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Surgery under the new South Australian workers compensation scheme

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Many of our readers will be aware that in 2015 the SA Government introduced new workers compensation legislation - the *Return to Work Act 2015* ("the new Act") - which drastically slashed the entitlements of injured workers.

Under the new Act the great majority of injured workers will only be entitled to receive income maintenance for a maximum period of two years, and compensation for most medical and associated expenses for a maximum period of three years. These are the maximum periods – shorter periods can apply.

If an injured worker's weekly payments of income maintenance cease in less than the maximum two year period, then medical expenses will only be paid for one more year after weekly payments cease.

The only exception to these maximum periods is for workers who qualify as "seriously injured" whose entitlements will, effectively, remain unchanged.

While the two year limit on the period of income maintenance payments is itself very significant, in this blog we are looking at the maximum three year limit on compensation for medical and associated expenses.

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With the exception of those workers determined “seriously injured”, after the maximum three years, injured workers will be required to meet the cost of their medication, treatment, surgery and all other medical expenses (with the exception of “therapeutic devices”) themselves.

This has the potential to be extremely problematic, not least because the range of options for medical treatment which an injured worker’s doctors might consider may not have been fully explored within the three year period.

For example, when a person suffers a back injury it is not at all unusual for their doctors to attempt conservative treatment for a period of time, before considering surgery. It is not at all unusual for injured workers to undergo surgical treatment of their injury some years after the injury was sustained, after all attempts at conservative treatment have failed.

In addition, there are some types of surgical treatment which have a limited life. For example, a knee replacement does not last forever. Often a knee replacement will need to be repeated after 10 or 15 years.

Section 33(21) of the new Act contains an exception to the rule in relation to medical treatment which presumably, is designed to address this problem. The new Act provides that:

If it is “reasonable and appropriate” for surgery to be undertaken after the period of entitlement to compensation for medical expenses has ended, due to the impact (or likely impact) of the work injury on the worker’s health and capacity or future health and capacity, then the injured worker can ask Return to Work SA to agree to pay for surgery to take place at a later time – after the entitlement to compensation for medical and associated expenses has ended.

An application must be made while the worker is still eligible for medical and associated expenses.

Therefore if it is not appropriate, suitable or convenient for a worker to undergo surgery during the three year (or lesser) period in which they are entitled to be compensated for medical and associated expenses, they can apply for that surgery to occur at a later date.

Here’s an example of why this provision is highly significant in the new Return to Work workers compensation scheme.

One of Andersons’ clients suffered a work related shoulder injury which required surgery. However, as he was fairly close to retirement age, and the surgery would have required him to take a considerable period of time off work, he wanted to defer the surgery until after he had retired.

Under the new Act, if he had delayed the surgery without making an application under Section 33(21), he would have had to meet the costs of the surgery himself, or alternatively, gone onto a waiting list for the surgery to be performed in the public system.

We assisted this client to make an application and Return to Work SA gave approval for the surgery to be undertaken at a later date and to meet the costs of that surgery when it was undertaken.

The new Act further provides that if surgery is approved on this basis, the cost of appropriate rehabilitation and recovery from surgery (for example, physiotherapy) will also be met and the injured worker can also receive up to 13 weeks of income maintenance payments while they recover from the surgery. In our example above however, our client will likely be retired at the time of surgery and income maintenance will not be paid in those circumstances.

How has the SA Employment Tribunal interpreted this section of the new Act?

In a recent decision, *Tinti v Return to Work SA,* a Deputy President of the SA Employment Tribunal considered section 33(21) for the very first time.

Mr Tinti was a 60 year old chef who had suffered a number of shoulder dislocations in the course of his employment. Although his doctors had suggested surgical treatment, Mr Tinti had elected to treat his shoulder injury conservatively. One of the reasons for this was that he did not wish to lose time from work while he recovered from what would be relatively major shoulder surgery, as he loved his work and wanted to continue working for as long as possible.

Mr Tinti's treating specialist had provided a report which indicated that he might require surgical treatment. The surgical options included arthroscopic assessment, followed by decompression, and rotator cuff repair which would cost between $12,000.00 and $15,000.00. Mr Tinti would also require an overnight stay in hospital, six weeks in a sling and six months of avoiding heavy activities.

