CIVIL JUSTICE RESEARCH CENTRE
A PROJECT OF THE LAW FOUNDATION OF NEW SOUTH WALES

COMPENSATION IN AN ATMOSPHERE OF REDUCED LEGALISM

Deborah Worthington

DECEMBER 1994

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A study of workers compensation claims made under the New South Wales WorkCover scheme

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CIVIL JUSTICE RESEARCH CENTRE

Charter of the Civil Justice Research Centre

The Civil Justice Research Centre was established by the Law Foundation of New South Wales in 1989.

The principal purpose of the Civil Justice Research Centre is to help make the processes for resolving civil disputes in New South Wales more efficient, more cost effective, and more accessible to the public.

The Centre examines the policies that shape the civil justice system, the behaviour of the people who participate in it, the operation of its institutions, and its effects on the community's social and economic systems.

The Centre adopts an interdisciplinary approach to the study of public policy issues; widely disseminates the results of its work to Government officials, legislators and judges; the unions; the business, consumer affairs, legal and research communities; and to the general public.

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Foreword

The Civil Justice Research Centre was established by the Law Foundation of New South Wales in 1989. Through its research, the Centre aims to contribute to a more efficient and more accessible civil justice system by providing policy makers with independent, empirical information on which their decisions about reform of the system can be based.

An important component of the civil justice system is the system for resolving disputed claims for workers compensation. Since its inception, the Centre has considered research into this system to be of great importance, and has conducted previous studies in this area, in particular a study of the role of the WorkCover conciliation service in 1990.

This current study was commissioned by the WorkCover Authority for the purpose of looking at the legal costs being generated by workers compensation claims. Although the WorkCover scheme appears to have been successful in reducing insurance premiums and improving rehabilitation rates, there is also evidence that legal costs are increasing, in spite of the scheme's emphasis on the non-litigious resolution of claims.

The purpose of this study is to provide information which will show where litigation is occurring, how it is being conducted and what legal costs are being incurred. The report reveals that only a small proportion of workers compensation disputes are resolved without litigation. Further, in certain cases, litigation does not appear to follow a disagreement between the parties, but is used as a means of making a claim for benefits. The study also provides information about the cost effectiveness of litigation, and considers whether certain types of claims are more likely to involve litigation.

The report suggests a number of areas where changes could be made to the WorkCover scheme if it is to achieve its goal of reduced legalism. The information provided by the study will also further our general understanding of the operation of the WorkCover scheme.

Gillian McAllister
Executive Director

Executive Summary

The WorkCover scheme was introduced in New South Wales in 1987. One reason for the introduction of this scheme was to contain the rising costs of workers compensation. At the time of the scheme's inception, management of costs within the workers compensation system had reached crisis proportions and insurers were warning of their impending withdrawal from workers compensation. WorkCover was designed as a non-litigious scheme with a primary focus on rehabilitation:

> *After more than twelve months of extensive public discussion and submissions we will together redirect the system back to the path it was originally intended to go – a system which emphasises occupational safety, rehabilitation and compensation in an atmosphere of reduced legalism and adversarial proceedings.*[1]

In the period immediately before the introduction of WorkCover, legal costs were equivalent to 10% of total workers compensation payments. This percentage was considered unacceptably high and contributed to the requirement that the new scheme aim to reduce legalism. However, since an initial drop off following the introduction of WorkCover, legal costs have gradually increased. They now, once again, account for 10% of total workers compensation payments, and it would appear that this percentage is rising.[2]

The legal cost problem is being addressed by the WorkCover Authority from a number of perspectives. As a part of this wider strategy, the CJRC received a request to undertake a study of workers compensation claims. The purpose of this study was to provide a better understanding of the way in which the workers compensation dispute resolution system was working by addressing the following questions:

- Why do disputes arise?
- How are disputes resolved?
- How long does it take to resolve disputes?
- Why does litigation occur?
- How is litigation conducted?
- What legal costs are incurred?
- What does contesting litigation achieve?
- Which claims are more likely to involve litigation?

It was intended that the answers to these questions would address the broader issue of whether the WorkCover scheme had achieved an "atmosphere of reduced legalism" and provide a sound empirical basis for recommendations as to areas in need of legislative or procedural change if legal costs are to be reduced.

The findings are based on a sample of claims in which the total incurred cost was greater than $5000. This focus on more expensive claims was deliberate as most legal costs incurred by the WorkCover scheme were found to stem from such claims. Information to address the questions was collected from both insurers' claim files and the WorkCover claims database.

Why do disputes arise?

To classify when and why disputes arise, four claim events were defined: the initial claim, an unlitigated claim for S66/S67 benefits, an unlitigated claim for further benefits, and a notification of discontinuation. It was observed that disputes were commonly preceded by one of these claim events. Details of the disputes arising from each of these events were recorded from the claim files.

Twenty-three percent of disputes arose in relation to the initial claim. Only 10% arose when the worker made an unlitigated claim for S66/S67 benefits. In 11% the dispute arose when the worker made an unlitigated claim for further benefits. A larger proportion of the disputes, 24%, arose when the insurer provided notification that weekly payments would be discontinued.

It was often observed that litigation arose without a preceding event. In 32% of disputes, litigation did not arise from one of the four claim events defined. Why litigation did arise in these circumstances will be considered under the question *Why does litigation occur?*

How are disputes resolved?

Overall, only a small proportion of disputes, 20%, were resolved without litigation. Litigation was commenced in 80% of disputes. This brings into question the "reduced legalism" intended by the WorkCover legislation.

Although a sizeable proportion of unlitigated disputes, 45%, were referred to and resolved by the WorkCover conciliation service, it must be emphasised that the proportion of unlitigated disputes overall is only small.

It would appear that insurers do not often refer disputes to WorkCover for conciliation unless they are required to do so by legislation. Likewise, matters are rarely referred by workers unless they have received a Notice of Discontinuation. In such circumstances the worker is usually informed on the Notice of the availability of the service.

How long does it take to resolve disputes?

Where disputes were resolved without litigation it took an average of five months from the date the initial claim was made. Unlitigated disputes arising out of claims for S66/S67 benefits took longer, an average of nine months.

Overall, litigated disputes took an average of 12 months to be resolved. Where litigated disputes settled before the day of hearing it took an average of 10 months.

Why does litigation occur?

The question *Why does litigation occur?* was looked at in terms of the benefits claimed by the worker on the Application for Determination. Did the litigation arise out of a claim for weekly benefits, a claim for permanent loss (S66), a claim for pain and suffering (S67), or some combination of these? The question of whether the litigation followed any disagreement, or indeed, whether the insurer knew the benefit was claimed prior to the commencement of the litigation, was also considered.

Weekly benefits (only) were claimed in 15% of the litigated disputes. A lump sum under S66/S67 (only) was claimed in 34% of the litigated disputes. In 50% of the litigated disputes, a claim was made for both weekly benefits and a lump sum under S66/S67.

