The News As We Know It

Welcome to the first edition for 2014 of The News As We know It. We trust that 2014 has started positively for you. With all that is happening in the Australian manufacturing sector (which includes many of our valued clients), we could all do with some good news!

Speaking of news, of course the recent state election has thrown up plenty of news, but none that might yet give some guidance as to how the proposed changes to the workers compensation system will play out. There are varying degrees of political willingness to review and restructure the legislation. It is likely it will be many more months yet before some clear guidance eventuates on what a new compensation scheme might look like.

In this edition we take a look at the new Federal bullying and harassment jurisdiction, discuss how best to manage those hearing loss claims that pop up out of the blue, and offer you our 'employers health check'. And, as usual, we'll have a round-up of interesting court cases and recurring features, letting you know about KJK and what we've been up to of late.

Contacting us:

p 08 7324 7801
f 08 7324 7801
e admin@kjklegal.com.au
w www.kjklegal.com.au

Bullying and Harassment and the Fair Work Commission – the flood hasn't eventuated?

On 1 January 2014 the Fair Work Act was amended, bringing with it a new set of anti-bullying laws. The laws add yet another layer to the pre-existing general protections, work health safety, anti-discrimination, and workers compensation laws that touch on the area of bullying and harassment.

A worker who has a reasonable belief they have been bullied at work can apply to the Fair Work Commission for an order to compel the bullying to cease. There must be a risk the worker will continue to be bullied. The bullying must be repeated and unreasonable, and in a way that creates a risk to health and safety. What constitutes "unreasonable behaviour" is highly subjective and not defined by the Act.

However, as with South Australian workers compensation legislation, reasonable management action carried out in a reasonable manner does not constitute bullying.

There are a number of factors the Fair Work Commission must take into account when deciding what orders to impose on an employer. Needless to say, the better an employer's procedures and policies, the more likelihood the Fair Work Commission will not intervene unless internal procedures and investigations fail to provide an adequate outcome. The Commission is not empowered to enforce any monetary penalty.

The expected flood of claims has been all but a trickle and to date, only the case discussed below has reached a determination.

In the very recent matter of *K.McInnes v Peninsular Support Services (AB2014/1009)*,

the Full Bench of the Fair Work Commission was asked to interpret an important point dealing with the timing of the bullying.

Ms McInnes alleged bullying at work between November 2007 and May 2013. She did not refer to any bullying behaviour after May 2013. Her employer, quite understandably, raised a number of jurisdictional objections, submitting the Commission had no jurisdiction to hear and determine allegations of bullying which occurred prior to the commencement of the relevant section of the Act and when no allegation of ongoing bullying was alleged.

In short, the Full Bench disagreed. It stated the new scheme is aimed at stopping future bullying behaviour, not punishing past bullying behaviour, or compensating the victims of such behaviour. Regardless of the allegation of bullying ceasing in May 2013, it was not a case of applying the new law retrospectively, just looking at past behaviour and considering if there is a risk the worker will continue to be bullied at work.

The Full Bench referred the application back to the initial Commissioner for determination of the remaining issues.

Hence, it is now clear, that contrary to popular belief, an applicant alleging bullying at work does not have to show it is currently taking place, just that it has occurred, and one would surmise, it is likely to occur again.

One major risk for employers is performance management. While the existence of good policies, documented investigation, dispute resolution and grievance procedures will place an employer in a strong position to argue compliance with the law, much can be undone by poor performance management procedures, and not ensuring all involved have received adequate training.

As always, we are here to assist, guide, and advise you through this complex legal web of interrelated laws.

Hearing Loss Claims – Tips and tricks for young (and old) players

One of the most prevalent types of claims that employers receive (and continue to receive) are hearing loss claims, despite the fact that most employers, particular in the heavy industry area, have for some considerable years now enforced hearing protection programs. Unfortunately the likelihood is that hearing loss claims will continue for some time yet, as there is now a well-developed hearing aid industry and a number of providers who “feed” off what are advertised as free services.

So for those case managers who receive and deal with these claims we thought we would put together some tips on how to manage and investigate such claims, and the likely issues that you will face when doing so.

1. Are you obliged to investigate every claim you receive? Not necessarily. If the claimant is a long term and current employee and has worked in a relatively noisy environment where the wearing of hearing protection may have only been enforced in the last 10-15 years, then the process may be quite straightforward. The employer is deemed to have exposed the worker to noise capable of causing noise induced hearing loss (NIHL). It is a difficult onus to discharge.
2. However, if the claimant has left your employment then the deeming provision may not apply to the employer. So ask yourself, am I the last employer? Is the worker now working elsewhere in an industry where exposure to noise is likely? How long has it been since the worker left my employment? Did the

worker retire on the grounds of age or ill-health? If so, are they outside the 2 year period so that the onus now rests on the worker to prove they were exposed to noise and that you are in fact the last employer who they were exposed to noise with?

