

## Worthing: the current situation

### Purposes

The purposes of this Circular are to advise you:-

- of a recent court case which may impact on your employees' claims; and
- how to deal with queries from any such employees.

### Background

A recent NSW court case, *Telstra v Worthing*, indicates that some Commonwealth employees may be entitled to submit claims for compensation under both the *Safety, Rehabilitation and Compensation Act 1988*, (SRC Act) and the NSW State workers' compensation scheme. This may also affect States other than NSW.

### Case details

The full case citation is *Telstra Corporation Ltd v Worthing & Anor* (1997) 150 ALR 217.

Mr Worthing, now an ex-employee of Telstra, suffered injuries in 1986, 1988 and 1993. Telstra accepted liability for his claims until June 1995, when determinations were issued denying ongoing liability, and rejecting a claim for permanent impairment. Mr Worthing lodged a claim with the Administrative Appeals Tribunal (AAT), which was part heard when he commenced proceedings in the NSW Compensation Court under the *Workers' Compensation Act 1987 (NSW)* (the NSW Act), seeking payments for ongoing compensation and a lump sum amount for permanent impairment.

In July 1997, the Compensation Court decided that the SRC Act did not constitute an exclusive scheme for the compensation of employees injured in the course of Commonwealth employment. It followed that Mr Worthing could claim compensation under the NSW Act, and that the Compensation Court had jurisdiction to hear Mr Worthing's claim.

Telstra appealed to the NSW Court of Appeal, which, on 5 December 1997, confirmed the Compensation Court's decision. In brief, the Court of Appeal decided that Telstra employees, who are covered by the SRC Act, can choose to claim workers' compensation under the NSW Act. The decision suggests that other employees covered by the SRC Act may also be able to claim workers' compensation under the NSW Act.

The position in States other than NSW is less clear. Whether employees covered by the SRC Act may be able to claim compensation under the workers' compensation schemes of those States will depend on a number of factors, including the terms of the particular State legislation and whether the courts of those States agree with the NSW Court of Appeal's decision.

### Commonwealth position on decision

The Commonwealth and Telstra have asked the High Court if it will hear an appeal against the NSW Court of Appeal's decision. The High Court will consider this request at a hearing on 19 May 1998. If the High Court agrees to hear an appeal, it is unlikely that it would hand down a decision until the latter half of 1999. The decision of the NSW Court of Appeal will remain in effect until it is overturned by the High Court or appropriate amendments are made to the SRC Act.

## **Comcare's position pending the High Court Appeal**

All claims will continue to be managed under the SRC Act as before. Where claimants indicate that they will also submit a claim under a State scheme, this will not influence our process or decision when they submit a claim under the SRC Act.

## **Where claimants receive benefits under a State scheme**

Even if a Commonwealth employee is entitled to submit a claim under both the SRC Act and a State workers' compensation Act, the employee would generally only receive compensation under one of those Acts, not both. If Comcare paid compensation to a claimant, and the claimant then received compensation under a State scheme, subsection 118(2) of the SRC Act gives Comcare a discretion to recover from the claimant the compensation Comcare paid to him or her.

## **Where claimants request advice from Comcare**

If an employee asks Comcare for advice about whether they can claim compensation under a State scheme, Comcare will advise them to seek their own legal advice. They will also be advised that the Commonwealth and Telstra are asking the High Court to consider an appeal against the decision in *Telstra v Worthing*.

Comcare will also make it clear to claimants that any action that they take under a State scheme is against their employer (that is, the Commonwealth or the Commonwealth authority for which they work), not against Comcare.

## **Costs to Commonwealth agencies other than Comcare**

If the decision in *Worthing* remains in effect, then Commonwealth agencies other than Comcare may be exposed to costs under State workers' compensation legislation. However, Comcare cannot provide workers'

compensation coverage for claims brought under State legislation, including the NSW Act.

## **Further advice**

Further advice will be provided as issues arise, and when there is an outcome in the High Court Appeal.

## **Further information**

Comcare would like to monitor any relevant claims. If you become aware of a claim of this kind, could you please advise the relevant Claims Manager in Comcare.

*If you have any further queries please call Helen Bull, in Comcare's Policy and Planning Group, on (02) 6275 0600 or Comcare's National Claims Help Line:*

### **National Claims Help Line**

1800 150 555

### **Stress Claims Management Centre**

1800 683 402

### **OHSHotline**

1800 642 770

### **Internet Site**

<http://www.comcare.gov.au>

If you would like more copies of this Circular, or copies of earlier Circulars, please contact:

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