SUPREME COURT OF QUEENSLAND

CITATION:	*Lau v WorkCover Queensland* [2002] QCA 244
PARTIES:	**KIN YING LAU** (applicant/appellant) **v** **WORKCOVER QUEENSLAND** (respondent)
FILE NO:	Appeal No 6843 of 2000 SC No 3947 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5 March 2002
JUDGES:	McPherson and Williams JJA and Byrne J Separate reasons for judgment of each member of the Court; McPherson JA and Byrne J concurring as to the orders made, Williams JA dissenting
ORDERS:	**Appeal allowed with costs of an incidental to the appeal. Orders of the primary judge set aside. Instead it should be declared that, in respect of the appellant's injuries mentioned in her notice of claim for damages dated 12 March 1999 (other than her right shoulder pain) that notice is a complying notice of claim within the meaning of s308(1)(a)(i) of the *WorkCover Queensland Act 1996.* Further order that the respondent pay the appellant's costs of an incidental to the proceedings below.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – NOTICE OF ACCIDENT – EFFECT OF INACCURACY IN OR FAILURE TO GIVE NOTICE – EXCUSES FOR FAILURE OR INACCURACY – MISTAKE OR IGNORANCE – whether complying notice of claim given before expiry of limitation period – where the notice of claim for damages included "alleged" non- assessed shoulder pain – whether the inclusion of a non–assessed injury meant that the notice of claim for damages was not a "complying notice of claim" – whether the notice satisfied

the requirements of s. 280 *WorkCover Queensland Act 1996*.

STATUTES – ACTS OF PARLIAMENT - INTERPRETATION – INTERPRETATION ACTS AND CLAUSES – PARTICULAR ACTS AND ORDINANCES – QUEENSLAND – *WorkCover Queensland Act 1996* – where the limitation period expired without the institution of proceedings – where there is provision under the W*orkCover Queensland Act* 1996 for the institution of proceedings after the expiration of the limitation period, if a declaration is obtained that the notice of claim for damages had been given in accordance with s. 280 – where such a declaration is refused – whether the disclosure obligation is confined to "assessed" injuries – whether, even if the notice complies with s. 280, WorkCover's decision is beyond curial examination.

Anagnostou v Woolworths Limited [2001] 2 Qd R 1, considered
Booker v State Rail Authority of NSW (No 2) (1993) 31 NSWLR 402, cited
Bonser v Melnacis [2002] 1 Qd R 1, distinguished
Canning v Brisbane City Council [2001] 2 Qd R 16, cited
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297, cited
Conway v WorkCover [2000] QSC 406, cited
Day v State of Queensland [2000] QSC 401, cited
Durham Holdings Pty Ltd v New South Wales (1999) 47 NSWLR 340, cited
Horinack v Suncorp Metway Insurance Limited [2001] 2 Qd R 266, cited
Re Lankheet [1999] QSC 51, considered
Liversidge v Anderson [1942] AC 206, not considered
McKelvie v Page [1999] 2 Qd R 259, not followed
Re Patterson; ex parte Taylor (2001) 75 ALJR 1439, not considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, considered
Re Robinson [1999] QSC 11, considered
Steley v Harbrew Pty Ltd [1999] QSC 442, cited
Tanks v WorkCover [2001] QCA 103, cited
Re Yin- Foo [2000] QSC 398, considered

WorkCover Queensland Act 1996 (Qld) ss 33, 42, 43, 197, 203, 204, 206, 207, 252, 253, 259, 279, 280, 282, 302, 303, 304, 305 308.
WorkCover Queensland Regulation 1997 (Qld) s 74

COUNSEL: Mr J A Griffin QC, with Mr G R Mullins, for the appellant
Mr R J Douglas SC, with Mr B L P Hoare, for the respondent

SOLICITORS: Stephens and Tozer for the appellant
Thynne & Macartney for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons of Byrne J for allowing this appeal. The appeal should be disposed of in accordance with orders proposed in those reasons.

[2] **WILLIAMS JA:** The appellant suffered some injuries in a fall at her place of employment on 6 February 1997. She gave notice to WorkCover on 6 May 1998.

[3] That resulted in the respondent issuing a Notice of Assessment which made a calculation of permanent impairment and stated the amount of lump sum compensation offered with respect to an injury particularised as: "Left index finger laceration and lumbar sacral sprain". The Notice also stated that: "This is a Non-certificate injury". The appellant accepted the calculation of permanent impairment but rejected the offer of compensation.

