

SPRING 2019



## Message from the Editor

In this edition of the Legal Check-Up, we bring you everything you need to know about consulting with your patient after they have been injured, and how you can help them ease back into work.

Employers have obligations and as a treating professional it is important to be aware of these. You also need to be aware of things an employer or Insurer may request that your patient does not have to comply with.

Lodging a WorkCover claim can be a daunting task, particularly when a patient is already struggling to cope emotionally and financially.

If you have a patient who requires assistance, or you would like further information about any of the topics discussed in this edition of the Legal Check-Up, contact us on (03) 9321 9988 to speak to one of our expert injury lawyers.

*Bree Knoester, Partner*

# Consulting with a patient post-injury

**As a treating medical professional, you are often the first point of call for an injured worker and play a crucial role in assisting and empowering your patient to return to work**

## Initial appointment post-injury

When meeting with a patient for the first time after a workplace injury it is important to take an accurate medical history, noting how the incident occurred and all symptoms the patient reports.

Often after a workplace injury, patients will focus on the major injury, ignoring the minor injuries caused by the incident. As these may progressively get worse over time, this could lead to issues down the track with their WorkCover claim.

By comprehensively taking notes of all of your patient's injuries, big or small, it could make a big difference to their claim.

## Certificates of Capacity

Once a diagnosis has been made and suitable treatment options have been identified, the patient should be assessed for their capacity to work.

You will need to complete a WorkCover "Certificate of Capacity" for your patient which lists their

diagnosis, functional restrictions and your opinion as to their work capacity.

It is not enough to complete an ordinary medical certificate for the purposes of a WorkCover claim.

For psychiatric injuries, it is not sufficient to list "stress" or "work pressure" as a diagnosis. Rather, you need to articulate the nature of their mental health and psychiatric state.

You may identify on the Certificate of Capacity certain restrictions or limitations of your patient such as:

- number of hours they can work per week;
- shift lengths or breaks needed;
- types of duties that cannot be performed.

The Certificate of Capacity is an effective tool to communicate with your patient's employer, the Insurer and the legal team about your patient's progress and capacity to work.

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The first Certificate of Capacity that you provide to a patient should only be issued for a 14 day period.

Thereafter, your patient will likely require follow up appointments on an ongoing basis to monitor the injury and review the effectiveness of the treatment.

A new Certificate of Capacity has to be issued every 28 days.

### Ongoing treatment of a WorkCover patient

If any treatment or referral to a specialist is required, a written request should be issued to the WorkCover Insurer to determine whether it will be funded. If a request is refused, the patient has the option to dispute the Insurer's decision and should seek legal advice.

Being injured and going through the WorkCover system can be a highly turbulent and stressful experience for many patients. Even if your patient is suffering from a physical workplace injury, it is worth asking your patient about their mental health during your consultation. If you believe your patient requires a referral to a psychologist or psychiatrist because of their workplace injury,

a request should be made in writing to the WorkCover Insurer.

You may occasionally be requested to write reports on your patient's treatment. These reports are crucial in informing the WorkCover Insurer and your patient's legal team about treatment and prognosis.

*"Comprehensive medical records also allow your patient's progress to be tracked over time and is important evidence of attempts to return to work."*

### Return to work

WorkCover Insurers are often ambitious in their return to work plans and all too often patients following this plan aggravate their condition. You should advise your patient on whether any proposed return to work plan is suitable according to the patient's functional limitations, and whether the plan may hinder their recovery.

**Shyla Sivanas**, Lawyer

**Thea Casey**, Research Assistant

# Manage your patient's return to work

**Returning to work is often an important milestone in your patient's recovery from a work-related injury, with research highlighting the link between returning to work and improved health and well-being**

It is important, however, that your patient's return to work plan is properly implemented and managed.

An employer has certain obligations to help injured employees return to work, including:

- providing suitable employment for the first 52 weeks of their accepted WorkCover claim;
- considering reasonable workplace support, aids or modification to assist in their return to work;
- providing them with clear, accurate and current details of their return to work arrangements;
- consulting directly with them about their return to work, as well as consulting with you as their treating health practitioner;
- appointing a Return to Work Coordinator who has an appropriate level of seniority.

*It is noteworthy that this does not give your patient's employer or return to work provider the right to attend medical appointments.*

## What can I do to help my patient with their return to work?

Your patient has an obligation to make reasonable efforts to return to work and participate in reasonable return to work programs.

However, this obligation does not require them to return to work when they are medically unable to do so or when you believe the proposed return to work plan is unreasonable.

For this reason it is important

that the Certificates of Capacity you provide clearly outline the restrictions on your patient's capacity for employment.