Where weekly benefits (only) were claimed on the Application for Determination, in 33% of the disputes there had been no disagreement over the worker's entitlement to the weekly benefit claimed.

Where a lump sum benefit under S66/S67 (only) was claimed on the Application for Determination, in 68% of these disputes, no previous claim for this benefit had been made. That is, the insurer only became aware the benefit was claimed by the worker when an Application for Determination was served.

Where the Application for Determination claimed both weekly benefits and a lump sum under S66/S67, it was found that in 58% of these disputes a disagreement had arisen over the weekly payments claimed. However, 96% of these disputes involved a claim for lump sum benefits that, prior to the commencement of litigation, had not even been made.

This finding could indicate that workers often only become aware of their right to claim lump sum benefits when seeking legal representation in relation to a disagreement over a claim for weekly benefits. Also, it would appear that litigation often occurs when there is no disagreement concerning the worker's entitlement to the benefit claimed.

WorkCover has encouraged a "pro-active" approach from insurers in relation to claims for benefits under S66/S67. The survey revealed that the insurer had

notified the worker of their entitlement to the lump sum benefit in 29% of the unlitigated claims for S66/S67 benefits.

How is litigation conducted?

In 90% of litigated disputes the insurer responded to the service of an Application for Determination by instructing solicitors. In the remaining 10% the insurer either indicated there was no need for litigation as the claim was not disputed, or, the insurer attempted to resolve the matter without instructing solicitors and incurring immediate legal costs. It would appear that once litigation is initiated by the worker, the adversarial process will proceed.

Most litigated disputes required two or less medico-legal assessments (82%) or factual investigations (90%). This could suggest that workers compensation litigation does not concern disputes in which the medical or factual basis is highly contested.

The proportion of matters settling "at the door of the court" was particularly high in the Compensation Court, 57%. A recent study of Supreme Court matters reported that only 27% settled "at the door" and 65% settled at an earlier stage.[3]

To what extent are the parties beginning the early negotiation of settlements in the Compensation Court? It was found that there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes.

A number of issues concerning the conduct of workers compensation litigation were highlighted by three case studies. It was found that:

- a pro-active role is sometimes taken by the insurer. In two claims the worker's solicitor was notified that liability for the claim was not in dispute, hence there was no need for litigation;
- the extent of permanent loss, and not liability, can be the critical issue;
- claims for weekly benefits, although initially made, may not be included in the final settlement of disputes; and
- there may be no strong reason why settlements could not occur earlier than the day set for hearing.

What legal costs are incurred?

Where legal costs were incurred, but no litigation was commenced, the average total legal cost was $1173. The average total legal cost for disputes which settled before the day of hearing was $4882. Where disputes settled on the day of/during hearing the average total legal cost was $13,779. This was similar to that for determined cases, $12,732.

The insurer's total legal costs tended to be somewhat higher than those of the worker. Where factual investigations were undertaken the cost formed a sizeable proportion of the total legal cost. Fees for counsel were incurred by the insurer in most of the disputes which reached hearing and this cost was also significant. Solicitors' professional fees formed the largest proportion of the legal costs incurred by the insurer.

What does contesting litigation achieve?

The question *What does contesting litigation achieve?* was looked at from the perspective of a simple "cost-benefit" analysis. Claims for benefits under S66/S67 only were considered because of difficulties inherent in quantifying open ended claims for weekly benefits.

The amount claimed under S66 at the time the litigation was commenced was recorded from the Application for Determination. This was compared to the actual amount obtained under S66 at the completion of the litigation. The difference between the amount claimed by the worker and the amount received was the "benefit" achieved by the insurer in contesting the litigation. This was compared to the total legal costs incurred in achieving this "benefit".

Where the worker received less than the amount claimed the median "benefit" achieved by the insurer in contesting the litigation was $3764. The median total legal cost incurred in achieving this benefit was higher, $5395.

Where the worker received the same amount as had been initially claimed, that is, no "benefit" was achieved by contesting the litigation, the median total legal cost incurred was $4015.

Where the worker received more than the amount initially claimed, that is, a cost was incurred in the insurer contesting the litigation, a median cost of $2889 was incurred in relation to the amount of benefit paid, and the median total legal cost was $7221.

While this analysis is based on only a small number of claims, it would appear that litigation is not a cost effective mechanism for administering claims for benefits under S66 and S67. If the intention of the WorkCover legislation is to reduce legalism, it must be asked whether there is not a better, more cost effective, way of making claims for such benefits.

Which claims are more likely to involve litigation?

Claims from women were more likely to involve litigation than claims from men. Overall, however, as more claims were made by men, more litigation was commenced by men.

Claims from labourers and related workers were more likely to be litigated than claims from the other occupational groups. Most litigation was commenced by workers from the manufacturing industry.

Workers aged between 40 and 50 years were more likely to make claims in which litigation was commenced. Workers residing in the Sydney metropolitan area were also more likely to make claims involving litigation.

Claims for sprain and strain injuries were more likely to be litigated than claims for the other injury categories.

Recommendations

This research was conducted to provide a sound empirical basis for recommendations as to areas in need of legislative or procedural change if legal costs are to be reduced. While the CJRC does not advocate specific policy changes, a number of recommendations are made. These are intended to assist policymakers in their efforts to improve the system for resolving workers compensation disputes and to meet with the intention of the legislation to provide a system that operates with "a minimum of delays, a minimum of legalism, and a minimum of cost".[4]

In making these recommendations, it should be noted that they are based largely on the information that was available from insurers' claim files. Further perspectives in dealing with the legal costs problem could arise from other sources. For example, research focussing on the specific amounts incurred in conducting litigation could be undertaken to see if expenditure on professional fees, medico-legal assessments or factual investigations is cost effective. Also, differences between certain types of claims and the likelihood that litigation will be commenced could be explored further.

Resolving Disputes Without Litigation

The study found that non-litigious mechanisms such as negotiation and conciliation were successful in resolving disputes. Overall, however, the proportion of disputes resolved in this way was only small. Typically, disputes resolved by non-litigious mechanisms were resolved more quickly and more cheaply than disputes in which litigation was commenced.

Recommendation 1

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

The use of non-litigious mechanisms for resolving disputes be increased

Claiming Benefits Under S66/S67

The study found that litigation is often commenced claiming benefits under S66/S67 when no previous claim for these benefits had been made on the insurer. Also, it would appear that litigation is not a cost effective mechanism for administering claims for such benefits.

There is some indication that workers may often only become aware of their right to benefits under S66/S67 when seeking legal advice in relation to another dispute, although, in some circumstances insurers were taking a "pro-active" role in notifying workers of this right.

The study revealed that even unlitigated disputes concerning claims for benefits under S66/S67 took longer to be resolved than other types of unlitigated disputes; litigation, which processed most claims for such benefits, took longer still. A number of case studies indicated that the extent of permanent loss can be the critical issue in the conduct of litigation.

