

Workplace injuries: Rights and claims

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EMPLOYERS AND EMPLOYEES SHOULD CONSIDER THE OPTIONS CAREFULLY

In a recent landmark decision of *SGB Starkstrom Pte Ltd v The Commissioner for Labour [2016] SGCA 27*, the Court of Appeal held that the next-of-kin of a mentally incapacitated employee cannot make an election on behalf of that employee to make a claim under the Work Injury Compensation Act (WICA) without a Deputy appointed pursuant to the Mental Capacity Act (MCA).

FACTS OF THE CASE

The injured worker, Tan Yun Yeow (Tan), was employed by SGB Starkstrom Pte Ltd (Starkstrom) as an engineer. On 19 March 2009, Tan was involved in an electrical explosion in the course of his employment. He suffered extensive burns and remained in a coma for several months. He was later considered to be a mentally disordered person of unsound mind and incapable of managing his financial and personal affairs after regaining consciousness. In the following month, the Commissioner of Labour (COL) sent a standard letter to Tan enquiring if he wished to make a claim under the WICA. This letter also enclosed an application form to be filled in and returned to the COL in the event that Tan wished to make a claim under the WICA.

On 22 January 2010, solicitors engaged by Tan's brother, Rodney Tan (Rodney), wrote to the COL informing her that Tan's wife had given Rodney her power of attorney to deal with matters relating to Tan. As Tan was assessed to be mentally incapacitated, the COL sought confirmation from Rodney's solicitors as to whether Tan's next-of-kin wished to claim compensation under the WICA on Tan's behalf. Rodney's solicitors responded in the affirmative.

The COL accordingly issued a Notice of Assessment (NOA) on 14 June 2010. Rodney and his solicitors neither filed any objections to the NOA nor withdrew the claim under the WICA. Starkstrom's insurers duly made payment in satisfaction of the NOA.

More than two years after the NOA was issued, Rodney obtained a court order appointing him as his brother's Deputy under the MCA.

Subsequently, Rodney changed his mind about making a claim under the WICA for Tan and wanted to make a claim under Common Law instead. In Rodney's solicitor's resulting correspondence with the COL, the COL asserted that the NOA was valid. This would mean that Tan was barred under the WICA from making any claims at Common Law against Starkstrom for this incident.

More than four years after the incident, Rodney proceeded to commence legal proceedings at common law against Starkstrom and other parties. Starkstrom applied to strike out the Suit on the basis that Tan could no longer maintain a common law claim against Starkstrom after having deemed to accept the NOA. In response to Starkstrom's application, Rodney's solicitors commenced judicial review proceedings against the COL, to quash the NOA on the grounds that it was issued invalidly.

At this juncture, the COL changed its position and asserted that the NOA was a nullity as Tan had no capacity to make a claim under the WICA. Starkstrom thus commenced separate judicial review proceedings against the COL challenging the COL's said change in position.

Both sets of judicial review proceedings were heard together. The High Court held that only a Deputy has the legal capacity to make a claim under the WICA on behalf of a mentally incapacitated employee. As Rodney was not Tan's Deputy at the material time, the NOA was issued by the COL in error and has no effect.

Starkstrom appealed. It argued that persons other than a Deputy may make a claim under the WICA for and on behalf of a mentally incapacitated employee, and Rodney had the requisite standing to make such claim on his brother's behalf.

DECISION ON REQUIREMENT OF DEPUTY UNDER THE WICA

The Court of Appeal led by Chief Justice Sundaresh Menon viewed the issue as one involving the right of election, viz whether the next-of-kin of a mentally incapacitated employee could without more, make an election on behalf of the employee to claim compensation under the WICA instead of damages at common law.

The Court emphasised that the making of a claim under the WICA on behalf of an injured employee has the effect of irrevocably foregoing the

rights of that employee to seek relief under the common law. There are material differences between the two avenues for seeking relief (with the compensation recovered via WICA route generally being less than a successful claim at common law). These significant implications underscore the need to ensure that the person making an election purportedly on behalf of a mentally incapacitated employee has been properly conferred with the authority to do so.

There is also significant need to protect the injured employee's right to choose his preferred avenue for claiming compensation especially in situations where the next-of-kin or dependants of the injured employee differ among themselves as to the preferred avenue. There should thus be safeguards to protect the injured employee's right of election.

Furthermore, the MCA is an Act of general application. In the absence of express words to the contrary, it will govern all situations involving mentally incapacitated persons, including the claim procedure under the WICA.

Since Rodney was not Tan's appointed deputy at the time he purported to make a claim on Tan's behalf under the WICA, the NOA was issued in excess of the COL's jurisdiction and was invalid. The consequence being that Tan can now maintain a claim at common law against Starkstrom.

PRACTICAL IMPLICATIONS

This decision underscores the importance of ascertaining that the representative purporting to make a claim under the WICA on behalf of an injured employee has the required legal capacity.

In situations involving mentally incapacitated employees, the representative making the election between compensation under WICA or at common law for the employee should be a properly appointed Deputy under the MCA, i.e. either by way of a Court Order or a grant of Lasting Power of Attorney. Based on the Court of Appeal's interpretation of the WICA and concerns raised, family members and dependents of a deceased employee may also not have any legal capacity to make a claim under the WICA without a grant of probate or letters of administration.

As such, in the absence of any substantive amendments to the WICA, it would be prudent for employers and insurers take steps to ensure that the claimants in WICA claims involving mentally incapacitated or deceased employees have the requisite legal capacity to make the claim before resolving the matter. This is to avoid any risk of concluded cases being re-opened and re-litigated under common law in future.

Currently, the COL appears to maintain the position that a grant of probate or letters of administration is not required for the family members or dependants of a deceased employee to make a claim under the WICA. The correctness of the COL's position is doubtful, and it remains to be seen if the COL's position would be upheld by a Court of Law.

Pending further clarity in the law on the validity of a claim made under the WICA by family members or dependents of a deceased employee, it is advisable for employers and insurers to consider the likelihood (or lack thereof) of the claim being subsequently re-litigated at common law before resolving the claim.

As any NOA issued pursuant to claims made by next-of-kin / dependants without legal capacity is technically invalid, employers and insurers may wish to note the following limitation periods in relation to claims concluded under the WICA prior to this decision:

- Claims by mentally incapacitated employees – three years from the date when the employee ceased to be under a disability (e.g. by appointment of a Deputy under the MCA) or died, whichever first occurred;
- Claims by the dependants of the deceased employees – three years from the date of demise of the employee; and
- Claims by the estate of deceased employees – three years from the date of demise of the employee.

Although claims involving mentally incapacitated employees may appear to have an indeterminate limitation period, in practice a Deputy would generally be appointed within a few years of the diagnosis of mental incapacity so that matters relating to these employees' personal welfare and/or property and financial affairs can be handled. Also, compensation paid under the WICA to the next-of-kin / dependants must be repaid before the Deputy / Administrator can maintain a common law claim against the employers. As such, this decision is unlikely to result in a floodgate of concluded cases being re-opened and/or re-litigated under common law.

On a more general note, unlike in common law claims, the WICA presently does not provide for the reimbursement of disbursements incurred by claimant when assessing the amount of compensation payable. Such relevant disbursements include the costs of obtaining the Court Order for a Deputy or to extract the grant of probate or letters of administration. Considering the time and costs involved in obtaining a Court Order for a Deputy or grant of probate or letters of administration, there may be an increase in claimants electing to make their claims under common law rather than the WICA.