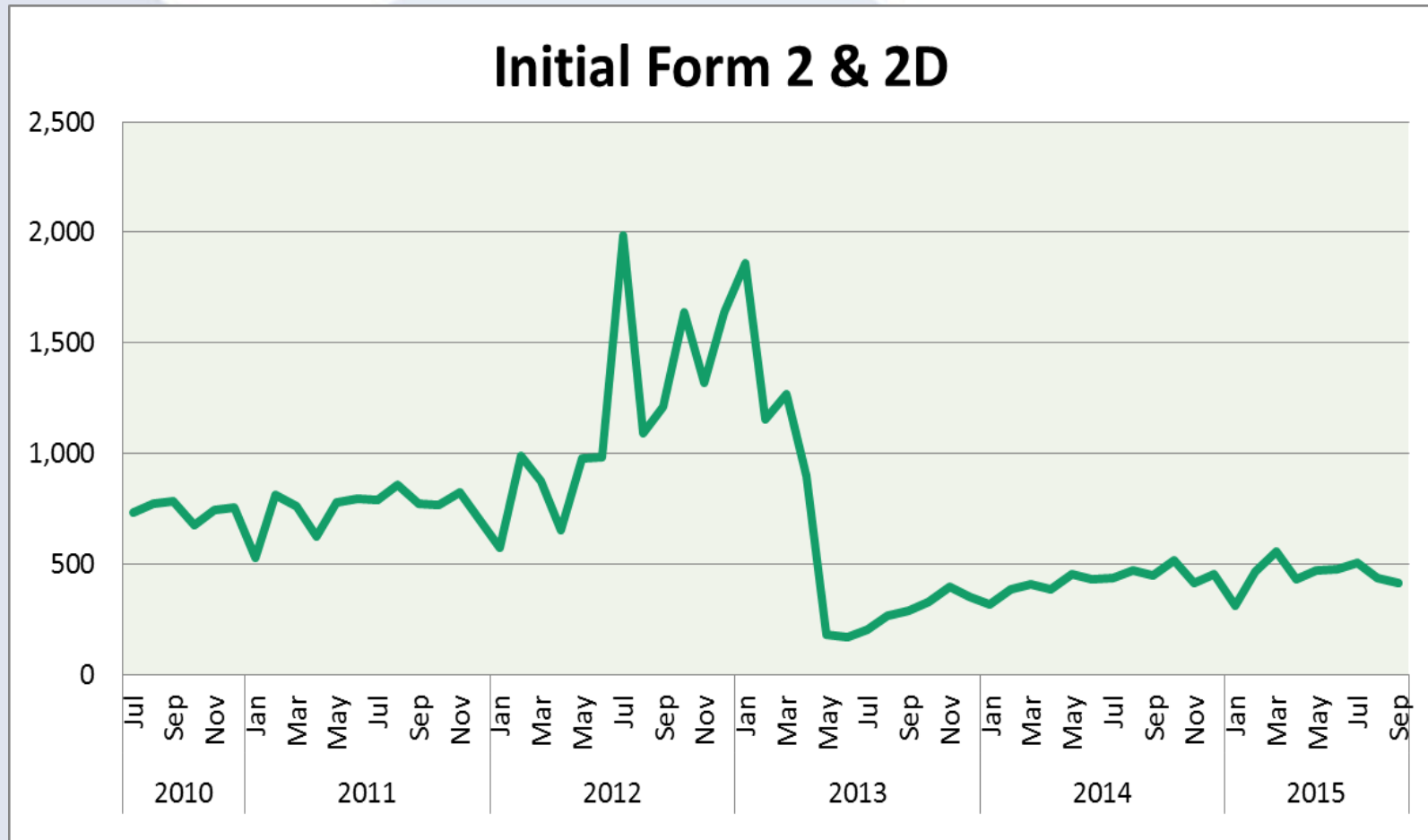
# Practice and Procedure

## *Lodgments*

<b>Application to Resolve a Dispute (Form 2)</b>	<b>2011</b>	<b>2012</b>	<b>2013</b>	<b>2014</b>	<b>2015</b> (to 30/09/15)
New	9,225	14,164	7,702	5,644	4,290