Recommendation 2

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

A timely, non-legal and cost effective procedure for claiming benefits under S66/S67 be introduced

Application for Determination

The study revealed that in many cases an Application for Determination is made when there is no disagreement concerning the worker's entitlement to the benefit claimed.

Once an Application for Determination is made, litigation will tend to proceed, typically, until a settlement is achieved on the day set for hearing, 15 months later and incurring an average total legal cost of $13,779. Disputes resolved by legal representatives without making an Application for Determination incurred an average total legal cost of $1173.

Recommendation 3

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

An Application for Determination is only made when legitimate disagreements require a Court determination

Conducting Litigation

The proportion of matters settling "at the door of the court" is particularly high in the Compensation Court. The study found that there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes.

Where litigated disputes were settled before the day of hearing the average total legal cost was $4882. In contrast, disputes which were settled on the day of hearing incurred, on average, a total legal cost of $13,779.

Recommendation 4

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

The early settlement of litigated disputes be facilitated

1 The Hon Mr P Hills, Minister for Industrial Relations and Minister for Employment, *Second Reading of WorkCover Bill*, 14 May 1987, Legislative Assembly, New South Wales Parliament.

2 WorkCover Authority, *Investigations into Legal Costs in the WorkCover Scheme*, June 1992, unpublished.

3 Baker, J, 1994, *Who Settles and Why? A Study of the Factors Associated with the Stage of Case Disposition*, CJRC, Sydney.

4 The Hon Mr P Hills, op cit.

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Research Manager

Table of Contents

		Page
Charter of the Civil Justice Research Centre		iii
Foreword		v
Executive summary		vii
Acknowledgments		xv
Tables		xix
Figures		xxi
1	**Introduction**	**1**
1.1	Background	1
1.2	Details of the WorkCover Scheme	2
1.2.1	Benefits Under the WorkCover Scheme	2
1.2.2	Processing Claims for Benefits	3
1.2.3	Dispute Resolution Under the WorkCover Scheme	3
1.3	Research Approach	4
1.3.1	Survey of Workers Compensation Claims	4
1.3.2	Sample Design	4
1.3.3	Reporting Findings	5
1.4	Claim Events	5
1.5	Organisation of this Report	7
2	**Why Disputes Arise and How They Are Resolved**	**9**
2.1	Why Disputes Arise	9
2.2	Were the Disputes Resolved Without Litigation?	10
2.3	Summary	12
3	**Resolving Disputes Without Litigation**	**13**
3.1	Activities Undertaken to Resolve Unlitigated Disputes	13
3.2	The Stage at Which Unlitigated Disputes are Resolved	15
3.3	The Time Taken to Resolve Unlitigated Disputes	15
4	**Why Does Litigation Occur?**	**17**
4.1	The Benefits Claimed	17
4.2	Did the Litigation Follow a Disagreement?	18
4.3	The Insurer's Role	20

5 Conducting Litigation in the Compensation Court: Survey Findings 21
5.1 Medico-Legal Assessments and Factual Investigations 21
5.2 Medical Panels 22
5.3 When are Disputes Resolved 22
5.4 Negotiation of Settlements 23

6 Conducting Litigation in the Compensation Court: Case Studies 25
6.1 Case One 25
6.2 Case Two 27
6.3 Case Three 29
6.4 Summary 30

7 Legal Costs 31

8 What Does Contesting Litigation Achieve? 35

9 Which Claims are More Likely to Involve Litigation? 39
9.1 Gender 39
9.2 Occupation 40
9.3 Industry 41
9.4 Age 42
9.5 Worker's Place of Residence 43
9.6 Injury 43
9.7 Time Off Work 44
9.8 Conclusion 44

10 Conclusion 45
10.1 Summary 46
10.2 Recommendations 50
10.2.1 Resolving Disputes Without Litigation 50
10.2.2 Claiming Benefits Under S66/S67 50
10.2.3 Application for Determination 51
10.2.4 Conducting Litigation 52

Appendices 53
1 The data collection form 54
2 Information abstracted from the WorkCover database 61
3 Sampling frame: target population, sample estimates, selected and actual sample 62
4 The number of claims with disputes and the number of claims in which each claim event took place 63

References 65

Tables

		Page
1	The disputes that arose in relation to each of the claim events	10
2	Disputes by claim event and method of resolution	11
3	Activities undertaken in resolving disputes on an unlitigated basis	14
4	At what stage were unlitigated disputes resolved?	15
5	The number of months from the claim event to the resolution of the unlitigated dispute	16
6	Benefits claimed on the initial Application for Determination	17
7	Weekly benefits (only): did the litigation follow a disagreement?	18
8	S66/S67 (only): had there been a disagreement over the claim prior to the commencement of litigation?	19
9	Weekly payments and S66/S67 benefits: had there been a disagreement over the claim prior to the litigation?	19
10	Number of respondent medico-legal assessments and factual investigations undertaken after the commencement of litigation	21
11	Stage dispute resolved and duration of litigation	23
12	Stage dispute resolved and total legal costs	31
13	Details of legal expenditure	33
14	The difference in amounts claimed and amounts received under S66, and total legal costs	36
15	Gender and whether litigation was commenced	39
16	Occupation and whether litigation was commenced	40
17	Industry and whether litigation was commenced	41
18	Age and whether litigation was commenced	42
19	Residence of worker and whether litigation was commenced	43
20	Injury and whether litigation was commenced	43
21	Time off work and whether litigation was commenced	44

Figures

		Page
Text Box 1	Claim events: definitions	6
1	Disputes resolved with or without litigation	11
2	Settlement negotiations before the day of hearing	24
3	Significant events in conducting litigation	26

1

Introduction

1.1 Background

The WorkCover scheme was introduced in New South Wales in 1987. One reason for the introduction of this scheme was to contain the rising costs of workers compensation. At the time of the scheme's inception, management of costs within the workers compensation system had reached crisis proportions and insurers were warning of their impending withdrawal from workers compensation. WorkCover was designed as a non-litigious scheme with a primary focus on rehabilitation:

> *After more than twelve months of extensive public discussion and submissions we will together redirect the system back to the path it was originally intended to go – a system which emphasises occupational safety, rehabilitation and compensation in an atmosphere of reduced legalism and adversarial proceedings.*[1]

As evidence of the success of the WorkCover scheme, premiums have been reduced from 3.8% of wages in 1986/87 to the present level of 1.8%. The WorkCover Authority reports that its statutory benefits and return to work rates are among the highest in Australia. However, despite these successes in some areas, actuarial monitoring has identified that increased legal costs are being generated.[2]

In the period immediately before the introduction of WorkCover, legal costs were equivalent to 10% of total workers compensation payments. This percentage was considered unacceptably high and contributed to the requirement that the new scheme aim to reduce legalism. However, since an initial drop off following the introduction of WorkCover, legal costs have gradually increased. They now, once again, account for 10% of total workers compensation payments, and it would appear that this percentage is rising.[3]

