

# Non-Compliance with section 182D of the Workers' Compensation Act 1990 (Qld) Is that fatal to your claim?

*Neuss v Roche Brothers Pty Ltd*, Plaintiff number D2133 of 1998

On 24 September, 1999 His Honour Queensland District Court Judge Forde handed down his decision arising from a court application in the matter *Neuss v Roche Brothers Pty Ltd*, Plaintiff number D2133 of 1998.

In that matter the Plaintiff was employed by the Defendant as a truck driver and alleged that he injured his back in June 1996 when driving trucks particularly suffering a prolapsed disc in 1996.

There were three applications before His Honour as follows:

1. The Plaintiff applied to disallow an amendment to the Defendant's Further Entry of Appearance and Defence;
2. The Plaintiff applied to have leave to consolidate two actions and deliver an Amended Statement of Claim; and
3. The Defendant applied pursuant to Rule 293 of the Uniform Civil Procedure Rules that the Plaintiff's action be struck out for failing to comply with Section 182D of the *Workers' Compensation Act 1990* ("the Act"), in that the Plaintiff did not obtain a certificate prior to the proceedings being commenced.

Rule 293 of the Uniform Civil Procedure Rules permits summary judgment for a Defendant. Rule 293(2) states:

"Also, the court may give any judgment or make any other order the court considers appropriate if satisfied:

- (a) No reasonable cause of action is disclosed; or
- (b) The proceeding is frivolous, vexatious or an abuse of the process of the court; or
- (c) The Defendant has a defence to the proceeding."

Section 182D of the Act sets out under several sub-sections the procedure which must be followed by a Plaintiff and WorkCover prior to proceedings in court being instituted. These procedures include the Plaintiff applying in the approved form to the WorkCover for a certificate (sub-Section 2); and WorkCover issuing an unconditional certificate (sub-Section 6).

The parties agreed in the matter that the procedures in Section 182D of the Act had not been followed as there was no offer of lump sum compensation to the Plaintiff, there was no decision by WorkCover that the Plaintiff's injury was a "certificate" injury and there was no certificate issued by WorkCover.

The Defendant's main submission was that pursuant to Section 182D if no certificate is issued prior to an action being commenced then failure to obtain that certificate is fatal to the action and

the action is a nullity. Numerous cases were cited by the Defendant to support that. As His Honour pointed out, in none of those cases was the question of waiver argued.

In this matter the legal representatives of the Plaintiff relied heavily upon the doctrine of waiver.

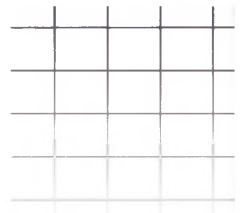
In relation to that, Mr Douglas SC for the Plaintiff argued that Section 183D(1) is merely procedural, albeit of a mandatory nature, and accordingly the argument existed that the requirement of the certificate may be waived by the Defendant.

His Honour considered the facts over the five years leading up to the application and considered the Plaintiff's argument that WorkCover did not raise the Section 182D issue until after the expiration of the limitation period and therefore the Plaintiff had been prejudiced by the conduct of WorkCover and that such conduct amounted to a waiver of WorkCover's rights under the relevant provisions of the Act. The Plaintiff submitted that if the issue had been raised earlier then the necessary certificate under Section 182D could have been obtained.

His Honour relied heavily on the case of the *Commonwealth v Verwayen* to summarise the requirements of the law on waiver involving a statutory requirement particularly the passage of McHugh J who stated:

"In my opinion the true basis of the

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## How to lodge your Compensation Claim Form with WorkCover

**1300 362 128**

For a new claim, call 1300 362 128 (for the cost of a local call) and lodge your claim over the telephone. If both the worker and employer are not available to complete the form during the same telephone call, WorkCover will send out the part-completed form to the workplace for completion and signing.

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Post your completed Compensation Claim Form (with all documents attached) to your nearest office.

decisions in these cases is that, where the existence of a statutory right depends upon the fulfilment of a condition precedent, a person entitled to insist on the fulfilment of that condition may dispense its compliance unless it is enacted for the benefit of the public, and that person will be held to have waived compliance with the condition if he or she knowingly takes or acquiesces in the taking of a subsequent step in the course of procedure laid down by the statute after the time

for the other person to fulfil the condition has passed.”

His Honour held as follows:

- (a) That WorkCover waived compliance by the plaintiff with Section 182D(1);
- (b) The solicitors for WorkCover were aware of the failure of the applicant to comply with Section 182D and failed to insist upon the fulfilment of the condition throughout the course of the action;
- (c) The obtaining of the certificate was a pre-condition placed upon a worker before seeking to obtain damages at law but it was open to the solicitors for WorkCover to notify the Plaintiff of the provisions of Section 182D if the fulfilment of the pre-condition was to be insisted upon.

His Honour therefore concluded that in all of the circumstances the conduct of WorkCover and those acting on

its behalf did amount to waiver of the statutory requirement of Section 182D and that could apply even though that statutory requirement is obligatory or mandatory and proceedings would otherwise be a nullity.

His Honour therefore ordered that:

1. The amendment to the Further Amended Entry of Appearance and Defence to please nullity be disallowed;
2. That the application to strike out the Plaintiff's action be refused;
3. That the actions be consolidated;
4. That the Respondent (WorkCover) pay the Plaintiff's costs of and incidental to all three applications to be assessed.

His Honour's decision is an excellent decision, not only on the principles His Honour discussed but also on common sense.

For too long WorkCover and its solicitors have attempted to rely on matters such as those before his Honour to defeat claims by Plaintiffs which are perfectly reasonable and entitled to proceed. **■**

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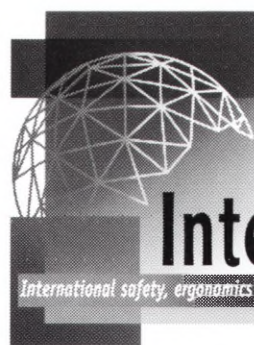
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