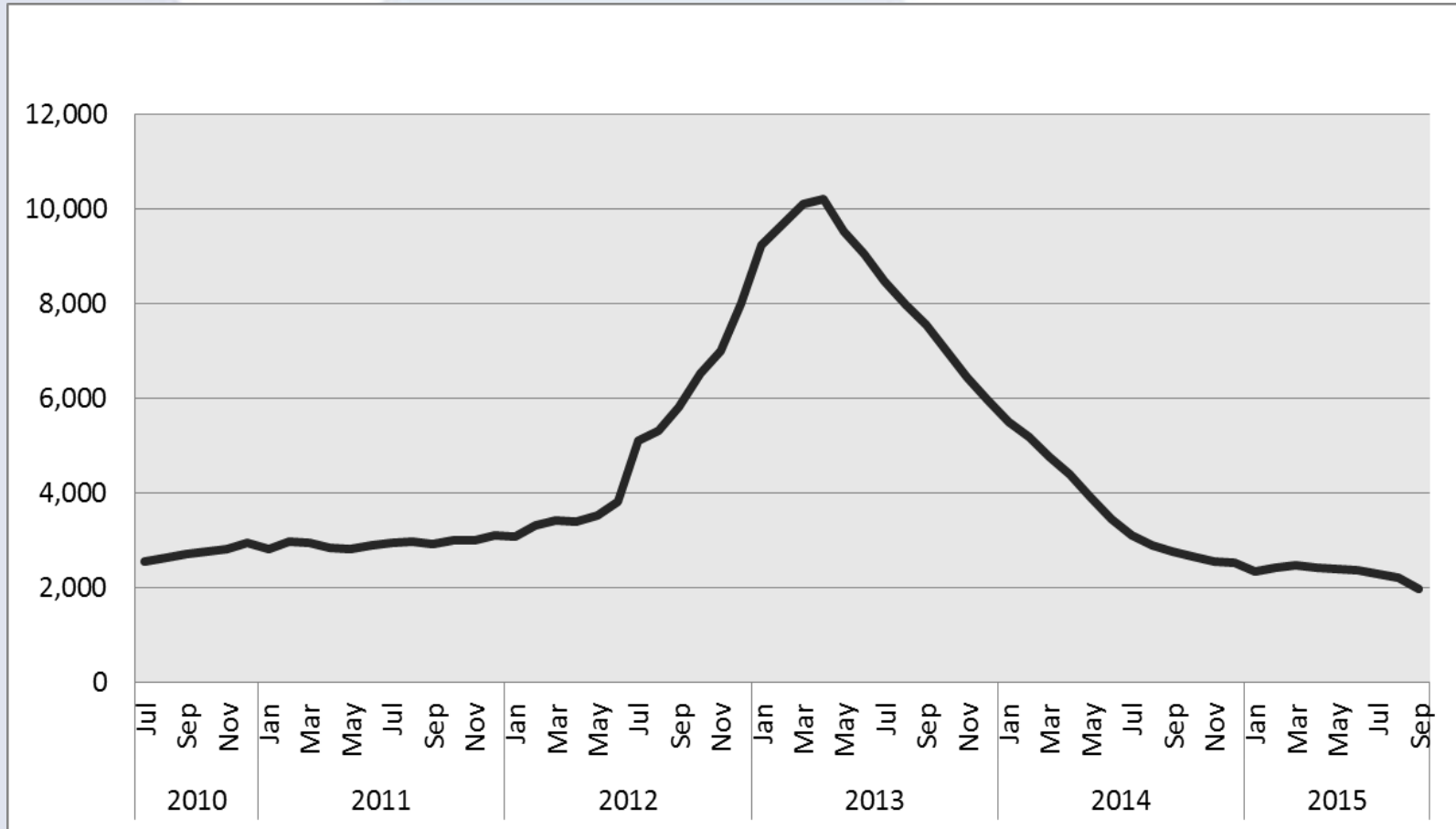
# Practice and Procedure

## *Lodgments*



# Practice and Procedure

## *Matters On Hand*



# Practice and Procedure

## *Forms Update*

### **Form 18 – Wages Schedule**

- Updated schedule of earnings to reflect 2012 legislative amendments

### **Form 1 – Application for Expedited Assessment**

- New schedule of earnings (Part 6.3)

### **Form 2 – Application to Resolve a Dispute**

- New schedule of earnings (Part 5.2)
- Separation of past and future medical expenses (Part 5.3)
- Pre-filled requirement for inclusion of worker statement (Part 6.2)

### **Form 2A – Reply to Application to Resolve a Dispute**

- New schedule of earnings (Part 4)

# Practice and Procedure

## *Supporting Documents (Form 2)*

### **Part 6.1**

- Forensic medical reports and treating doctor reports by
  - doctor, and
  - chronological order

### **Part 6.2**

- Other documents by
  - sub-group, and
  - chronological order within sub-group

# Practice and Procedure

## *Supporting Documents (Form 2)*

### **Part 6.2 – Sub-groups**

- (a) Claim form(s)
- (b) Worker's statement(s)
- (c) Witness statements
- (d) Factual investigation report(s)
- (e) Notice of claim
- (f) Dispute notice(s)
- (g) Relevant correspondence
- (h) Medical certificates
- (i) Clinical notes
- (j) Financial records

# Practice and Procedure

## *Supporting Documents (Form 2)*

### General requirements

- Clear copies
- Avoid multiple copies
- Do not include with Reply if attached to ARD

# Practice and Procedure

## *Late Documents*

### **2013 Form 2 Applications (7,702)**

- 66% subject to late documents applications
- 20,833 late documents applications