[4] The appellant then had an entitlement to seek damages subject to the provisions of Chapter 5 of the *WorkCover Queensland Act* 1996, all of which "are provisions of substantive law" (s 252(2)). The appellant had to comply with the pre-court procedures outlined in Part 5 thereof in order to be entitled to prosecute in court her claim for damages. The first step was the giving of a notice pursuant to s 280. Between March and December 1999 various attempts were made by or on behalf of the appellant to give a notice which complied with the requirements of the Act. It is not necessary to detail the various areas of non-compliance which were addressed during that period. After the furnishing of material on or about 15 December 1999 the respondent conceded there was only one particular in which it contended that the notice was non-complying, namely that the Notice of Claim referred to an injury to the right shoulder in addition to the finger injury and the injury to the lower back. That is, it referred to an injury with respect to which there had been no assessment.

[5] That remained the position on 6 February 2000 when the ordinary limitation period relevant to the appellant's cause of action expired.

[6] On 6 April 2000 the appellant filed an originating application in the District Court seeking a declaration that her Notice of Claim dated 12 March 1999 and 15 December 1999 "has been given in accordance with s 280 of the *WorkCover Queensland Act* 1996", or in the alternative a declaration that "non-compliance has been waived by the respondent as a consequence of a failure to comply with s 282(3) of the said Act". That application was transferred to the Supreme Court and on 19 June 2000 a judge of the Trial Division declined to make the first declaration sought. It appears that the alternative declaration was not the subject of submissions at first instance. It was also noted that the appellant did not seek relief if it was held that the Notice was non-complying. It is from that decision that this appeal is brought.

[7] Section 302 of the Act provides that a "claimant may start a proceeding in a court for damages only if the claimant has complied with" relevantly Part 5 of Chapter 5 and s 303. The proceedings may only be brought after the ordinary limitation has expired in the circumstances stated in s 308; one condition is that a complying notice was given before the end of the period of limitation. Given what has occurred the appellant could not prosecute an action for damages unless the court

declares that she gave a complying notice before 6 February 2000; even if such a declaration was made there may now be other obstacles to such an action being commenced.

[8] I said in *re Robinson* [1999] QSC 11; "when one has regard to s 203, s 204, s 206, s 207, s 253 and s 259 the inference is irresistible that the proceedings for damages can only be commenced in relation to an injury for which an assessment and certificate has issued." I see no reason to depart from that; indeed that statement is now supported by similar observations in a number of single judge decisions: *Steley v Harbrew Pty Ltd* [1999] QSC 442, *Conway v WorkCover* [2000] QSC 406, *Day v State of Queensland* [2000] QSC 401, *re Lankheet* [1999] QSC 51, *re Yin-Foo* [2000] QSC 398, *Anagnostou v Woolworths Limited* [2001] 2 Qd R 1, and *Canning v Brisbane City Council* [2001] 2 Qd R 16. That approach is also consistent with the reasoning in *Tanks v WorkCover* [2001] QCA 103. A number of those cases were concerned with the distinction drawn in the Act between a "psychiatric or psychological injury" and "another injury" (see ss 42 and 43), but the principle is the same regardless of the nature of the injury. That is confirmed by ss 33 and 203 which require one assessment for all injuries sustained in the incident giving rise to the claim.

[9] When all the relevant provisions of the Act are considered the only rational conclusion open, in my respectful view, is that the injuries which must be particularised in the Notice for it to comply with s 280, given the express requirements of s 74 of the WorkCover Queensland Regulation 1997, are the injuries which have been the subject of prior assessment by the respondent. That follows in particular from a reading together of s 203(2) of the Act and s 74(c)(i) of the Regulation. The learned judge at first instance, after referring to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, concluded that the requirement was to particularise injuries "which have been the subject matter of assessment"; it followed, in his view, that the result of including a non-assessed injury was to make the Notice non-complying. I respectfully agree with that conclusion.

[10] The learned judge at first instance also stated that the "staggering of claims in respect of 'multiple injuries [sustained] in an event' is inconsistent with" the object of enabling the respondent to enter into early settlement negotiations with a claimant. Again I agree. Section 280(6) requires the Notice to be accompanied by a genuine offer of settlement. The Notice here contained a figure representing the appellant's offer but the respondent could not meaningfully consider it because it clearly contained some component, not particularised, for the shoulder injury.

