



WorkCover common law claims and applications for a serious injury certificate

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If you're injured at work and the injury becomes permanent, you may have an entitlement to compensation in the form of pain and suffering and economic loss damages. This is known as [common law entitlements](#). One of the criteria to be eligible to apply for WorkCover common law damages is to meet the "serious injury" definition. This article looks at the definition and the process for lodging a serious injury application.

Common law compensation can be significant; however, the process is not straightforward. Legal advice is crucial so that you understand your options and can make informed decisions every step of the way to maximise your entitlements.

Legal requirements for WorkCover common law claims

To be successful with a common law claim, the *Workplace Injury Rehabilitation and Compensation Act* requires that you need to meet the following criteria:

1. That your injuries occurred during the course of your employment;
2. That your injuries occurred as a result of your employer's or a third party's negligence. That is, that they failed in their duty of care to you; and
3. That your injuries meet the "serious injury" definition.

What determines a serious injury?

A serious injury, for the purposes of a WorkCover common law claim, is defined as follows:

- Your injuries have been assessed as having a greater than 30% whole person impairment; or
- You have a permanent serious impairment or loss of a body function; or
- You have a permanent serious disfigurement; or
- You have a permanent severe mental or permanent severe behavioural disturbance or disorder; or
- Loss of a foetus.

How to prepare a WorkCover serious injury application

There are a number of steps that need to be taken to ensure your serious injury claim is brought correctly and the chances of success are maximised.

Gathering and collating evidence

- Gathering all relevant medical information including clinical notes and medical reports from your treating doctors and any hospitals you have attended;
- Obtaining a full copy of your file from the relevant WorkCover insurer;
- Taking a detailed statement from you concerning the circumstances of your injury in order to assess whether or not your injury occurred in negligent circumstances (that is, did someone else cause your injury?);
- Take witness statements from any relevant family members and co-workers as to the effect the injury has had upon you;
- Have you assessed by relevant medico-legal practitioners (health practitioners who specialise in, for example, compensation matters) in order to obtain expert medical opinion about the nature of your injury, your prognosis and any treatment required;
- Obtain taxation documents in order to assess your financial loss; and
- Have you assessed by an occupational physician to determine whether you have a work capacity.

Meeting with your lawyer

Once all of the evidence is to hand, you can then expect to meet with your lawyer and, in some instances, a barrister so that your serious injury affidavit can be drafted. A barrister is someone who brings significant legal expertise to cases and provides specialised advice on complex matters. They are engaged by your lawyer and form part of the team advising you.

Your affidavit is the foundation document which outlines:

- What injury you sustained;
- how your injury occurred;
- the treatment you have received; and

- the effect of the injury upon you.

It is crucial that this affidavit is true and correct as it will be relied upon in court if your case does not resolve prior.

Your lawyer and barrister will also give you advice as to whether your serious injury application should be lodged for pain and suffering damages only or pain and suffering and economic loss damages. To be successful in a claim for economic loss, you need to show that you do not have the capacity to earn more than 60% of your pre-injury income. This test can be quite complex and any decision made can have long-lasting and permanent consequences. So, it is crucial to get legal advice.

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Lodging your serious injury application and granting of serious injury certificate

Once your serious injury application has been compiled, this will be lodged with the Victorian WorkCover Authority (VWA).

The VWA will allocate your serious injury application to one of their defendant panel law firms. The defendant has 120 days to decide if you meet the serious injury definition and if they will grant you a serious injury certificate.

Granting a serious injury certificate paves the way to pursuing your common law damages claim.

If WorkCover rejects your serious application

If the VWA decide that you do not meet the serious injury threshold and they do not grant a serious injury certificate, then proceedings need to be issued in the Court for a judge to decide if you meet the threshold. This is done by way of an Originating Motion. It can take up to 12 months for your case to be heard by the Court.

If WorkCover accepts your serious injury application

If your serious injury application is accepted within 120 days, or alternatively the Court has determined you have a serious injury, then your matter will proceed to a compulsory conference with the defendant.

Most matters do not resolve at this initial conference. This is usually because the parties are unable to reach agreement on quantum (the amount of compensation you are entitled to) or there are issues in proving negligence. Nonetheless, the conference is a good opportunity for the parties to discuss the case and understand the opposing party's assessment of the matter.

If the case does not resolve at the compulsory conference, then formal offers need to be made in an attempt to resolve the dispute. The defendant makes the first offer and then the plaintiff (that's you), makes the counteroffer. These offers are known as statutory offers and have significant cost implications should the case not resolve before proceedings are issued in Court.

What are the costs implications if my matter goes to Court?

Once proceedings are issued in Court, you need to resolve your dispute for 90% or more of the statutory counteroffer (the offer made by the defendant), for the defendant to be responsible for paying a portion of your legal costs. These legal costs are known as party/party costs.

If the matter resolves for less than 90% of the statutory counteroffer, but more than the statutory offer (the defendant's offer at the conference), then each party has to pay their own legal costs.

Further, if the case resolves for less than the defendant's statutory offer, then costs will be pursued against the plaintiff. Due to this risk, it is crucial you have a highly experienced lawyer negotiating your case on your behalf.

Why Guardian Injury Law?

At Guardian Injury Law, we understand how daunting and complex the WorkCover system can be for injured workers. That is why we take the time to get to know our clients and explain the law plainly and clearly.

We understand the risk of legal proceedings and constantly advise our clients as to the success of their case, ensuring they are empowered to make sound decisions every step of the way.

At Guardian Injury Law, our first appointment is free and we strive to ensure that you are provided with clear and accurate legal advice so that you can make informed decisions.

Contacting Guardian Injury Law

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