### **2014 Form 2 Applications (5,644)**

- 56% subject to late documents applications
- 14,121 late documents applications

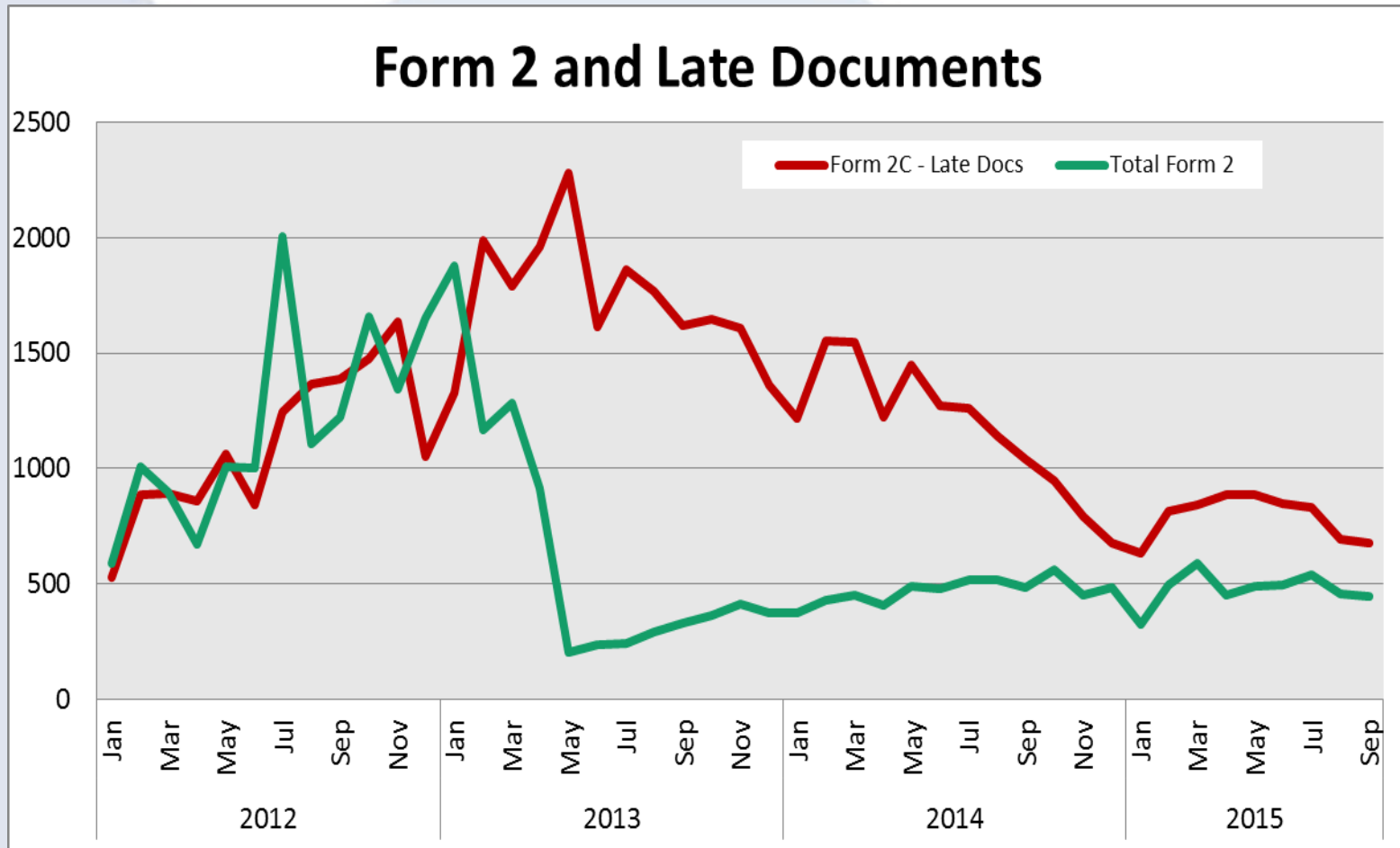
### **2015 Form 2 Applications (4,290 to 30/09/15)**

- 49% subject to late documents applications
- 7,111 late documents applications



# Practice and Procedure

## *Late Documents*



# Practice and Procedure

## *Late Documents*

Document Type	% of Late Apps
Medico-Legal Reports	25%
Clinical Records	15%
Other – e.g. payment records, surveillance	12%
Statements	11%
General Correspondence	10%
Late Reply	8%
Wages Schedule/Payslips/Tax records	7%
Medical Certificates	6%
Misc Documents from DFPs	6%

# Practice and Procedure

## *Witness Statements*

- Rule 14.2
- Worker's statement generally required
- Applications regularly contain inadequate or no statements

# Practice and Procedure

## *Worker Statement*

Include the following matters (as relevant):