The alternative surgical option was a more significant surgery – a reverse shoulder replacement – which would cost between $30,000.00 and $40,000.00 and require a longer hospital visit and rehabilitation period. The specialist indicated that if surgery was performed in the near future, the arthroscopy and rotator cuff repair would be the appropriate option. However, if surgery was to be deferred for 10 years or so, a reverse shoulder replacement would probably be required.

Mr Tinti's surgeon was of the view that Mr Tinti should continue to avoid surgery in the immediate future as he was generally coping with his symptoms through conservative treatment, and was able to continue working.

In these circumstances, Mr Tinti's lawyers made an application pursuant to Section 33(21) to Return to Work SA (the compensating authority), asking it to agree to pay for the surgery in the future which meant payment would be after Mr Tinti's entitlement to compensation for medical and associated expenses had ended.

"Return to Work SA rejected Mr Tinti's application"

Return to Work SA rejected Mr Tinti's application. When the matter came before the SA Employment Tribunal the lawyers for Return to Work SA argued that in order to make an application under section 33(21) an injured worker must be able to specifically detail:

- that there was a probable requirement for surgery (noting that in Mr Tinti's case, there was no guarantee that he would actually require surgery in the future);
- the exact type of surgery required (noting that in Mr Tinti's case, the treating specialist had suggested different surgical options depending upon the circumstances); and

- the time at which the surgery will be undertaken (noting that in Mr Tinti's case, he had not done so).

The lawyers for Return to Work SA argued that in Mr Tinti's case, the Tribunal was being asked to pre-approve surgery, the type of which was unknown, and which may not even be required.

On the other hand, the lawyers acting for Mr Tinti argued that there was no need to establish:

- that, at the time of the application, surgery was required;
- the exact nature of the proposed surgery; or
- the exact time of the proposed surgery.

Instead, Mr Tinti's lawyers argued all that was necessary was to establish that the proposed surgery was reasonable and appropriate for the injury in question and that it was reasonable to delay the surgery. They argued that Mr Tinti should be given some credit (and should certainly not be disadvantaged or penalised) for wanting to keep working and engaging with the community for as long as possible prior to undertaking surgery.

Furthermore, they argued that Section 33(21) did not contain any time limit and therefore an application could be made whether the surgery was likely to needed in two months, 10 years, or even longer.

"The Tribunal considered the arguments from both sides and reached a decision which was, in our view, sensible, appropriate and just."

The Tribunal considered the arguments from both sides and reached a decision which was, in our view, sensible, appropriate and just. The Tribunal concluded that, in order to be entitled to pre- approval of surgery under Section 33(21):

- there is no need to show that the surgery is required at the time the application is made;
- instead, the question should be whether the proposed surgery is likely to be needed in the future (rather than at the time of the application to Return to Work SA);
- it is necessary to establish that the proposed surgery is appropriate having regard to the injury or condition in question and the worker's circumstances or likely future circumstances;
- it is necessary to establish that the cost of the proposed surgery is likely to be reasonable;
- there is no need to identify when the surgery will take place;

The Tribunal concluded that the question to be answered in any Section 33(21) application was whether proposed surgery was likely to be necessary and would provide sufficient benefit to the injured worker to justify Return to Work SA paying for it outside of the period of entitlement to compensation for medical and associated expenses.

In Mr Tinti's case, the Tribunal noted that the medical evidence suggested that, because of the delay in surgery to date, the arthroscopic and rotator cuff repair surgery might not be successful. As a result, the Tribunal concluded that a reverse shoulder replacement was the only procedure which would be likely to restore strength and function to Mr Tinti's right shoulder and therefore, that a reverse right shoulder replacement was appropriate surgery for Mr Tinti in the future.

On that basis the Tribunal concluded that it was reasonable and appropriate to authorise a reverse shoulder replacement being undertaken at a later, unspecified time having regard to the impact or likely impact of Mr Tinti's shoulder injury on his future health and capacity.

As at the date of publication of this blog, Return to Work SA has not appealed against this decision.

If you believe that you may require surgery for a work injury and are concerned about the time limit on compensation for medical and associated expenses, please contact one of Andersons' expert workers compensation lawyers or feel free to get in touch directly with today's blog writer, Margaret Kaukas.

*** Important to Remember ***

Any application under Section 33(21) **MUST** be made before your entitlement to compensation for medical and associated expenses comes to an end.