[11] At the initial hearing counsel for the appellant sought to abandon any claim for damages with respect to an injury to the right shoulder. It was submitted both at first instance and on appeal that such an abandonment had the effect of making the notice a complying one so that there was no obstacle to the appellant proceeding with her action claiming damages. The Notice here was defective because it referred to injuries other than those in respect of which the appellant had received a notice of assessment. The submission was that if one were to cross out the reference to an injury to the right shoulder wherever it appeared the notice would become on its face a complying one.

[12] The question then becomes whether there can be an amendment or abandonment after the expiration of the ordinary limitation period such as to render the Notice complying.

[13] There is little or no authority upon the legal effect of a claimant purporting to abandon reference to a non-assessed injury in a notice given pursuant to s 280. In *Lankheet*, White J declined, because it was not necessary to her decision, to decide the effect of the solicitors for the applicant in that case seeking to delete any reference to psychological injuries in the notice on the basis that such injuries had not yet been assessed. The limitation period in that case had not expired when the solicitors took that step. Because her Honour held that the notice was non-complying for other reasons she went on to say: "I would not wish to decide conclusively whether a Notice of Claim containing a non-assessed injury is a nullity so as to preclude a claimant withdrawing the non-assessed injury from the claim and thereby regularising it without hearing fuller argument on the point". A similar issue was raised before the same judge in *Yin-Foo*. There, within the limitation period, the claimant in a statutory declaration said he would "not be relying upon the 'psychological effect' as stated in the Notice of Claim, for the purposes of compliance with s 280". In that regard her Honour said: "Neither has the applicant remedied non-compliance by the statutory declaration. Had the applicant abandoned any claim based upon any psychological sequelae by statutory declaration it would be appropriate to declare that the non-compliance was remedied, but that is not the case."

[14] The only other reference I can find to abandonment in any reported case is a statement in *Anagnostou* as to the attitude of WorkCover. In paragraph 16 I recorded the following: "The position adopted by WorkCover was that the applicant should either proceed to have his alleged psychological injury assessed and then lodge a fresh Notice of Claim for Damages referring to both the back injury and the psychological injury, or abandon the claim for psychological injury and proceed with a claim limited to the injury stated in the Notice of Claim for Damages of 2 August 1999". Again it is significant that in that case the relevant limitation period had not expired when the application was heard.

[15] As the limitation period had expired in this case before any application was made to the court, nothing said herein concerns the effectiveness of an amendment to a s 280 notice before the expiration of the limitation period.

[16] No proceedings have yet been commenced by the appellant. In order for proceedings to be commenced the appellant must comply with the requirements of ss 302 and 303 of the Act. Section 308 provides for limited circumstances in which the proceeding for damages may be brought after the end of the ordinary period of limitation. But that section is so worded that, for it to operate, before the end of the limitation period the claimant must give a complying notice or the court must make a declaration under s 304 or the court must give leave under s 305. The fact that the applications to the court under either s 304 or 305 must be brought before the end of the limitation period strongly suggests that nothing can be done after the expiration of the limitation period to convert a non-complying notice into a complying one.

[17] A somewhat analogous question has arisen under the *Motor Accident Insurance Act* 1994. The decision of the Court of Appeal in *Horinack v Suncorp Metway Insurance Ltd* [2001] 2 Qd R 266, overruling *McKelvie v Page* [1999] 2 Qd R 259,

indicates that in circumstances such as exist here the legislation would have to expressly empower the court to regularise non-complying procedural steps after the expiration of the limitation period.

[18] Given the scheme of the WorkCover legislation I am of the view that steps cannot be taken by way of amendment or abandonment after the expiration of the ordinary limitation period in order to convert a non-complying s 280 notice into a complying one.

[19] It follows that the appeal should be dismissed with costs.

[20] **BYRNE J: Injury at work** On 6 February 1997, the appellant was injured in a fall at work. Presumably, she later gave notice to the respondent ("WorkCover") and was medically examined at its request. For, on 6 May 1998, WorkCover issued her with a notice of assessment for a "non-certificate injury", described as "left index finger laceration and lumbarsacral sprain", and offering lump sum compensation of $4420. The offer was rejected.