- Prior work history
- Prior injury history
- Names of medical practitioners
- Periods of incapacity
- Current address
- Names and dates of birth of dependants
- A full description of how each injury occurred
- A description of the physical effects of each injury
- Details of any attempt at light work or alternative duties post injury

# Practice and Procedure

## *Worker Statement*

- Details of all unsuccessful attempts to find suitable work
- Details of any physical restrictions
- Details of the type of suitable duties the worker is fit for
- Details of the availability of suitable work
- Details of the earnings available in suitable employment
- Details of any witnesses to the accident/accidents
- Details of reports of injury
- Details of the compensation claimed including the amount claimed and the relevant periods
- Details of the earnings of comparable employees

# Practice and Procedure

## *New Rules*

### **Worker statement**

- Amend Rule 10.3 to require a worker to lodge a witness statement at time of commencing proceedings

### **Schedule of weekly payments**

- Amend Rule 10.3 to require a schedule of all amounts and periods of weekly compensation

# Practice and Procedure

## *New Rules*

### **Direction for production**

- Amend Rule 13.4 to limit direction for production on treating doctor only where either failure to comply with request or special reasons for not requesting

### **Late documents**

- Amend Rule 10.3 to require a party to serve late documents as soon as practicable but one occasion to lodge with Commission at least 5 working days prior to medical, t/c, con/arb
- Further occasion with leave only

# Practice and Procedure

## *New Rules*

### **Expedited assessment disputes**

- Amend Rules 9.2 and 9.7 to allow lodgment of Reply at least 3 working days before t/c

### **Guidelines**

- Amend Rules by deleting WorkCover Guidelines and referring instead to Workers Compensation Guidelines



# Practice and Procedure

## *New Rules*

### **SIRA**

- Amend Rule 1.4 by replacing WorkCover NSW with State Insurance Regulation Authority (SIRA)

### **Address for service on SIRA**

- Amend Rule 8.2 to update address for service on SIRA

# Practice and Procedure

## *User Group*

### Legal Profession Representatives

Shane Butcher, Law Partners

[shane.butcher@lawpartners.com.au](mailto:shane.butcher@lawpartners.com.au)

Ros Everett, Everett Evans

[ros.everett@everettevans.com](mailto:ros.everett@everettevans.com)

Steve Harris, Moray & Agnew

[sharris@moray.com.au](mailto:sharris@moray.com.au)

Andrew Mulcahy, Mulcahy Lawyers

[mulcahy@atlaw.com.au](mailto:mulcahy@atlaw.com.au)

Elizabeth Wood, Henry Parkes Chambers

[wood.eg@bigpond.com](mailto:wood.eg@bigpond.com)

# Practice and Procedure

## *Publications*

- Decisions
- On Appeal
- On Review
- e-Bulletins

# 2015 Amendments

## *Workers Compensation Amendment Act 2015*

### **Transitional provisions**

- Part 19I, Schedule 6, 1987 Act
- Part 3, Schedule 8, 2010 Regulation

### **Lump sum compensation (s 66)**

- Increase maximum compensation from \$220,000 to \$577,050
- Increase increments
- Annual indexation on 01/07
- Commenced 16/10/15 (cl 13, Pt 19I, 1987 Act)
- Applies to injuries on or after 05/08/15 (cl 35, Sch 8, 2010 Reg)

# 2015 Amendments

## ***Workers Compensation Amendment Act 2015***

### **Death benefits (s 25; s 26)**

- Lump sum increased from \$425,000 to \$750,000
- Funeral expenses increased from \$9,000 to \$15,000
- Commenced on 16/10/15 but retrospective operation
- Applies to deaths on or after 05/08/15 (cl 5, Pt 19I, Sch 6)

### **Weekly compensation (s 32A, s 38, s 38A, s 43, s 44, s 44BA-BF)**

- Worker with highest needs (>30%) – not yet commenced
- Worker with high needs (>20%) – not yet commenced
- Review of work capacity decision stays decision – not yet commenced

# 2015 Amendments

## *Workers Compensation Amendment Act 2015*

### **Weekly compensation after retiring age (s 52)**

- Extends weekly compensation to one year after reaching retiring age
- Commenced 16/10/15; claims from 01/10/12 (cl 10, Pt 19I, Sch 6; cl 32, Sch 8, 2010 Reg)

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

- Minor amendments – commenced 21/08/15
- Major amendments (below) – not yet commenced
- 10% or less: up to 2 years
- >10%-20% : up to 5 years
- >20% : unlimited
- Exclusion of artificial aids; consequential surgery (w/in 2 yrs.)