It is also important that you respond to requests for updates by providing detailed and accurate reports. We do not recommend responding to request for updates verbally.

This will limit any potential confusion and help the WorkCover Insurer understand if your patient is able to commence a return to work plan or not.

In the event your patient is able to return to work, it is also important you review any proposed return to work plan and make any necessary amendments.

If you feel your patient is being pressured to return to work when they are medically unable to do so, or that the proposed return to work plan is unreasonable, you should suggest your patient seeks legal advice.

**Grace Bowran-Burge**, Lawyer

# Toxic workplaces leaving permanent consequences

**In days gone by, victims of workplace bullying were often discouraged from reporting their concerns, fearing their career progression may be stunted or they would be labelled as "weak"**

However, over time, there has been a gradual change in community attitudes, resulting in an acknowledgement of the significant damage toxic and aggressive workplaces can have on the mental well-being of employees, and the importance of eliminating these cultures through criminal convictions if necessary.

## Toxic workplaces to get found out

WorkSafe Victoria recently secured a conviction against Monjon (Australia) Pty Ltd and its director, John Moncrieff, for allowing an unhealthy workplace culture to develop, which included aggressive and intimidating behaviour towards staff, swearing, using sexist and racist language, and encouraging managers to speak to staff in an aggressive manner. After pleading guilty to one charge each of failing to provide a working environment that was, as far as reasonably practicable, safe and without risks, the company was fined \$97,000 and Mr Moncrieff was personally fined an additional \$19,250.

## Support is available

In addition to potential criminal ramifications, there is now also improved support for workers who have developed a psychiatric injury as a result of unhealthy workplace cultures and practices.

Unfortunately, it is not uncommon for victims to struggle with depression and anxiety after these experiences, compromising their capacity to return to any sort of paid employment.

*Recent statistics from WorkSafe Victoria indicate that psychiatric injuries are now the second most common cause of claims for compensation, comprising 11% of all WorkCover claims in Victoria.*

In these situations, an injured worker can access assistance under the WorkCover system to counselling, medication and supplementary income while they receive treatment for their injuries. In addition to this initial support, a worker may also access lump sum compensation where their injuries become permanent and impact their ability to perform their activities of daily living. If the applicable legal test can be satisfied, a worker can sue their employer for pain and suffering damages and loss of earnings, provided they can establish that their employer's negligence was the cause of their permanent incapacity.

**Genna Angelowitsch**, Senior Associate

# Surveillance of injured workers on WorkCover

**While an injured worker is receiving WorkCover entitlements and/or in the process of making a WorkCover application, a worker may be placed under surveillance**

## Who conducts the surveillance?

Surveillance must be conducted by a licensed and trained Private Investigator/Surveillance Officer. They must be registered with WorkSafe.

## When can surveillance be used?

Surveillance can only be used when other less intrusive methods of investigation have been considered or used and determined to be ineffective, inadequate and/or inconclusive.

Moreover, surveillance will only usually be used where there is evidence to suggest that the injured worker is:

- misrepresenting his/her disability;
- claiming excessive disabilities;
- pretending to be ill in order to escape work and/or their obligations; and/or
- involved in the commission of a fraud.

## How should injured workers respond to surveillance?

Injured workers should always be honest and truthful regarding their restriction resulting from their workplace injury. If they have then there should be very little reason for concern if they are put under surveillance.

Injured workers should also comply with any restrictions that are recommended to them by their treating doctors. This is the best way to ensure that inconsistencies will not be filmed or photographed between what an injured worker does and has been told not to do.

## What to do if an injured worker is experiencing psychological difficulties due to the surveillance?

Firstly, it is imperative that an injured worker obtains appropriate medical/psychological assistance should they struggle to cope with any surveillance activity.

Separately, if an injured worker believes that the Private Investigator/Surveillance Officer is breaching the law and/or their obligations, then a formal complaint can be made to WorkSafe regarding this.

## Does the consent of the injured worker need to be obtained?

The consent of the injured worker does not need to be obtained for the purposes of obtaining surveillance.

## How long is the period of surveillance?

Generally speaking, the period of surveillance should not be beyond 15 hours. However, where appropriate, approval can be sought for an extended period of surveillance.

## What rules apply to the surveillance activity?

All surveillance activity needs to comply with Australian and Victorian law and the Surveillance Guidelines for Private Investigators and WorkSafe Guidelines.

Therefore, amongst other things, Private Investigators/Surveillance Officers are required to:

- not unreasonably impinge on the privacy of injured workers and the rights of other people (i.e. treasurers, friends and relatives of the injured workers);
- not commit criminal offences while conducting surveillance (i.e. trespass on the injured worker's property);
- not entrap the injured worker.