Notice to WorkCover

[21] On 12 March 1999, the appellant completed a notice of claim for damages, using WorkCover's form, foreshadowing her intention to litigate a claim against her employer for damages for the injuries allegedly sustained in her fall. The form demands a deal of information, including, by question 56, a "specific list" of "all injuries" and, by the next question, identification of every "part of the body injured". The appellant mentioned deep cuts to the ring finger of the left hand, lacerations to the palm and base of the thumb of the left hand, sprain and numbness in the lower back and, as the least severe of her injuries, pain in the back and right shoulder.

Problems with the Notice

[22] WorkCover received the notice on 16 June 1999, as appears from its letter dated 20 July 1999. This letter, which was WorkCover's initial response, referred to supposed "areas of non-compliance" with the requirements of s. 280 of the *WorkCover Queensland Act* 1996 ("the Act").[1] The author was not, she wrote, prepared to "waive compliance in relation to these questions" and asked that these "defects" be remedied within 60 days. The "defects" list did not mention the responses to questions 56 or 57.

[23] On 16 August 1999, the appellant's solicitors furnished additional information. WorkCover then retained solicitors, who, in September 1999, wrote to the appellant's solicitors objecting that the notice of claim for damages[2] was "non-compliant in a number of areas", including the answers to questions 56 and 57. The letter pointed out, correctly, that there had not been an "assessment"[3] of a claim of right shoulder pain, adding that, if the appellant intended to claim damages for such a disability, the shoulder pain "injury"[4] had also to be "assessed".

---

1 References throughout are to the Act as it stood before the *WorkCover Queensland Amendment Act* 2001 took effect.

2 which the letter asserted had been received by WorkCover on 17 August.

3 Presumably, the appellant's initial notification of her injuries did not mention shoulder pain, which would explain why the assessment issued on 6 May 1998 omitted reference to such a complaint.

4 There is no suggestion that the pain in the shoulder was attributable to the back injury.

[24] Rather than contending that WorkCover must be taken to have waived any non-compliance with s. 280 beyond the "defects" suggested in July, or else because WorkCover had not responded to the appellant's notice within the 30 days mandated by s. 282(2)[5], the appellant's solicitors, in a fashion, set about addressing the new objections to the sufficiency of the responses to the many inquiries made by the notice. First, they asked to retrieve her completed form so that it could be altered. A copy was supplied. When the appellant's solicitors pressed for the original, WorkCover proposed that the concerns be met by the provision of more information, supported by a statutory declaration. Some such declaration was provided with a letter dated 15 December 1999. Concurrently, the appellant's solicitors submitted an application for a damages certificate in relation to the shoulder pain. But still there had not been an assessment of the right shoulder injury claim. Its absence led WorkCover's solicitors to say that they could not "recommend" that the notice of claim for damages "be deemed compliant".

Proceedings for declaratory relief

[25] There things stood when, on 6 February 2000, the limitation period expired without the institution of proceedings.

[26] Under s. 308(1) of the Act, proceedings may be commenced seeking damages for work-related personal injury after the limitation period expires if:

> "(a) before the end of the period of limitation –
>
> (i) the claimant gives a notice of claim that is a complying notice of claim: or
>
> (ii) the claimant gives a notice of claim for which WorkCover waives compliance with the requirements of section 280; or
>
> (iii) a court makes a declaration under section 304; or
>
> (iv) a court gives leave under section 305; and
>
> (b) the claimant complies with section 302".

[27] In order to take advantage of s. 308(1)(a)(i), the appellant sought a declaration that her notice of claim for damages had been given in accordance with s. 280.

[28] At the hearing, the appellant disclaimed any intention of seeking damages for her right shoulder pain. The principal question before the primary judge was therefore whether, as WorkCover maintained, the mention of shoulder pain in response to questions 56 and 57 meant that her notice was not a "complying notice of claim" within s. 308(1)(a)(i) in respect of the other injuries[6] alleged in the notice to have been sustained in the fall. The declaration was refused. Hence this appeal.

[29] Before turning to s. 280, it is as well to explain the references to assessment.

---

5 Neither point was taken in this Court or before the primary judge.

6 It was, and remains, common ground that all the other injuries nominated were encompassed by WorkCover's notice of assessment.

Assessment and its significance for damages suits

[30] Under s. 197(1) of the Act, WorkCover may have a worker's injury "assessed" to decide if the injury has resulted in permanent impairment. For injuries other than industrial deafness, and psychiatric or psychological complaints, the assessment is undertaken "by a doctor".[7]

[31] By s. 203:

> "(1) WorkCover must, within 28 days after receiving the assessment of the worker's permanent impairment, give the worker a notice of assessment in the approved form.
>
> (2) However, if a worker sustains multiple injuries in an event[8], WorkCover must give the notice only after the worker's degree of permanent impairment from all the injuries has been assessed."