# 2015 Amendments

## *Workers Compensation Amendment Act 2015*

### **Future medical expenses (s 60(5))**

- Procedural change
- Removal of mandatory two-step dispute resolution
- Referral to AMS optional
- Commenced 16/10/15

# Future Direction

## *Challenges*

- Relevance of documents lodged with ARD and Reply
- Making t/c first genuine attempt to resolve dispute
- Greater involvement of solicitor with carriage of matter
- Attendance of solicitors, insurers and employers at con/arb
- Readiness to proceed
- Reducing late documents
- Keeping up to date with the law



# PRACTICE AND PROCEDURE – PART 2

# Overview

- Adjournments
- Directions for Production
- Suitable Employment
- Permanent Impairment
- Seriously Injured Worker

# Adjournments

- See the Commission's *Guideline for the Practice of the Conciliation/ Arbitration Process*
- Telephone conference 35 days after the registration of the ARD
- Conciliation/arbitration about 21 days after teleconference (or 56 days if Directions for Production are to issue)
- The timing of the conciliation/arbitration will be discussed at the teleconference
- The Applicant should consider these time frames when filing

# Adjournments

- Discretion to adjourn a conference or hearing
- Exercised in the context of the objectives of the Commission - s367 of the 1998 Act
- Practice Direction 2 sets out the practice and procedure for requesting an adjournment
- Guiding principle - is a party likely to suffer injustice if adjournment is not granted?

# Adjournments

Relevant factors include:

- The need for parties to present their case at the time scheduled for hearing, including complying with the Rules about the filing of material
- The period of the adjournment sought
- Prejudice – from granting or refusing an adjournment
- The Commission's resources should be used efficiently
- The Commission's objectives to ensure a fair and cost effective system and to provide a timely service

# Adjournments

Some relevant authorities:

- *Dapto Leagues Club Ltd v O'Brien* [2006] NSWWCCPD 89
- *Rinker Group Limited v Mackell* [2008] NSWWCCPD 100
- *Rinker Group Limited v Mackell* [2009] NSWWCCPD 97
- *Fire and Rescue NSW v S* [2015] NSWWCCPD 50
- *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27

# Directions for Production

- Section 357(1) of the 1998 Act
- Subject to the Rules - s357(7)
- Rule 13.4(1) - *discretion* to grant or refuse leave at a telephone conference and not later unless a special case and necessary to avoid injustice
- Rule 13.4(2) - no direction if the requesting party was entitled to the documents under an obligation in the legislation or guidelines
- Practice Direction 7 - discretion exercised in the context of the Commission's objectives

# Directions for Production

Factors to be considered include:

- Does the other party oppose the direction being issued?
- What earlier attempts were made to obtain the documents (including notices for production)?
- Does the request have a legitimate forensic purpose or is it fishing?
- Do the documents have apparent relevance and is it “on the cards” they materially assist the case?
- Are the documents likely to assist resolution of the dispute?



# Directions for Production

- Leave of the President is required for a direction to be served outside of NSW: s57 *Service and Execution of Process Act* (Cth)
- Can only be granted if production is necessary for the interests of justice
- Recipient must have time to make application for relief from the direction
- Arbitrator will order issuing of direction for production however reasons must also be made with application to President

# Directions for Production

Relevant authorities include:

- *ICAP Australia Pty Ltd v BGC Partners (Australia) Pty Ltd* [2009] NSWCA 307
- *Campaign Master (UK) Limited v Forty Two International Pty Ltd* (No 4) [2010] FCA 398
- *Attorney General for New South Wales v Dylan Chidgey* [2008] NSWCCA 65
- *Toll Pty Ltd v Morrissey* [2007] NSWSC 221
- *Symbion Health Limited v Thomas* [2010] NSWSC 16

# Suitable Employment

- Claims for weekly payments of compensation are determined by Commission if injury, substantial/main contributing factor or incapacity are in issue subject to a work capacity decision not having been made
- Key to determining if worker has current work capacity and entitlement to weekly benefits

# Suitable Employment

- Defined in s32A as employment in work for which the worker is currently suited:
  - (a) having regard to:
    - (i) the nature of the worker's incapacity and the details provided in medical information including, ..., any certificate of capacity ... (under section 44B), and
    - (ii) the worker's age, education, skills and work experience, and
    - (iii) any ... document prepared as part of the return to work planning process, including an injury management plan ..., and
    - (iv) any occupational rehabilitation services ..., provided to or for the worker, and
    - (v) such other matters as the Workers Compensation Guidelines may specify, and

# Suitable Employment

(b) regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence.

# Suitable Employment

- To make an award the Commission must have evidence which deals with whether or not there are real jobs which a worker could perform and the likely wage rates
- Whether jobs are actually available in the worker's labour market has not been relevant since 2012

# Suitable Employment

Relevant authorities:

- *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55
- *Hume v CSR Ltd* [2015] NSWCCPD 7
- *Cronje v Leighton Contractors Pty Ltd* [2015] NSWCCPD 16

# Permanent Impairment

## *Potential for conflicting findings by Arbitrator and AMS*

- *Dealt with in Jaffarie v Quality Castings Pty Ltd [2014] NSWCCPD 79. Set aside by Court of Appeal in Jaffarie v Quality Castings Pty Ltd [2015]NSWCA 335 but on different issue.*
- Use the reconsideration power (s 350(3) of the 1998 Act) where further evidence (a MAC) became available after the original arbitral decision [267] or
- Determine any injury issues, refer to an AMS to deal with whole person impairment, defer decision on weekly compensation and s60s until a MAC is available [269].