**Linda Hanley**, Associate

# Can an **employer** attend a medical appointment?

**Has a patient attended a medical appointment accompanied by an unfamiliar person? Did you discover that this unfamiliar person is not a friend or family member, but instead the patient's employer or their representative or agent?**

Unfortunately the practice of employers inviting themselves along to medical appointments of employees is becoming more frequent, particularly when a worker's compensation claim is involved.

Adviceline is also aware of situations where case managers and representatives of insurance companies are requesting and at times insisting to attend these appointments.

Many doctors and patients have asked us whether an employer or a representative of the employer of the patient is legally permitted to attend a medical appointment.

The answer is simple and it is No.

This is an intrusion on a person's private and confidential medical appointment and there is no law that permits it. It is simply a breach of privacy.

If an employer asks to attend a medical appointment or tells your patient that they do not have a choice, they are wrong. They do have a choice. As a treating doctor you also have a choice to refuse their presence, unless this has been specifically requested by your patient.

When employers and their representatives intrude on a private medical appointment, the impact on a worker's health can be detrimental.

For example, an injured worker gave consent to his case manager to attend his GP

appointment. He consented because he was led to believe that he did not have a choice. During and shortly after the appointment, his anxiety escalated and resulted in a panic attack.

While we understand that employers and their representatives have a right to request medical information pertaining to the particular injury or condition including diagnosis, causation and capacity for employment, this right does not extend to attending a private medical appointment.

## **What can you do if this happens?**

The employer or their representative must seek permission from the patient prior to attending an appointment. Should this be granted, you should speak with your patient and advise them that they can decline and if they do, they will not be penalised. The ultimate decision is made by your patient.

If an employer or representative attends an appointment with your patient unannounced, here are some handy tips:

- seek clarification as to who the person is and where they are from;
- have a private discussion with your patient so they do not feel intimidated in the presence of the employer or their representative;

- remind your patient that they can decline to have the employer or their representative attend the appointment;
- ensure your patient is agreeable to continue with the appointment. If they are not, advise the employer or their representative.

The Fair Work Ombudsman released a statement on 27 September 2012 which states that the Ombudsman does not condone or support employer's attendance at medical appointments and sees no reason why they should seek to do this, unless specifically requested to do so by the employee.

Formal complaints in relation to these matters can be made to WorkSafe on 1800 136 089 or the Fair Work Ombudsman on 13 13 94.

**Tina Toutzaris-Sabo**,  
Senior Associate



# Upcoming events

## SUNDAY, OCTOBER 20 2019

### Mornington Festival

11am - 5pm | Main Street, Mornington

## TUESDAY, OCTOBER 22 2019

### Health Workers Union Regional Conference

IBIS Sale, 25-41 Princess Hwy, Sale

## WEDNESDAY, OCTOBER 23 2019

### Health Workers Union Regional Conference

Mornington Hotel, 917 Nepean Hwy

## WEDNESDAY, OCTOBER 30 2019

### Health Workers Union Regional Conference

Quality Hotel Wangaratta Gateway,  
29-37 Ryley Street, Wangaratta

## THURSDAY, OCTOBER 31 2019

### Health Workers Union Regional Conference

All Seasons, 1741-183 Mclvor Road, Bendigo

## THURSDAY, NOVEMBER 7 2019

### Health Workers Union Regional Conference

Bell Tower Inn, 1845 Sturt Street, Ballarat

## SATURDAY, NOVEMBER 9 2019

### Djerriwarrh Festival

From 11am | Melton Recreation Reserve

## FRIDAY, NOVEMBER 15 2019

### General Practitioners Conference & Exhibition

8.30am - 4.30pm |  
Melbourne Convention & Exhibition Centre  
*Adviceline Presentation 10.15am - 11.15am*

## SATURDAY, NOVEMBER 16 2019

### General Practitioners Conference & Exhibition

8.30am - 4.30pm |  
Melbourne Convention & Exhibition Centre  
*Adviceline Presentation 10.15am - 11.15am*

## SUNDAY, NOVEMBER 17 2019

### General Practitioners Conference & Exhibition

8.30am - 4.30pm |  
Melbourne Convention & Exhibition Centre



*Image: Kirsty Osborne, Lachlan Hicks & Grace Bowran-Burge at the Mornington Festival in 2018*

CONTACT US

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LOCATIONS

EPPING | MELBOURNE | MELTON | MOE | SPRINGVALE | WANGARATTA

[www.alil.com.au](http://www.alil.com.au)