Analysis of claims information provided by insurers has enabled WorkCover to develop some understanding of this current high level of legal expenditure. For example, WorkCover has found that most workers compensation claims are able to be processed without incurring legal costs. Only 4% of all claims actually incur any legal cost. In contrast to this overall picture, however, legal costs are often incurred by more expensive claims.[4] For example, legal costs were incurred in 68% of claims in which the total cost was more than $50,000.[5]

The legal cost problem is being addressed by the WorkCover Authority from a number of perspectives. As a part of this wider strategy, the CJRC received a request to undertake a study of workers compensation claims. The purpose of this study was to provide a better understanding of the way in which the workers compensation dispute resolution system was working. It has done this by addressing the following questions:

- Why do disputes arise?
- How are disputes resolved?
- How long does it take to resolve disputes?
- Why does litigation occur?
- How is litigation conducted?
- What legal costs are incurred?
- What does contesting litigation achieve?
- Which claims are more likely to involve litigation?

It was intended that the answers to these questions would address the broader issue of whether the WorkCover scheme had achieved an "atmosphere of reduced legalism" and provide a sound empirical basis for recommendations as to areas in need of legislative or procedural change if legal costs are to be reduced.

1.2 Details of the WorkCover Scheme

Details of the benefits that the WorkCover scheme makes available and the statutory provisions affecting workers compensation are found in the *Workers Compensation Act, 1987*. A short summary of the benefits available, how claims are processed, and the mechanisms for dispute resolution will be provided here.

1.2.1 Benefits Under the WorkCover Scheme

The WorkCover scheme provides for payments of compensation to employees who are injured during their employment or in certain circumstances such as during a periodic journey or during a recess break. Payments include:

- weekly payments to compensate for lost wages;
- reasonable hospital, medical and associated expenses;
- lump sum compensation for the loss of a specified bodily function or limb (Section 66);

- lump sum compensation for pain and suffering (Section 67);
- a death benefit; and
- benefits for dependants of an injured or deceased worker.

Where a worker is seriously injured and the injury was caused by the negligence of the employer, it is possible for the worker to sue that employer under common law.

1.2.2 Processing Claims for Benefits

Claim processing usually begins when the insurer receives both a claim form completed by the worker and a report of injury form from the employer. If the worker had time off work these forms should be accompanied by a WorkCover medical certificate.

After the initial claim for benefits is made, the insurer may require the worker to attend a medical or rehabilitation assessment. If the insurer queries some aspect of the claim a request for further information may be made or a factual investigation or surveillance undertaken. Once the insurer accepts liability for the claim, these processes might continue whilst weekly payments are made.

The worker may make claims for further benefits following the initial acceptance of the claim. Medical certificates must be provided for all periods of further incapacity and details of medical and related expenses provided.

Disputes may arise over various aspects of the claim at any time. Thus several disputes may occur in the course of one claim. Disputes may be resolved informally, for example, through discussions between the worker and the insurer, or by some more formal process.

1.2.3 Dispute Resolution Under the WorkCover Scheme

The *Workers Compensation Act* allows for two formal dispute resolution mechanisms: a conciliation service administered by the WorkCover Authority and the Compensation Court.

Where a dispute concerning a claim arises, any party to that dispute may refer the matter for conciliation by the WorkCover Authority (Section 97). In respect of claims for the weekly payment of benefits, an insurer is required to commence payment within 21 days of the claim having been made, or to refer the matter for conciliation within this 21 day period (Section 102).

A person who is a party to any dispute before a WorkCover Conciliation Officer is not entitled to be represented by a barrister or a solicitor unless the Conciliation Officer and all parties to the dispute agree to such representation.

The Compensation Court has exclusive jurisdiction to examine, hear and determine matters arising under the *Workers Compensation Act, 1987* (Section 107). The Court is regulated by the *Compensation Court Act, 1984*. A case is commenced in this Court when an Application for Determination is made.

If the worker is to sue the employer under common law, litigation may be commenced in either the Supreme Court or the District Court of New South Wales.

1.3 Research Approach

1.3.1 Survey of Workers Compensation Claims

To address the research questions a survey of workers compensation claims was undertaken. Information on individual claims was abstracted from both the WorkCover database and insurers' claim files.

A data collection form (Appendix 1) was designed to record information from the claim files. Data was coded onto this form by a team of trained coders. Claim files were made available to this team at the offices of the licensed insurers.

The WorkCover database provided a significant amount of information on each of the sampled claims. This was abstracted and combined with the file-based information (Appendix 2).

The target population for the survey consisted of 11,153 claims in which the injury or disease occurred during the 1989/1990 policy renewal year.[6] As the WorkCover scheme was introduced in 1987, this allowed time for claims likely to give rise to disputes to have already done so. The target population was also restricted to claims in which the total incurred cost was greater than $5000[7] and only the managed fund scheme (13 insurers) was included.[8]

1.3.2 Sample Design

A sample of 930 claims was selected from the target population. This was stratified with respect to legal costs,[9] gender, whether the insurer had closed the relevant claim,[10] and injury type (see Appendix 3).

Although 930 claims were selected for inclusion in the survey, a number of claim files could not be made available during the study period and the findings reported are based on 894 claims. Appendix 3 presents details of the target population, the structure of the final sample selected, and details of the claims on which this report is based.

1.3.3 Reporting Findings

The tables in this report present population estimates. These population estimates were formed from the survey data using a complex weighting procedure. This involved weighting the survey estimates so that they conformed to the distribution of the target population.

Sampling error occurs because the data were only obtained from a sample, not the entire population. One measure of the variability of estimates which occurs as a result of surveying only a sample is the *relative standard error* (RSE).[11] Only estimates with a RSE of less than 25% are, for most purposes, regarded as sufficiently reliable.[12] However, estimates and percentages with larger RSE's have been included in the report, preceded by an asterisk (*) to indicate that they should only be used with caution.

1.4 Claim Events

The claim file survey was designed to collect information on disputes, when and why they arose, how they were resolved, how long it took, and the legal costs incurred. To classify when and why disputes arose, four claim events were defined:

- *Event A: initial claim*
- *Event B: claim for S66/S67 benefits*
- *Event C: claim for any further benefits*
- *Event D: notification of discontinuation*

This list of claim events was constructed following the initial pilot stage of the study.[13] It was observed that disputes were commonly preceded by one of these claim events. Also, it was observed that litigation often arose when there was no apparent preceding event. A fifth claim event, *Event E*, was constructed to capture this:

- *Event E: litigation (not arising from Event A, B, C or D)*

Further information defining these claim events is provided in Text Box 1.

Where a particular claim event occurred on more than one occasion within a claim, details for the first instance only were recorded. This circumstance occurred on only one occasion during the pilot stage of the study and was not observed to increase during the main data collection.