3. Check any pre-employment records that may be available. Are there any "true" pre-employment audiograms that may indicate that the worker came to you with an already established hearing loss? Can you use that as proof that you did not expose the worker to noise capable of causing NIHL or at least use it to achieve a reduction in their WPI assessment?

4. Did the worker commence employment before or after your hearing protection programs were in place? Was wearing of hearing protection enforced? Do you have sufficient proof of that?

5. Consider preparing a standard hearing loss questionnaire to address some of the important issues, e.g. employment before and after your employment, other potential causes of hearing loss, noisy hobbies or activities, medical conditions that can affect hearing etc.

6. Remember when looking at information such as audiograms that hearing loss caused by exposure to noise is more evident in the higher frequencies. Low tone hearing loss is usually caused by something other than exposure to noise.

7. Require the worker to provide all audiograms that he or she has undergone (usually with the audiologist who is recommending hearing aids). Perhaps consider setting up a relationship with an audiologist who can answer and/or interpret audiogram results.

8. Do you arrange your own IME or wait for the worker to provide his or her own assessment? Some employers will automatically arrange an IME of their own. But perhaps consider requiring the worker (or their solicitor, as often claims come via a solicitor) to provide their assessment first. Many of the accredited medical assessors provide very similar opinions/assessments, particularly given the WPI accreditation process now in place. If the result is less than 5% then there is no real need to seek an alternative opinion.

9. Always adopt the lowest assessment available on the test results, as the ENT specialists generally will say that, as hearing loss is to an extent a subjective reaction to the test, the best outcome on testing is indicative of the actual loss. If there is any doubt, or a large discrepancy between one assessment and another, then usually the ENT will recommend more objective testing, e.g. Brain Stem Evoked Response tests (expensive, but far more accurate).

10. Is it necessary to arrange noise testing of the area in which the worker was employed? Often this is not particularly helpful as most employers' worksites change over time and there is no guarantee that a current test is reflective of what the site was like when the worker worked there.

11. If the claim is very old and the worker has not worked for you for many years, consider whether you are prejudiced in now investigating/determining the claim. If so, you may be able to reject on the basis of the claim being statute barred.

12. Hearing aids – be mindful of the fact that an acceptance of the claim even for a low percentage hearing loss is likely to result in a request for payment of hearing aids. Can you shop around for lower quotes? Yes, there are providers who will quote for less than others. You are not obliged to pay the quote provided. Has the hearing aid actually been provided, or is the worker "holding out" for you to agree to pay and only then will they purchase

it? Can you resolve the claim on an overall basis , and include redemption of future medical expenses in the settlement such that you know you can close the file completely and not have to reopen it in 10 years' time, when the worker wants a replacement hearing aid.

Hearing loss claims raise many issues both legally and factually. They do require some careful consideration, as the law is quite complex in this area and there are a number of authorities already decided that need to be considered. There are also areas that have not yet been thrashed out by the WCT, such as the issue of previous assessed losses and whether they can be "disregarded" for the purposes of a current WPI assessment.

There are a number of legal practitioners who purport to specialise in this area on behalf of workers. If in doubt as to who you are dealing with, and how you should deal with the claim, then seek early advice as this may help to reduce your potential liability.

Quartuccio's case

The Supreme Court has recently been called upon to decide exactly what constitutes a 'determination' for the purposes of section 53 of the Workers Rehabilitation and Compensation Act (the Act).

In *Quartuccio v The State of South Australia* [2013] SASC 167 the worker applied for judicial review of a purported determination to reject her claim, against a background of the worker having apparently been served with a form of acceptance letter 'by mistake' somewhat earlier in time. The Court was asked to consider exactly when a 'determination' for section 53 purposes is made – when the decision to do so is formulated in the decision maker's mind, or when the actual written determination is produced? The Court decided it was the latter.

While the original letter was issued by mistake (probably to effect a step-down of what might have been the provisional payments still being made at the time), it still set out in clear terms an apparent acceptance of the claim, even if that was not the intention of the decision maker. The Court confirmed that you can't simply say the document represented a mistake, and issue another determination. The way to solve the problem was the re-determination provisions of section 53(7) of the Act instead.

Capping compensation for unfair dismissal

For HR practitioners, the Full Bench of the Fair Work Commission has clarified exactly what the cap on compensation means for those awarded compensation when unfairly dismissed from their employment.