[32] The notice of assessment is critical to an entitlement to sue. By s. 259(1), a claimant who, like the appellant, sustains a non-certificate injury[9] "may seek damages for the injury only[10] after the claimant has received a notice of assessment from WorkCover" "issued under section 203".[11] But that is not the only precondition to litigation.

Complying Notices

[33] Part 5 of Chapter 3 of the Act, which includes ss. 280 and 282, has as its object, enabling WorkCover "to enter into early negotiations with claimants to achieve early resolution of claims for damages before the start of court proceedings".[12] To that end, s 280 provides:

> "**280.(1)** Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for the damages …
>
> **(2)** The claimant must give-
>
> (a) WorkCover … a notice of claim in the approved form …
>
> **(3)** The notice must include the particulars prescribed under a regulation.
>
> **(4) …**

---

7 Section 197(2)(c).

8 "An event is anything that results in injury, including [an insidious disease]…": s. 33(1) of the Act.

9 defined in s 43 to include an injury "from an event" that results in work-related impairment "of less than 20%".

10 Cf *Bonser v Melnacis* [2002] 1 Qd R 1.

11 See Schedule 3 definition of "Notice of Assessment". See also s. 302(b), by which a "claimant may start a proceeding in a court for damages only if the claimant has complied with …part 5, other than as provided by section 304 and 305 …".

12 Section 279.

(5) The notice must be verified by statutory declaration.

(6) The notice must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement can not yet be made.

(7) The notice must be accompanied by the claimant's written authority allowing WorkCover to obtain information, including copies of documents relevant to the claim, and in the possession of-

(a) a hospital; or

(b) the ambulance service of the State or another State; or

(c) a doctor, provider of treatment or rehabilitation services or person qualified to assess cognitive, functional or vocational capacity; or

(d) the employer or a previous employer; or

(e) insurers that carry on the business of providing workers' compensation insurance, compulsory third party insurance, personal accident or illness insurance, insurance against loss of income through disability, superannuation funds or any other type of insurance; or …"

[34] Section 74 of the *WorkCover Queensland Regulation* 1997 prescribes the "particulars" which, by s. 280(3) of the Act, must be included in the claimant's notice. The notice "must be made in the approved form and include …

(c) full particulars of the nature and extent of –

(i) all injuries alleged to have been sustained by the claimant because of the event; and

(ii) the degree of permanent impairment that the claimant alleges has resulted from the injuries; and

(iii) the amount of damages sought under each head of damage claimed by the claimant and the method of calculating each amount; and

(iv) how the claimant is presently affected by the injuries;"

The appellant's notice of claim

[35] When the appellant submitted her notice of claim for damages, she maintained that the least severe of the symptoms was her right shoulder pain; and at that time she intended to pursue a claim for damages for that, as well as other, injuries sustained in her fall. In view of the Regulation 74(c)(i) obligation to disclose "full particulars of the nature and extent of all injuries alleged to have been sustained …" and the content of questions 56 and 57, it is not surprising that the appellant referred to her

shoulder pain even though no injury to which the condition might be related had then been assessed. WorkCover, however, maintains that mentioning that pain in response to questions 56 and 57 not only means that her notice was not given in accordance with s. 280 but also precludes the litigation of a claim for damages for the rest of her - all assessed - injuries. The primary judge accepted, and the appellant challenges, the correctness of both propositions.

[36] Is the disclosure obligation confined to "assessed" injuries?

[37] "Not without some hesitation", the judge was persuaded that the Act required such an interpretation. His Honour was particularly impressed by two matters: the s. 259(1) constraint on damages claims, permitting suits only for "assessed" injuries, and the assumption s. 203(2) reflects that multiple injuries sustained in the one event will all be "assessed" before WorkCover delivers its Notice. Before us, the judge's interpretation was also sought to be supported on the basis that the inclusion of a non-assessed injury in a claimant's notice might inconvenience WorkCover in its evaluation of, or its response to, a foreshadowed damages claim: as, for example, by creating a difficulty in deciding what sum to offer in compromise.