In some claims there may have been no disputes, alternatively, in others, there may have been more than one. Appendix 4 provides details of the number of disputes per claim and the number of claims in which each claim event took place.

Text Box 1. Claim events: definitions

Event A: initial claim

This event refers to the first formal notification the insurer received that a claim for compensation was made. The initial claim may have been for weekly benefits, medical expenses, lump sum benefits under S66/S67, or a death benefit. Usually the insurer received a claim form from the worker's employer, however in some circumstances, the first formal notification may have been when legal proceedings were commenced.

Event B, Event C, and Event D are claim events which may occur following the acceptance of the initial claim. They are all "unlitigated events", and as such, are defined as occurring prior to the claim becoming "litigated".

Event B: claim for S66/S67 benefits

This event relates specifically to unlitigated claims for lump sum benefits under S66/S67 made after the initial claim. Usually, these claims were made in letters to the insurer, either from workers or their legal representatives.

Event C: claim for any further benefits

This event concerns unlitigated claims for any further benefits after the initial claim was accepted. This does not include claims made under S66/S67 as these are included as *Event B*. File based evidence for such claims might have been found in letters from the worker requesting the further benefit, or in file notes of telephone conversations.

Event D: notification of discontinuation

This event relates to occasions where a worker receiving payments for periods of continuing incapacity was notified by the insurer that payments would be discontinued. This may have occurred, for example, because the insurer received medical information that the worker was no longer incapacitated. A formal letter would be sent to the worker in such circumstances. Where the insurer denied liability, following an initial acceptance and payment of a claim, this was also treated as *Event D*.

Event E: litigation (not arising from Events A, B, C or D)

This event concerns litigation that did not arise from *Event A, Event B, Event C,* or *Event D*. The litigation may have been commenced in the Compensation Court, the District Court or the Supreme Court of New South Wales.

1.5 Organisation of this Report

The results of the workers compensation claim survey are presented in eight sections:

- Why disputes arise and how they are resolved.
- Resolving disputes without litigation.
- Why does litigation occur?
- Conducting litigation in the Compensation Court: survey findings.
- Conducting litigation in the Compensation Court: case studies.
- Legal costs.
- What does contesting litigation achieve?
- Which claims are more likely to involve litigation?

The final section of the report provides a summary of the findings from the claim survey. Recommendations as to the areas in need of legislative or procedural change if legal costs are to be reduced are then made from this empirical base.

1 The Hon Mr P Hills, Minister for Industrial Relations and Minister for Employment, *Second Reading of WorkCover Bill*, 14 May 1987, Legislative Assembly, New South Wales Parliament.

2 WorkCover Authority, *Investigations into Legal Costs in the WorkCover Scheme*, June 1992, unpublished.

3 WorkCover, ibid.

4 As used here, the expensiveness of a claim refers to the *total incurred cost*. This is the sum of all payments made in relation to the claim, plus, for claims still open at September 1993, an estimate of the future liability for that claim.

5 WorkCover, ibid.

6 For injuries, the date of occurrence is the date of accident. For diseases, and injuries of gradual onset, the date of occurrence is the date first reported to the employer.

7 See Footnote 4 for definition of *total incurred cost*.

8 The managed fund scheme consists of insurers who are licensed under the Workers Compensation Act, 1987, excluding self-insurers, specialised insurers, and the Treasury Managed Fund (NSW Government) and operates as the Authority's fund managers. Licensed insurers receive management fees for assessing and collecting premiums, paying claims and investing funds. They are not underwriters and have no ultimate liability regarding workers compensation claims.

9 The sample was stratified on the basis of the *legal costs* information available from the WorkCover database as at September 1993, the time the sample was selected. *Legal costs* refers to the legal costs incurred by WorkCover in handling the claim. It excludes any individual legal costs incurred by either party. Legal costs incurred at common law are not included here.

In Section 5: Legal Costs, the legal cost information is based on that which was available from the claim files at the time the survey was conducted: March/April 1994.

10 An administrative indicator used when the insurer considers the claim finalised.

11 The relative standard error provides an indication of the reliability of an estimate of a population parameter.

12 One measure of the variability of estimates which occurs as a result of surveying only a sample of the population is the *standard error* (SE). The standard error can also be expressed as a percentage of estimates and this is known as *relative standard error* (RSE). The RSE is determined by dividing the SE of an estimate by the estimate and expressing it as a percentage.

13 The pilot sample was equivalent to 10% (93 claims) of the total number of claims selected for inclusion in the sample.

2

Why Disputes Arise and How They are Resolved

The WorkCover legislation aimed to "put in place a system of dispute resolution that resolved disputes with a minimum of delays, a minimum of legalism, and a minimum of costs".[14] Following the introduction of the scheme, it was intended that people would, in a sense, change their behaviour and resolve disputes through negotiation and conciliation. Litigation might only be commenced in exceptional circumstances, or when these other methods had been unsuccessful.

This section considers why disputes arise and the extent to which disputes are resolved without litigation.

2.1 Why Disputes Arise

To consider why disputes arise four claim events were defined. Details of the disputes arising from these claim events were recorded from the claim files:[15]

- *Event A: initial claim*
- *Event B: claim for S66/S67 benefits*
- *Event C: claim for any further benefits*
- *Event D: notification of discontinuation*
- *Event E: litigation (not arising from Event A, B, C or D)*

A dispute was defined either as litigation, or any open disagreement between the worker, and the employer or their insurer, concerning the worker's entitlement. This may have concerned the type, nature, or duration of the payment of a benefit. Requests for further information, by either party, were not classified as disputes.

Table 1 shows the disputes that arose in relation to each of the claim events. In 23% the dispute arose from the initial claim *(Event A)*. That is, either there was some disagreement concerning the worker's entitlement or the worker commenced litigation in relation to some aspect of the processing of the initial claim.

Table 1. The disputes that arose in relation to each of the claim events

	Population estimate	%
Event A: initial claim	1320	23
Event B: claim for S66/S67 benefits	592	10
Event C: claim for any further benefits	607	11
Event D: notification of discontinuation	1352	24
Event E: litigation (not arising from Events A, B, C or D)	1862	32
Total	5733	100

Source: CJRC survey. Population estimates based on 725 disputes identified from the full sample of 894 claims.

Only 10% of disputes arose when the worker made a claim for S66/S67 benefits *(Event B)*. In 11% the dispute arose when the worker made a claim for any further benefits *(Event C)*. A larger proportion of the disputes, 24%, arose when the insurer provided notification that weekly payments would be discontinued *(Event D)*.

In most cases, 32% of disputes, litigation did not arise from Events A, B, C or D. Why litigation did arise in these circumstances will be addressed further in Section 4.

2.2 Were the Disputes Resolved Without Litigation?

Disputes were classified as to whether they were resolved with or without litigation. Table 2 looks at each of the claim events, the disputes that arose from these events, and whether they were resolved with or without litigation.

