

RECENT DECISIONS

Work Injury Damages: A timely reminder about strict timeframes

Van Der Borgh v Memjet North Ryde Pty Ltd [2018] NSWDC 346 27 November 2018

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An employer has been unable to dispute liability in a work injury damages claim after failing to serve a pre-filing defence within 42 days of receiving the worker's pre-filing statement. The pre-filing statement was served directly on the employer's solicitor by email. The employer's attempts to argue that this did not constitute valid service were unsuccessful.

The case

Sections 315, 316 and 317 of the *Workplace Injury Management & Workers Compensation Act 1998*

These sections provide that:

- A pre-filing statement must be served on a defendant before a worker can commence court proceedings to recover work injury damages.
- A defendant is not entitled to assert that a pre-filing statement is defective unless it has notified the worker of the alleged defects within 7 days of receipt of the pre-filing statement.
- A defendant is unable to file a defence disputing liability for the claim if a pre-filing defence was not served within 42 days of receipt of the pre-filing statement.

Background

The worker suffered a psychological injury during the course of his employment and pursued a claim for work injury damages against his employer. After receiving the worker's notice of claim, the employer's solicitor wrote to the worker's solicitor advising they acted on behalf of the employer.

On 29 November 2017, the worker's solicitor sent an email to the employer's solicitor serving a pre-filing statement.

The email was received by the law firm acting for the employer, however, for reasons unknown, the email did not come to the

attention of the solicitor with carriage of the matter and as a result, a pre-filing defence was not served within 42 days of receiving the pre-filing statement.

The worker subsequently argued that the employer was not permitted to file a defence disputing liability for the work injury damages claim as the pre-filing defence was served out of time.

The employer submitted at the hearing that the pre-filing statement was not validly served as it had not been served directly on the employer and/or the employer's insurer. That is, the employer argued that service on its solicitor was not sufficient.

Decision

Judge Levy considered the wording of the relevant sections of the *Workplace Injury Management & Workers Compensation Act 1998*. His Honour noted that section 315 of that Act requires service of a pre-filing statement on the 'defendant', which he determined should include the appointed legal representative of the employer or the employer's insurer.

His Honour observed that the employer's solicitors did not assert that the pre-filing statement was defective for any reason, including service, until after the pre-filing defence had been served. Any such notice was required to be given within 7 days of receiving the pre-filing statement pursuant to section 317 of the 1998 Act.

The employer's solicitor had advised the worker's solicitor that they were acting on behalf of the employer on instructions from the insurer. Judge Levy determined that it was then reasonable to infer that further correspondence relevant to the claim could be addressed to the employer's solicitor.

His Honour concluded that the pre-filing statement had been validly served. Although the employer's solicitor had no knowledge of his or her firm receiving the email attaching the pre-filing statement, service was nevertheless considered to

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be effective as the firm's IT records confirmed that it had been received. As a consequence, His Honour then determined that the employer was not entitled to file a defence disputing liability for the worker's claim.

Implications

This case serves as a timely reminder of the strict and unforgiving legislative timeframes for responding to work injury damages claims.

- If an employer believes that a pre-filing statement is invalid for any reason, then it must notify the worker within seven days of receipt.
- It is crucial that a pre-filing defence is served within 42 days of receiving a pre-filing statement, to ensure that an employer is not prohibited from disputing liability for the claim.

For more information, please contact:



Adele Fletcher

Partner

adele.fletcher@turkslegal.com.au



Eliza Hannon

Senior Associate

eliza.hannon@turkslegal.com.au