In *Haigh v Bradken Resources* [2014] FWCFB 236 the Commission confirmed that an exercise needs to be undertaken to assess what the appropriate compensation should be, based on the circumstances of the case, e.g. initially awarding a significant sum of compensation taking account of the length of the worker's service with the employer, and then reducing it to reflect the extent to which the worker's conduct might have contributed to the decision to terminate their employment.

Once that was done, you may end up in a situation where what is considered to be the initial fair sum of compensation payable might exceed the statutory cap of 6 months' pay because of the worker's length of service and anticipated long term employment were it not for the dismissal. In that case the Commission said that you do not automatically reduce the sum down to 6 months' pay, and then possibly apply other reduction factors, such as the worker's behaviour in contributing to the decision to dismiss. Instead the Commission indicated that the process was to set the

initial compensation sum and then reduce it for any negative factors. If the sum payable still exceeds 6 months' pay, then it is at that time that the statutory reduction takes effect and the compensation is limited to the 6 months' pay compensation cap. The 6 months' cap is only a limit **at the end** of the compensation award calculation process.

'Employers Health' – a KJK initiative

In this time of a changing legislative environment (who knows what we'll get once the dust settles on the SA State election), and WorkCover's new approach to claims auditing for self-insurers, it pays to be on top of your claims issues.

KJK Legal is mindful that you are always busy as a claims manager, with the requirement to maintain a tight budget, yet implement effective claims management action and strategies. Sometimes you don't know where to start, especially when workforce changes come along that are unexpected (downsizing being a prime example).

We would like to believe that we can serve you better by looking at your claims from a quasi- medical perspective – by checking on your overall 'Employers Health'. We all know that it's best to treat a health issue from a holistic approach of looking at the whole person. It's the same with an employer's health.

How is your claims management system functioning? Is it integrating well with your HR and WHS systems? Is everyone in those areas on the same page when it comes to working together to solve both the small individual employee problems, as well as the broader workplace issues that might arise, such as with large redundancies? Are issues regarding the provision of suitable employment and section 58B and C obligations something that your team has a good understanding of? These are all issues that we can address with you claims, HR and WHS teams. They will become increasingly important issues to consider if pending legislative change makes some fundamental alteration to employer's obligations towards the ongoing employment of injured workers.

KJK Legal can visit your workplace to help conduct a health check of your claims, and assess how best to manage them in conjunction with your broader obligations as an employer – whether that be by way of taking steps to cease or reduce weekly payments, improve the return work outcome, assessing entitlements under section 35B of the Act (for the longer term injured) or possibly looking at the finalising of a worker's employment (and possibly their claim).

If you are interested in having a health check of your claims undertaken, then please contact us. We can talk about fixed time charging or a reduction on our ordinary rates, so you are getting value for money when we attend. We can also call upon the services of specialised claims management consultants in this process, developing a cost effective plan to address the various legal and claims issues that crop up.

Team Member of the Month – Carmel Preece

Carmel came to work with KJK Legal from its inception, completing a loop that saw her, Tracey and Mark start off their legal careers at Aldermans in the 1980's.

Carmel works as a consultant with the firm, specialising in the providing of legal advice and support to many self-insured and registered employers under the WorkCover scheme. She also provides services to another small Adelaide firm. She has truly practiced 'on both sides of the fence', having spent time with one of Adelaide's more prominent workers firms as well.

A keen supporter of the Carlton football club makes for interesting Monday morning discussions in winter with her fellow KJK team members, while Carmel is also known to enjoy a cold beer or good red with her many friends in the legal profession and workers compensation industry.

Carmel also has established close relationships with several elements of our State's emergency services. Just ask her one day about the best way to get a fireman to your front door!

Out and about in the community with KJK Legal

KJK Legal have again been active on the sponsorship front as 2014 progresses.

We are proud to be able to join with Maxima Group Inc. to sponsor an award at their annual employer awards dinner in April 2014, which event celebrates workplace diversity.

Additionally, we have again teamed with SISA as a support sponsor for their well-regarded Closing the Loop annual conference. We are looking forward to being a part of that event, and have already held discussions with Robin Shaw regarding a varied and challenging format to part of conference.

We have also renewed our long-running undertaking as an award sponsor at the SISA Annual dinner and Awards night. It's always an occasion that is worth being a part of – celebrating the positive achievements that occur in our industry, and as they relate to the work health and safety of our employees.

KJK Legal news

KJK Legal are pleased to be able to confirm that they have been successful in relation to several national legal panel tender's recently, including teaming with the prominent interstate firm HWL Ebsworth, as their South Australian connection for national companies. We are excited about this development, as it will enable us to share legal information and experiences across the nation, and allow our clients and ourselves access to a much broader base of expertise where required.

Lastly, something to make you smile for the end of a working week.