[38] These considerations do tend to indicate that the disclosure required of a prospective litigant might sensibly have been confined to assessed injuries. But other, more weighty, factors show that a non-assessed injury that is intended to be the subject of a claim for damages - as with the shoulder pain - is appropriately notified in accordance with Regulation 74(c)(i).

[39] First, there is the natural and ordinary meaning of "full particulars of the nature and extent of … all injuries alleged to have been sustained …" Those words contain no hint that the injuries required to be stated are limited to those already assessed - a qualification which, had it been meant, could easily have been expressed.

[40] Secondly, it would accord with the purpose the notice is to serve - as s. 279 puts it, "to achieve the early resolution of claims for damages" before litigation starts – for WorkCover to be informed not only of injuries then assessed but also of any other injury sustained in the same "event" which, when assessed, is to be the subject of a damages claim.[13]

[41] Inclusion of the "alleged", non-assessed shoulder pain for which the appellant intended to claim damages was consistent with the burden Regulation 74(c) imposes. Her notice therefore[14] satisfied the requirements of s. 280[15].

---

13 Another consideration might also be thought to support an interpretation of Regulation 74(c) that accords with the ordinary meaning of its words. Regulation 74(c) elsewhere suggests that the required disclosure serves to facilitate a thorough investigation by WorkCover of the merits of the issues to be agitated in prospective litigation: by subs (d), for example, the name and address of every treating doctor must be disclosed; so must "all personal injuries, illness and impairments of a medical, psychiatric or psychological nature sustained … before or after the event for which the claimant has claimed damages, compensation or benefits, the name and address of any person against whom a claim for damages or compensation was made and, if an insurer was involved, the name and address of the insurer" (sub- regulation (g)). Knowledge of all alleged injuries could sometimes assist in assessing the likelihood that each of them had occurred in the way the claimant asserts.

14 It is not suggested that Regulation 74(c) is, to the extent it requires disclosure of injuries "alleged" but not assessed, beyond power.

15 This conclusion makes it unnecessary to consider WorkCover's, at first blush breathtaking, contention that the Act discloses an intention to forbid the prosecution of notified, assessed claims should a claimant divulge in the notice of claim the existence of another, not then assessed, injury.

WorkCover conclusively right though wrong?

[42] WorkCover, however, maintains that it is immaterial that the notice complies with s. 280. Its view to the contrary is said to be now beyond curial examination.[16] Sections 282, 304(1) and 308(1)(a)(iii) are central to this contention.

[43] Section 282 provided:

> "**282.(1)** This section applies if a notice of claim is given to WorkCover.
>
> **(2)** WorkCover must, within 30 days after receiving the notice, give the claimant written notice—
>
> (a) stating whether WorkCover is satisfied that the notice of claim complies with section 280 (a **"complying notice of claim"**); and
>
> (b) if WorkCover is not so satisfied – identifying the noncompliance and stating whether WorkCover waives compliance with the requirements; and
>
> (c) if WorkCover does not waive compliance with the requirements – allowing the claimant a reasonable period of at least 30 days either to satisfy WorkCover that the claimant has complied with the requirements or to take reasonable action to remedy the noncompliance.
>
> **(3)** If WorkCover is not prepared to waive compliance with the requirements in the first instance, WorkCover must, within 30 days after the end of the period specified in subsection (2)(c), give the claimant written notice stating that—
>
> (a) WorkCover—
>
> (i) is satisfied the claimant has complied with the relevant requirements; or
>
> (ii) is satisfied with the action taken by the claimant to remedy the noncompliance; or
>
> (iii) waives the noncompliance; or

[16] This idea was not raised before the primary judge.

> (b) WorkCover is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, with full particulars of the noncompliance and the claimant's failure to remedy it…"
>
> **(4)** WorkCover must, within 30 days after receiving a complying notice of claim or waiving noncompliance with the requirements of section 280, advise the employer or employers against whom negligence is alleged.

[44] By s 304(1):

> "**(1)** Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant dissatisfied with WorkCover's response under section 282 to a notice of claim, declares that—
>
> (a) notice of claim has been given under section 280; or
>
> (b) the claimant is taken to have remedied noncompliance with the requirements of section 280.