# Permanent Impairment

*Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250

- If compensation under s66 was claimed before 19 June 2012 and the claim resolved, s66(1A) now prevents a worker from making a further claim for compensation under s66
- The Commission's power to award further compensation under s 66A(3)(c) is limited to the situation where the claim for further compensation is made before 19 June 2012
- Before making a claim, investigate the likelihood of deterioration or other body parts/systems being affected

# Permanent Impairment

## *Workers Compensation Amendment (Lump Sum Compensation Claims) Regulation 2015*

One further lump sum claim:

- If lump sum claim made before 19/06/12, injured worker can make further claim if condition deteriorated
- No time limitation and no restriction on minimum increase
- Commenced 13/11/15
- Estimated 6,000 claimants may be eligible

Commission proceedings:

- If discontinued or dismissed, may restore by letter or new proceedings
- If decisions, may seek reconsideration or new proceedings

# Permanent Impairment

Recent Arbitral decisions:

- *Tokich v Tokich Holdings Pty Limited* [ 2015] NSWWC 244
- *O'Callaghan v Energy World Corporation Ltd* [2015] NSWWC 261
- *Iredale v State of NSW* [2015] NSWWC 273
- *Nixon v Lyndhurst Rural Services Pty Limited* [2015] NSWWC 276

# Seriously Injured Worker

Defined in s32A :

“..a worker whose injury has resulted in permanent impairment and:

(a) the degree of permanent impairment has been assessed ... to be more than 30%, or

(b) an assessment of the degree of permanent impairment ... has not been made because an approved medical specialist has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable, or

...

(c) the insurer is satisfied that the degree of permanent impairment is likely to be more than 30%.”

# Seriously Injured Worker

- Permanent impairment from separate injuries cannot be aggregated to determine if worker exceeds threshold
  - *Merchant v Shoalhaven City Council* [2015] NSWCCPD 13
  - *Trustees of the Roman Catholic Church of the Diocese of Parramatta v Barnes* [2015] NSWCCPD 35
  - *Davison v State of New South Wales* [2015] NSWCCPD 47
- For pre-2002 injuries, an AMS must assess whole person impairment
  - *Hogan v Mercy Care Centre* [2014] NSWCC 349

# ARBITRAL APPEALS

# Overview

- Procedural Requirements
- Arbitral Appeals:
  - Ground/s of Appeal
  - Submissions
  - Time to Appeal
  - Monetary Thresholds
  - Interlocutory Decisions
  - Fresh Evidence
  - Correct Legal Identity of the Employer
  - Chronologies
- Key Points

# Procedural Requirements

- Section 352 of the *Workplace Injury Management and Workers Compensation Act 1998*
- Pt 16 of the *Workers Compensation Commission Rules 2011*
- Practice Direction No 6 – Appeal Against a Decision of the Commission Constituted by an Arbitrator
- Application – Appeal Against Decision of Arbitrator (Form 9)



# Section 352(2)

“An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that the procedural requirements of this section and any applicable Rules and regulations as to the making of an appeal have been complied with. The Registrar is not required to be satisfied as to the substance of the appeal.”

# Appeal – s 352(5)

- Not a review or new hearing
- Limited to the determination of matters in which there is an alleged error of fact, law or discretion

# Basic Approach to an Appeal

D F Jackson QC summarised the basic approach to an appeal as follows:

- “(a) what aspect of the judgment or decision below is being attacked?
- (b) why is it said to be wrong?
- (c) what is the consequence if it is wrong?”

*(Appellate Advocacy (1992) 8 ABR 245)*

# Ground/s of Appeal

An appellant must clearly identify the respects in which error of law, fact or discretion is alleged to have occurred, as well as:

- any material findings it is said the Arbitrator should or should not have made, and
- any material facts it is said the Arbitrator should or should not have found

# Ground/s of Appeal

- The error must be one that has affected the outcome (*Leichhardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 cited in *Trazivuk v Motor Accidents Authority of New South Wales* [2010] NSWCA 287 at [110])
- Parties will usually be bound by the way their cases were presented at the arbitration (*Metwally v University of Wollongong* [1985] HCA 28; 60 ALR 68 at 71; *Suttor v Gundowda Pty Ltd* [1950] HCA 35; 81 CLR 418 at 438)
- A new point on appeal will only be permitted in certain circumstances (*Coulton v Holcombe* [1986] HCA 33; 162 CLR 1 at 7; *Water Board v Moustakas* [1988] HCA 12; 180 CLR 491 at 497)