The initial claim *(Event A)* was the source of 39% of the unlitigated disputes. This high proportion probably reflects the statutory provisions requiring insurers to refer disputes of claims for weekly benefits to WorkCover for conciliation.

Claims for benefits under S66/S67 *(Event B)* gave rise to 12% of the unlitigated disputes and claims for any further benefits *(Event C)* gave rise to 32%. When the insurer notified the worker that weekly payments would be discontinued *(Event D)*, 16% of unlitigated disputes arose from this event.

Table 2. Disputes by claim event and method of resolution

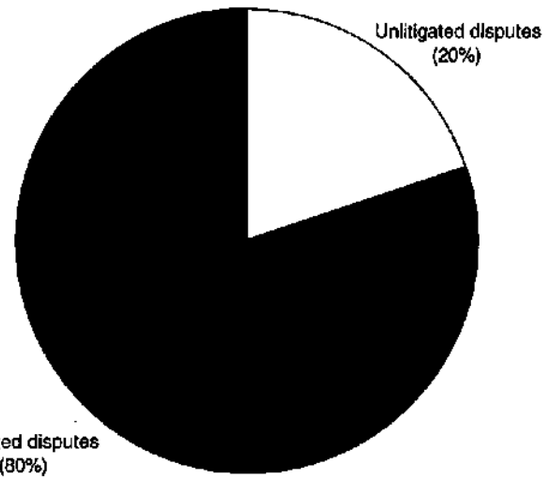
	Unlitigated Population estimate	%	Litigation Population estimate	%
Event A: initial claim	448	39	872	19
Event B: claim for S66/S67 benefits	*140	*12	452	10
Event C: claim for any further benefits	*367	*32	240	5
Event D: notification of discontinuation	*188	*16	1164	25
Event E: litigation (not arising from Events A, B, C or D)	–	–	1862	41
Total	1143	100	4590	100

Source: CJRC survey. Population estimates based on the 725 disputes identified from the full sample of 894 claims.

Nineteen percent of litigation arose from the processing of the initial claim *(Event A)*. Claims for benefits under S66/S67 *(Event B)* gave rise to 10% of litigation, claims for any further benefits *(Event C)* gave rise to 5% of litigation. A large proportion of litigation, 25%, arose when the insurer notified the worker that weekly payments would be discontinued *(Event D)*.

Figure 1 summarises the proportion of litigated and unlitigated disputes that arose overall. Only 20% of disputes were resolved without litigation, litigation was commenced in 80% of disputes.

Figure 1. Disputes resolved with or without litigation



Source: CJRC survey. Population estimates based on 725 disputes identified from the full sample of 894 claims.

2.3 Summary

This section has addressed the first two research questions: *Why do disputes arise?* and *How are disputes resolved?* This was undertaken by considering the claim events from which disputes commonly arise and the extent to which disputes are resolved without litigation. It was found that in a large proportion of cases litigation did not arise from one of the specified claim events. Why litigation did arise in these circumstances will be addressed further in Section 4.

In looking at how disputes are resolved it was found that only a small proportion of disputes are resolved without litigation, bringing into question the "reduced legalism" intended by the WorkCover legislation.

14 The Hon Mr P Hills, op cit.

15 Full definitions of these are provided in Section 1.4.

3

Resolving Disputes Without Litigation

The previous section revealed that only a small proportion of disputes are resolved without litigation. This section looks at the activities undertaken by the parties to resolve disputes on an unlitigated basis, the stage at which unlitigated disputes are resolved, and how long it takes for agreements to be reached.

3.1 Activities Undertaken to Resolve Unlitigated Disputes

Table 3 shows the activities undertaken by the parties in resolving disputes on an unlitigated basis. That is, whether the dispute was referred to WorkCover for conciliation and if so who referred it, whether legal advice was sought by the insurer, and whether the worker had legal representation.[16]

Both unlitigated disputes and disputes in which litigation was commenced following a disagreement are considered in this section. The latter are included as "unlitigated" activities may have been undertaken to resolve the dispute before the litigation was commenced.

Of the disputes that arose from the initial claim *(Event A)* 77% were referred to WorkCover for conciliation by the insurer, only 2% were referred by the worker. The insurer sought legal advice in relation to 6% of the disputes of the initial claim. The worker had legal representation in 55% of these disputes.

Where disputes concerned either a claim for benefits under S66/S67 *(Event B)*, or a claim for further benefits *(Event C)*, the disputes were rarely referred to WorkCover for conciliation. However, the worker often had legal representation in attempting to resolve these disputes.

Where disputes arose following notification that payments would be discontinued *(Event D)*, these were more commonly referred to WorkCover for conciliation by the worker than by the insurer. Sixty-five percent of the disputes concerning the discontinuation of weekly payments were referred to WorkCover for conciliation by the worker, only 3% by the insurer. The worker had legal representation in 60% of these disputes.

Table 3. Activities undertaken in resolving disputes on an unlitigated basis

	Referred to WorkCover by insurer		Referred to WorkCover by worker		Insurer sought legal advice		Worker had legal representation		Total	
	Population estimate	%	Population estimate	%	Population estimate	%	Population estimate	%	Population estimate	%
Event A: initial claim	649	77	*17	*2	*52	*6	464	55	843	100
Event B: claim for S66/S67 benefits	*7	*2	*0	*0	*23	*7	*244	78	314	100
Event C: claim for any further benefits	*30	*5	*137	*23	*7	*1	*271	45	607	100
Event D: notification of discontinuation	*53	*11	*307	*65	*15	*3	*286	*60	*473	100
Total	739	33	461	21	97	4	1265	57	2237	100

Source: CJRC survey. Population estimates based on 125 unlitigated disputes and 130 disputes in which litigation followed a disagreement. More than one activity may have been undertaken in resolving each dispute, percentages therefore do not sum to 100.

3.2 The Stage at Which Unlitigated Disputes are Resolved

Litigation was commenced in almost half of the disputes referred to in Table 3. Table 4 illustrates the stage at which the remaining disputes were resolved.

Twenty-nine percent of the unlitigated disputes were resolved through negotiations between the insurer and worker, 45% were resolved following referral to WorkCover for conciliation, and 16% were resolved through negotiations with legal representatives involved. Disputes in the latter category may also have involved negotiations between the insurer and worker, or have been referred to WorkCover for conciliation at some earlier stage. Nine percent of the disputes were unresolved at the time of the study.

Although a sizeable proportion of unlitigated disputes are referred to and resolved by the WorkCover conciliation service, it must be noted that overall, the proportion of unlitigated disputes is only small.

Table 4. At what stage were unlitigated disputes resolved?

Stage	Population estimate	%
Negotiations between the insurer and worker	*335	29
WorkCover conciliation	*517	45
Negotiations with legal representatives involved	*189	16
Unresolved	*102	*9
Total	1143	100

Source: CJRC survey. Population estimates based on 125 unlitigated disputes identified from 894 claims.

