Proposed changes for Victorian WorkCover claims in 2024 will impact injured workers

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There is a Bill before parliament called the *Workplace Injury Rehabilitation and Compensation Amendment Bill*. The Bill proposes alarming changes to the scheme that administers WorkCover claims. In this blog, we explore the proposed changes to psychological injury (mental illness/injury) claims and changes to eligibility for weekly payment benefits beyond a period of 130 weeks.

The debate on the Bill was held on 5 March 2024 in the Victorian Legislative Council. The enactment of the Bill is to be no later than 31 March 2024. This blog outlines what you need to know about the proposed changes and what they mean for injured workers covered by the Victorian WorkCover scheme.

What are the proposed changes to the definition of mental injury?

In the current version of the *Workplace Injury Rehabilitation and Compensation Act* ("the Act"), there is no definition of "mental injury."

Alarmingly, the Bill proposes to limit an injured worker's entitlement to worker's compensation for mental (psychological) injuries by providing a definition of mental injury that claimants must meet.

The proposed definition of "mental injury" under the Bill is:

"mental injury means an injury that—

1. *causes significant behavioural, cognitive or psychological dysfunction; and*

2. *is diagnosed by a medical practitioner in accordance with the latest version of the Diagnostic and Statistical Manual of Mental Disorders;".*

This new definition of mental injury (if passed) requires that for all WorkCover claims, including if a worker is exposed to a traumatic event at work, a worker must be suffering an injury that *"causes significant behavioural, cognitive or psychological dysfunction that is diagnosable under the latest Diagnostic and Statistical Manual of Mental Disorders criteria by a medical practitioner".*

This definition is highly problematic, as the word "significant" is a subjective test that is open to interpretation. It is foreseen that this will cause a great deal of disagreement between workers and WorkCover insurers.

Further, the requirement that a treating medical practitioner diagnose the mental injury in accordance with the Diagnostic and Statistical Manual of Mental Disorders adds a further layer of complexity to WorkCover mental injury claims and may deter some practitioners from treating workers with mental injuries.

Has your mental injury or illness primarily arisen from your employment?

The Bill further proposes additions to the Act. Section 39 of the current Act considers entitlements for compensation from an injury, which includes both physical and mental.

You can read more about the current (pre-March 2024) mental illness claims in our earlier blog, "WorkCover and mental health claims for psychological injury".

A new section, section 39(1A), is proposed to be inserted into the Act. This will place a new requirement that the mental injury predominantly arose out of or in the course of employment.

The term "*the mental injury predominantly arose out of or in the course of employment*" is not defined in the proposed Bill, however, it is intended to take on the ordinary meaning referring to the strongest or largest contributing factor. If you have a pre-existing mental injury that recurs, is aggravated, exacerbated, accelerates, or deteriorates, it must be predominantly because of your employment.

The Bill does not define traumatic events either, however, the explanatory memorandum defines traumatic events as "*emotionally shocking and causing fear and distress*". This may involve exposure to, or actual physical abuse, the threat of physical harm or actual physical harm.

What if my mental injury is stress or burnout as a result of work?

One of the most significant proposed changes to WorkCover legislation is the insertion of a new clause, section 40(1):

"(1A) There is no entitlement to compensation in respect of an injury to a worker if the injury is a mental injury predominantly caused by work-related stress or burnout that has arisen from events

that may be considered usual or typical and reasonably expected to occur in the course of the worker's duties."

These new limitations on injuries caused by stress and burnout **do not** extend to workers whose normal duties exposed them to traumatic situations, such as emergency personnel and other front-line workers.

Usual or typical work activities may include typical job demands, workload pressures and interpersonal interactions. This would mean that should a worker become stressed due to unreasonable workload pressures and have to take time off work and seek medical treatment, it is unlikely they will be eligible for worker's compensation. The exclusion of work-related stress and burnout will leave many workers unsupported, as these are often symptomatic of other issues, such as mental illness.

What do the proposed changes for WorkCover mental injury/illness mean for injured workers?

The eligibility criteria for mental/psychological injury or illness claims will be very narrow. Many workers who experience mental injury due to unreasonable and unfair workplace practices will not be eligible for worker's compensation.

Proposed changes to eligibility for WorkCover weekly payments after 130 weeks?

The Bill proposes an alarming change to the eligibility of injured workers for WorkCover weekly payments after a period of 130 weeks, which is also known as after the second entitlement period.

The proposed changes to this section of the Act are:

- For workers to be entitled to receive weekly payments of compensation beyond 130 weeks, workers must have a medicolegal assessment and be assessed as having a greater than 20% whole-person impairment based on the AMA4 guides;
- Workers must also have an indefinite capacity for work; and
- Further, for workers in receipt of weekly payments after 130 weeks, there will be a requirement to undergo work capacity reviews at least every two years.

Having a threshold test for weekly payments post 130 weeks is incredibly problematic, let alone a threshold test as high as 20%. This change will unfairly disqualify workers from ongoing support even when they have no real capacity for working.

The decision to introduce the impairment threshold to weekly payments will make it extremely difficult for workers to receive payments beyond 130 weeks.

It is very rare for a worker to have an impairment greater than 20%. Hence, the safety net for long-term injured workers is no longer there, and the Act will no longer support them. Furthermore, this change will apply to those who have accepted claims but have not yet reached the 130-week threshold.

Will an assessment by a doctor always required under the proposed changes?

No. Your WorkSafe agent may make an administrative decision where it is not necessary or practicable to obtain an assessment. This should only be made in the case where there is no reasonable prospect of the injury reaching the new threshold requirements or there are no reasonable prospects the injury will not meet the threshold.

How will disputes about 130-week termination of WorkCover weekly payments be resolved if the changes come into effect?

When a worker disputes the percentage of estimated impairment, the insurer's decision must be disputed to the Workplace Injury Commission. Should it not be resolved there, it can either go to the Medical Panel for a binding assessment, the WorkCover Independent Review Service or pursued through the Magistrates' Court.

Implications for injured workers if the proposed WorkCover changes pass

If the Bill passes, the changes will have a significant impact on injured workers and their ability to access appropriate compensation, including weekly payments. The proposed changes establish an unfair standard which is too difficult for injured workers to meet.

Get help from a WorkCover lawyer

At Guardian Injury Law, we are experienced at representing injured workers and assisting in ensuring that your WorkCover compensation is maximised. We work on a no-win, no-fee or expenses basis with your first consultation free of charge. It costs nothing to find out where you stand.

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