# Submissions

- Must be directed to each of the grounds of appeal
- Must be divided into paragraphs and numbered consecutively
- Must have appropriate subheadings
- Must have references to the relevant evidence, authorities and the Commission's official transcript of proceedings

# Time to Appeal – s 352(4)

- An appeal is to be made within 28 days after the making of the decision appealed against
- An Arbitrator's decision is made when the Commission issues a certificate of determination under s 294(1) (Pt 16 r 16.2(2) of the *Workers Compensation Commission Rules* 2011)
- Time commences to run the day after issuing the certificate of determination (*Dennis v NSW Fire Brigades* [2007] NSW WCCPD 165 at [23])

# Exceptional Circumstances – s 352(4)

- A Presidential member may exercise their discretion to extend time to appeal, having regard to the matters set out in *Gallo v Dawson* [1990] HCA 30; 93 ALR 479 at 480 and *Bryce v Department of Corrective Services* [2009] NSWCA 188 at [10]
- If the appellant seeks leave to extend time to appeal they must provide:
  - reasons for the appeal being out of time
  - full details of the arguments in favour of granting an extension of time, and
  - submissions on the demonstrable and substantial injustice that losing the right to appeal would allegedly cause



# Monetary Thresholds – s 352(3)

- No right to appeal unless the amount of compensation at issue on appeal is at least:
  - \$5,000, **and**
  - 20 per cent of the amount awarded in the decision appealed against.

# Interlocutory Decisions – s 352(3A)

- The Commission will not grant leave to appeal an interlocutory decision unless of the opinion that determining such an appeal is necessary or desirable for the proper and effective determination of the dispute
- Is it an interlocutory decision?

“Does the judgment or order, as made, finally dispose of the rights of the parties?” (*Licul v Corney* [1976] HCA 6; 180 CLR 213 at 225)

# Interlocutory Decisions – s 352(3A)

The Commission has held the following to be interlocutory decisions:

- an order striking out an Application to Resolve a Dispute (*Shams v Venue Services Group Pty Ltd* [2013] NSWWCPCPD 57; *Cooper v Family and Community Services (Ageing, Disability and Home Care)* [2014] NSWWCPCPD 8)
- a ruling concerning the exclusion of certain evidence (*Northern NSW Local Health District (Tweed Heads Hospital) v Conaghan* [2014] NSWWCPCPD 54)

# Interlocutory Decisions – s 352(3A)

- a finding of a deemed date of injury and that a claim had been duly made, with no final orders disposing of the issues in dispute (*Sydney Institute of Technology – NSW TAFE Commission v Fleming* [2007] NSWWCPCD 97)
- an order refusing leave to dispute injury to a particular body system (*Glemaro Pty Ltd v He* [2015] NSWWCPCD 17), and
- a referral to an Approved Medical Specialist for assessment of whole person impairment (*Woolworths Ltd v Stafford* [2015] NSWWCPCD 36; *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes* [2015] NSWWCPCD 35)

# Fresh Evidence or Additional Evidence – s 352(6)

- Leave is required
- Threshold questions:
  - (a) whether the evidence could reasonably have been obtained in advance of the arbitration, and
  - (b) whether the continued unavailability of the evidence would cause “substantial injustice in the case”
- *CHEP Australia Ltd v Strickland* [2013] NSWCA 351 and *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255

# Fresh Evidence or Additional Evidence – s 352(6)

If you are seeking to admit fresh or additional evidence on appeal you must include:

- A schedule of the fresh or additional evidence
- A copy of the fresh or additional evidence
- A brief outline of the fresh or additional evidence and a detailed explanation as to why it was not tendered in the proceedings before the Arbitrator, and
- Submissions on why the fresh or additional evidence should be admitted

# Correct Legal Identity of the Employer

- Has the employer been correctly named?
- *Kelly v Secretary, Department of Family and Community Services* [2014] NSWCA 102 at [11]
- *State of New South Wales v Bishop* [2014] NSWCA 354 at [26]–[28]
- Do you need to make an application to amend the description of the employer (Pt 4 r 4.2 of the *Workers Compensation Commission Rules* 2011)?

# Chronologies

- Must be an objectively accurate statement of the principal events
- Must include references to the page number where the evidence is to be found

DATE	EVENT	PAGE REFERENCE
1 January 2010	Worker injures back lifting a box at work.	Worker's statement – ARD, page 10
2 January 2010	Worker attends Dr Smith	Worker's statement – ARD, page 11



# Other Matters

- Additional Respondent/Insurer/Scheme Agent Schedule
- Notice of Opposition to Appeal Against Decision of Arbitrator (Form 9A)
- Reply
- Discontinuing an appeal:
  - Election to Discontinue Proceedings (Form 14B), or
  - Agreement to Discontinue Proceedings (Form 14A)

# Key Points

- An appeal is not a review or new hearing
- An appeal must identify whether it is against the whole or only part of the Arbitrator's decision
- The ground/s of appeal must clearly identify the respects in which error of law, fact or discretion is alleged to have occurred
- Submissions must be directed to each of the ground/s of appeal, together with references to the relevant evidence and authorities