3.3 The Time Taken to Resolve Unlitigated Disputes

The amount of time taken to resolve unlitigated disputes varied depending on the claim event out of which the dispute arose (Table 5).

Where disputes arose from the initial claim (*Event A*), a claim for further benefits (*Event C*) or following a notification of discontinuation (*Event D*), and these were resolved without litigation, it took an average of four months. Unlitigated disputes arising out of claims for S66/S67 benefits (*Event B*) took longer to be resolved, an average of nine months. These durations will be compared to those of litigated disputes in Section 5.

Table 5. The number of months from the claim event to the resolution of the unlitigated dispute

	Population estimate	Months average
Event A: initial claim	*426	*4
Event B: claim for S66/S67 benefits	*108	*9
Event C: claim for any further benefits	*310	*4
Event D: notification of discontinuation	*187	*4
Total	*1031	*5

Source: CJRC survey. Population estimates based on 107 of 125 unlitigated disputes: those that were resolved and had dates available.

16 If the worker sought legal advice, this would not necessarily be available from the insurer's file and is therefore not able to be reported here.

4

Why Does Litigation Occur?

4.1 The Benefits Claimed

In Section 2 it was seen that litigation often did not arise from a specified claim event. This section therefore looks at the question *Why does litigation occur?* in terms of the benefits claimed. Did the litigation arise out of a claim for weekly benefits, a claim for permanent loss (Section 66), a claim for pain and suffering (Section 67), or some combination of these? Following this, the question of whether the litigation followed any disagreement, or indeed, whether the insurer knew the benefit was claimed prior to the commencement of the litigation, will be considered.

Table 6 shows the benefits that were claimed by the worker on the initial Application for Determination. Only claims for weekly benefits and those for lump sum benefits under Section 66 or Section 67 are considered. "Other" benefits may also have been claimed, for example, medical expenses, but these are not shown unless the claim was for these alone.

Weekly benefits (only) were claimed in 15% of the litigated disputes. A lump sum under S66/S67 (only) was claimed in 34% of the litigated disputes. In 50% of the litigated disputes, a claim was made for both weekly benefits and a lump sum under S66/S67. In 1% the claim was for "other" benefits (only).

Table 6. Benefits claimed on the initial Application for Determination

	Population estimate	%
Weekly payments	615	15
Section 66 and/or Section 67	1440	34
Weekly payments and S66/S67	2082	50
Other	*63	*1
Total	4200	100

Source: CJRC survey. Population estimates based on 552 disputes in which litigation was commenced in the Compensation Court.

4.2 Did the Litigation Follow a Disagreement?

The following three tables show whether there had been any disagreement about the worker's entitlement to the benefits claimed on the Application for Determination before the litigation was commenced.

Table 7 shows the litigated disputes in which weekly benefits (only) were claimed on the Application for Determination. In each of the disputes the worker had already claimed weekly benefits from the insurer. In 33% of the disputes there had been no disagreement over the worker's entitlement to the weekly benefit claimed. Litigation may have been commenced, for example, when the worker became concerned about the level of benefits received, or was perhaps aware of surveillance being undertaken by the insurer, and sought legal advice which resulted in litigation. In either case, there was no open disagreement prior to the commencement of litigation.

Table 7. Weekly benefits (only): did the litigation follow a disagreement?

	Population estimate	%
No previous claim made	–	–
No disagreement over claim for weekly benefits	*203	*33
Disagreement over claim for weekly benefits	412	67
Total	615	100

Source: CJRC survey. Population estimates based on 64 disputes in which litigation was commenced and weekly benefits (only) were claimed on the initial Application for Determination.

Table 8 shows the litigated disputes where a lump sum benefit under S66/S67 (only) was claimed on the Application for Determination. In 68% of these disputes, no previous claim for this benefit had been made. That is, the insurer only became aware the benefit was claimed by the worker when an Application for Determination was served.

In 13% of the disputes where the litigation made a claim for benefits under S66/S67 (only), the claim had been made by the worker, but no disagreement had arisen before the litigation was commenced. In such circumstances, the worker may have made the claim for a lump sum benefit and commenced litigation when, for example, the insurer requested further information or suggested that the injury had not stabilised. In either case, there was no open disagreement prior to the commencement of litigation.

Only in 18% of the disputes where the litigation made a claim for benefits under S66/S67 (only) had the claim been previously made and a disagreement arisen.

Table 8. S66/S67 (only): had there been a disagreement over the claim prior to the commencement of litigation?

	Population estimate	%
No previous claim made for S66/S67 benefits	986	68
No disagreement over claim for S66/S67 benefits	191	13
Disagreement over claim for S66/S67 benefits	*263	*18
Total	1440	100

Source: CJRC survey. Population estimates based on 187 disputes in which litigation was commenced and S66/S67 benefits (only) were claimed on the Application for Determination.

Table 9 refers to the litigated disputes in which the Application for Determination claimed both weekly benefits and a lump sum under S66/S67. In 58% of these disputes a disagreement had arisen over the weekly payments claimed. In contrast, as many as 96% of these disputes involved a claim for lump sum benefits that, prior to the commencement of litigation, had not even been made, let alone was the subject of a disagreement.

This finding could indicate that workers often only become aware of their right to claim lump sum benefits when seeking legal representation in relation to a disagreement over a claim for weekly benefits. Also, it would appear that litigation often occurs when there is no disagreement concerning the worker's entitlement to the benefit claimed.

Table 9. Weekly payments and S66/S67 benefits: had there been a disagreement over the claim prior to the litigation?

	Weekly payments		S66/S67	
	Population estimate	%	Population estimate	%
No previous claim made	–	–	2003	96
No disagreement over claim	870	42	*44	*2
Disagreement over claim	1212	58	*35	*2
Total	2082	100	2082	100

Source: CJRC survey. Population estimates based on 287 disputes in which litigation was commenced and both weekly payments and S66/S67 benefits were claimed on the initial Application for Determination.

4.3 The Insurer's Role

WorkCover has attempted to encourage a "pro-active" approach from insurers in relation to claims for benefits under S66/S67. The survey revealed that the insurer had notified the worker of their entitlement to the lump sum benefit in 29% of the unlitigated claims for S66/S67 benefits.[17] This notification was more likely to be undertaken when the injury fell in the laceration/amputation category. This is probably because such injuries are easily demonstrable. There is generally little doubt of the percentage permanent loss incurred when a finger has been amputated. This contrasts with situations where the worker may, for example, have lost some use of the back following a back strain.

Where an Application for Determination was served on the insurer, the survey revealed that in 90% of cases, the response of the insurer was to instruct solicitors. In the remaining 10% the insurer either indicated there was no need for litigation as the claim was not disputed, or, the insurer attempted to resolve the matter without instructing solicitors and incurring immediate legal costs. It would appear that once litigation is initiated by the worker, the adversarial process will proceed.