[45] Section 308(1)(a)(iii), which proceeds upon the basis that a declaration under s. 304 must be made before the end of the limitation period, has already been mentioned.[17]

[46] According to WorkCover, a notice of claim for damages is a "complying notice of claim" within the meaning of s. 308(1)(a)(i) only where WorkCover is, to adopt language of s. 282(2), "satisfied that the notice of claim complies with section 280". If, as in this case, WorkCover is wrong to regard the notice as non-compliant, once the limitation period passes without a declaration of compliance having been made under s. 304, the damages claim is, WorkCover maintains, lost for all the injuries sustained in the "event". No inability to fund proceedings for declaratory relief matters. Exigencies of court lists or a delayed judgment are beside the point. If an adverse determination under s. 282 is not judicially reversed by a declaration pronounced before the limitation period ends, it can never be called into question in a court. And should WorkCover, for whatever reason, omit to give a s. 282(2)(a) notice expressing its satisfaction, the claimant's notice, however precisely it may conform with s. 280 and Regulation 74, is not a "complying notice of claim".

[47] Before the limitation period expires, some steps can be taken to cope with the absence of a response, or with an unsatisfactory response, to a notice given pursuant to s. 280. Section 304 may be called in aid to obtain a declaration of compliance. There is also s. 305(1), by which "… the claimant may start the proceeding if the court… gives leave to bring the proceeding despite non-compliance with requirements of section 280", allowing a claimant who gets no s. 282 response to seek the favourable exercise of a judicial discretion permitting the institution of damages proceedings nonetheless. But taking advantage of these possibilities

---

17 See para [7].

inevitably involves trouble and expense. Despite them as means of ameliorating hardship, from a practical perspective, substantial inhibitions remain on an injured employee's capacity to prosecute a damages claim if WorkCover is correct about the effect of s. 308(1)(a)(i). Even in this Act, which besets the path of work-related damages claims with more than one complication[18], the consequences of WorkCover's interpretation are so unattractive, and therefore so unlikely to have been intended, that clear and unambiguous language would be needed to sustain it.[19]

[48] Literally construed, the material words are opposed to WorkCover's interpretation. Section 282(2)(a) does not in terms stipulate that a notice of claim which WorkCover "is satisfied … complies with section 280" constitutes a "complying notice of claim". Instead of defining the expression "complying notice of claim" in that way, the provision requires WorkCover to give "a written notice" to a claimant who notifies an intention to prosecute a damages claim. That notice must state "whether WorkCover is satisfied that the notice of claim complies with section 280…" The succeeding parenthetical expression, "a complying notice of claim", therefore appears to be grammatically referable to a document that "complies with section 280" rather than to WorkCover's state of mind.

[49] So to construe s. 282(2)(a) would accord with the regime s. 282 establishes. Where WorkCover notifies its satisfaction that s. 280 has been complied with, it will be held to that determination. If not so satisfied, WorkCover is to identify "the noncompliance" and choose whether to waive the noncompliance, and if not, ss. 282(2)(c) and (3) state the consequences.

[50] A literal interpretation also makes s. 282(4) capable of sensible operation.

[51] The interpretation for which WorkCover contends is not needed to implement the legislative intention emerging from the statutory scheme.

[52] The preferable interpretation of s. 282 therefore permits the grant of declaratory relief determining that the appellant's notice of claim was a "complying notice of claim" within the meaning of that expression in s. 308(1)(a).[20]

Disposition

[53] The appeal should be allowed, the orders made by the primary judge set aside, and instead it should be declared that, in respect of the appellant's injuries mentioned in her notice of claim for damages dated 12 March 1999, other than her right shoulder pain, that notice is a "complying notice of claim" within the meaning of s. 308(1)(a)(i) of the *WorkCover Queensland Act* 1996. There should be a further order that the respondent pay the appellant's costs of and incidental to the appeal and to the proceeding before the primary judge to be assessed.

---

18 "a number of hurdles to be cleared by would be plaintiffs", as the Explanatory Notes to the *WorkCover Queensland Amendment Bill 2001* (at p14) characterize the several impediments.

19 See *Durham Holdings Pty Ltd v New South Wales* (1999) 47 NSWLR 340, 352-353; (2001) 75 ALJR 501, [28]- [31]; *Booker v State Rail Authority of NSW [No 2]* (1993) 31 NSWLR 402, 410; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320.

20 Which makes it unnecessary to consider whether authorities in the tradition of the (dissenting) speech of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (for example, *Re Patterson; ex parte Taylor* (2001) 75 ALJR 1439, 1502 [330]) lead to an interpretation of s. 282(2)(a) that compels WorkCover's satisfaction as to compliance where compliance exists in fact.