# Key Points

- Submissions must be divided into paragraphs and numbered consecutively with appropriate subheadings
- If the appeal has been filed out of time there must be submissions addressing s 352(4)
- There must be submissions addressing the monetary threshold requirements under s 352(3)
- If the appeal is against an interlocutory decision there must be submissions addressing s 352(3A)

# Key Points

- If fresh or additional evidence is relied upon there must be submissions seeking leave to admit that evidence under s 352(6)
- The parties must be correctly described in the proceedings, and, if not, an application to amend the description of the relevant party will need to be made (Pt 4, r 4.2 of the *Workers Compensation Commission Rules 2011*)
- A detailed chronology of events, with references to where the evidence can be found, must be attached to the appeal application

# MEDICAL APPEALS

# Overview

- By the Numbers
- Grounds for Appeal
- Section 323
- Other Recent Decisions
- Conclusion

# By the Numbers

- 1 Arbitrator
- 2 Approved Medical Specialists
- 4 grounds for appeal
- 28 day appeal period
- Part 7 of Chapter 7 of the 1998 Act
- 14 sections

# Grounds for Appeal

- Deterioration s 327(3)(a)
- Additional relevant information s 327(3)(b)
- Incorrect criteria s 327(3)(c)
- Demonstrable error s 327(3)(d)

Grounds **of** appeal  $\neq$  grounds **for** appeal



# Deterioration

- Deterioration in the degree of permanent impairment certified in the MAC
- Not necessarily satisfied by the same IME certifying a higher impairment than the AMS
- *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission of NSW & Ors* [2007] NSWCA 149

# Additional Relevant Information

- Not available before **and** could not reasonably be obtained
- Must be “additional” and “relevant”
- Should not restate a medical opinion
- Not a statutory declaration challenging findings made: *Petrovic v BC Serv No 14 Pty Limited and Ors* [2007] NSWSC 1156
- Will not readily be accepted if a worker disputing history taken by AMS: *Lukacevic v Coates Hire Operation Pty Ltd* [2011] NSWCA 112
- Surveillance evidence taken on/after the AMS appointment unlikely to satisfy test
- Cannot be used to make out a demonstrable error

# Incorrect Criteria

- Factual errors are not incorrect criteria: *Campbelltown City Council v Vegan* [2006] NSWCA 284
- Criteria are the tests applied by the AMS, contained in the WorkCover Guides and AMA 5
- Guides are delegated legislation
- Not a “recipe approach”
- Assessments “in accordance with” means “in conformity with and not otherwise”: *Kolundzic v Quickflex Constructions Pty Ltd* [2014] NSWSC 1523

# Demonstrable Error

- Undefined in the Act
- Error on the face of the record that is readily apparent from an examination of the MAC and the referral: *Merza v Registrar of the Workers Compensation Commission* [2006] NSWSC 939
- Cannot rely on evidence adduced under s 327(3)(b): *Marina Pitsonis v Registrar of the Workers Compensation Commission* [2008] NSWCA 88
- A difference of opinion is not a demonstrable error

# Section 323

- Starting point is the statute
- Long history of judicial decisions
- Three step process:
  1. What is the current level of impairment?
  2. Is a proportion of that impairment due to an earlier injury/condition/abnormality?
  3. What is the extent of that proportion?

## Application of s 68A

- *Government Cleaning Service v Ellul* (1996) 13 NSWCCR 344
- *D'Aleo v Ambulance Service of New South Wales* (1996) 14 NSWCCR 139

## Application of s 323

- *Cole v Wenaline Pty Limited* [2010] NSWSC 78
- *Vitaz v Westform (NSW) Pty Ltd* [2011] NSWCA 254
- *Elcheikh v Diamond Formwork (NSW) Pty Ltd (in liq)* [2013] NSWSC 365
- *Wilkinson v C & M Leussink Pty Ltd* [2015] NSWSC 69
- *Ryder v Sundance Bakehouse* [2015] NSWSC 526
- *Moy v Emoleum Services Pty Ltd* [2015] NSWSC 1062
- *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416

## Meaning of “condition”

- *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284
- *Fire & Rescue NSW v Clinen* [2013] NSWSC 629

# Other Recent Decisions

- *Jenkins v Ambulance Service of New South Wales* [2015] NSWSC 633
  - Application of the WorkCover Guides
  - Psychiatric Impairment Rating Scale (PIRS)
- *El Masri v Woolworths Ltd* [2014] NSWSC 1344 applying *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43
  - Adequate reasons
  - Different requirement for an AMS and an Appeal Panel

# Conclusion

- MACs to be read as a whole
- General allegations of error will not make out grounds of appeal
- The Appeal Panel are limited by your submissions
- Not every decision affecting rights is appealable, let alone appealable on unconstrained grounds