17 The survey only recorded this information when claims for S66/S67 were made on an unlitigated basis, that is, Event B (see Section 1.4).

5

Conducting Litigation in the Compensation Court: Survey Findings

This section looks at the research question *How is litigation conducted?* Particularly it focuses on Compensation Court matters, the use of medico-legal assessments, medical panels and factual investigations,[18] when disputes settle and how long this takes. Only disputes in which litigation was finalised are referred to here.

5.1 Medico-Legal Assessments and Factual Investigations

As the file survey focused on insurers' claim files, only the number of medico-legal assessments or factual investigations undertaken by the respondent, that is, the insurer or its legal representative, are known. To distinguish the medical assessments and factual investigations undertaken as part of the normal administration of claims only medico-legal assessments and factual investigations conducted after litigation was commenced are included in this analysis.

Table 10. Number of respondent medico-legal assessments and factual investigations undertaken after the commencement of litigation

	Medico-legal assessments		Factual investigations	
Number undertaken	Population estimate	%	Population estimate	%
0	538	17	1544	49
1	745	24	901	28
2	1312	41	402	13
3	230	7	225	7
4	251	8	*74	*2
> 4	*93	*3	*23	*1
Total	3169	100	3169	100

Source: CJRC survey. Population estimates based on 429 disputes in which workers compensation litigation was finalised.

Table 10 shows that most commonly, two medico-legal assessments were undertaken by the insurer or its legal representative. Two or less medico-legal assessments were undertaken in 82% of the disputes. No factual investigations were undertaken in approximately half the disputes; 90% took two or less.

The large number of disputes requiring two or less medico-legal assessments or factual investigations could suggest that workers compensation litigation does not concern disputes in which the medical or factual basis is highly contested. If the Workers Compensation Act was intended to reduce legalism, this could suggest a suitability of many claims to be dealt with by alternative procedures.

5.2 Medical Panels

The Workers Compensation Act provides that there shall be medical panels constituted of two or more medical referees as appointed by the Chief Justice of the Compensation Court. To provide some indication of the contribution made by medical panels the study recorded the extent to which medical panel assessments were used in the final assessment of claims.

Medical panels were used in 23% of the litigated disputes. In 75% of these the medical panel's assessment was equivalent to that applied to the final assessment of the claim. Medical panel assessments were most likely to form the basis of the final assessment where the claim was for industrial deafness. In contrast, only half of the medical panel assessments for sprain and strain injuries were used.

5.3 When are Disputes Resolved

The WorkCover scheme aimed "to put in place a system of dispute resolution that resolves disputes with a minimum of delays".[19] The research therefore looked at the stage at which litigated disputes were resolved and the length of time taken.

Table 11 shows that most disputes, 57%, settled either on the day of hearing or during the hearing. These disputes took an average of 15 months from the date the Application for Determination was filed until the date the dispute was resolved. The durations of these litigated disputes are longer than those revealed in Section 3 (Table 5) for unlitigated disputes.

Delays in other personal injury jurisdictions are more extreme than these in the Compensation Court. For example, in the District Court civil jurisdiction the current duration from filing to hearing is 40 months.[20] However, the proportion of matters settling "at the door of the court" is particularly high in the

Compensation Court. A recent study of 951 Supreme Court matters, 76% of which concerned industrial accidents, reported that only 27% settled on the day of/during hearing and 65% settled before the hearing.[21] These Supreme Court matters were part of a case management program that achieved particularly high settlement rates by encouraging early negotiation.[22] To what extent are the parties beginning early negotiation in the Compensation Court?

Table 11. Stage dispute resolved and duration of litigation

Stage dispute resolved	Population estimate	%	Months average
Settled before day of hearing	795	25	10
Settled on day of/during hearing	1800	57	15
Determined	481	15	14
Struck out/withdrawn	93	3	15
Total	3169	100	12

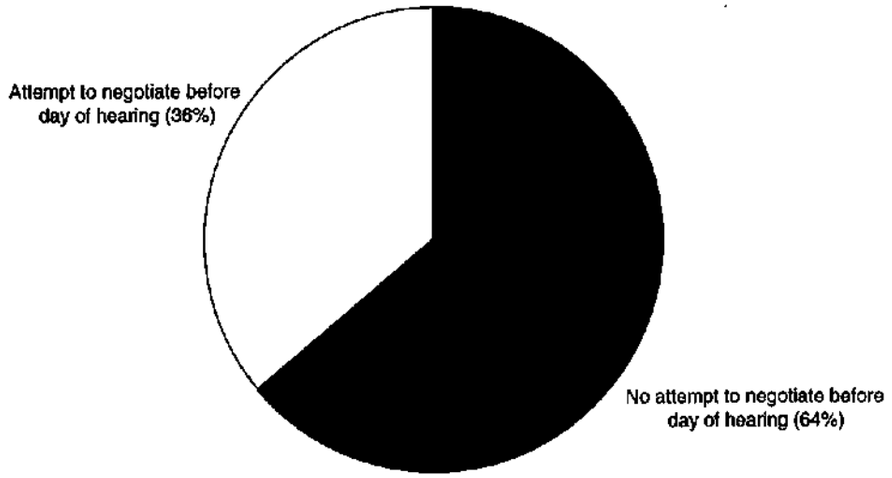
Source: CJRC survey. Population estimates based on 429 disputes in which workers compensation litigation was finalised.

5.4 Negotiation of Settlements

The survey recorded whether the parties attempted to negotiate settlement of a claim before the day of hearing. This required there to have been a statement by either party that they would offer or accept a specified dollar amount other than that claimed on the Application for Determination.

It was found that there was no attempt by either party to negotiate settlement before the day of hearing in 64% of the litigated disputes in the survey (Figure 2).

Figure 2. Settlement negotiations before the day of hearing



Source: CJRC survey. Population estimates based on 429 disputes in which workers compensation litigation was finalised.

18 Surveillance activities arranged by the insurer are included under the heading "factual investigations".

19 The Hon Mr P Hills, op cit.

20 Department of Courts Administration, 1994, *Key Performance Summary*, New South Wales, unpublished.

21 Baker, J, 1994, *Who Settles and Why? A Study of the Factors Associated with the Stage of Case Disposition*, CJRC, Sydney.

22 Rasink, E, 1994, Supreme Court Special Sittings – The Practitioner's Perspective, *Civil Issues*, Number 4, CJRC, Sydney.

6

Conducting Litigation in the Compensation Court: Case Studies

To provide further insight into the processing of workers compensation claims and, particularly, the conduct of workers compensation litigation, this section presents three case studies. These were selected at random from a sample of claims that were considered typical.[23] Figure 3 presents a time line for each of the cases.

In reading these case studies it is important to note that they provide only a short summary of the events which occurred and are based only on information that was obtainable from the insurer's claim file. Further events and issues may have arisen in processing the claim and in the conduct of the litigation, but these were not available from this source.

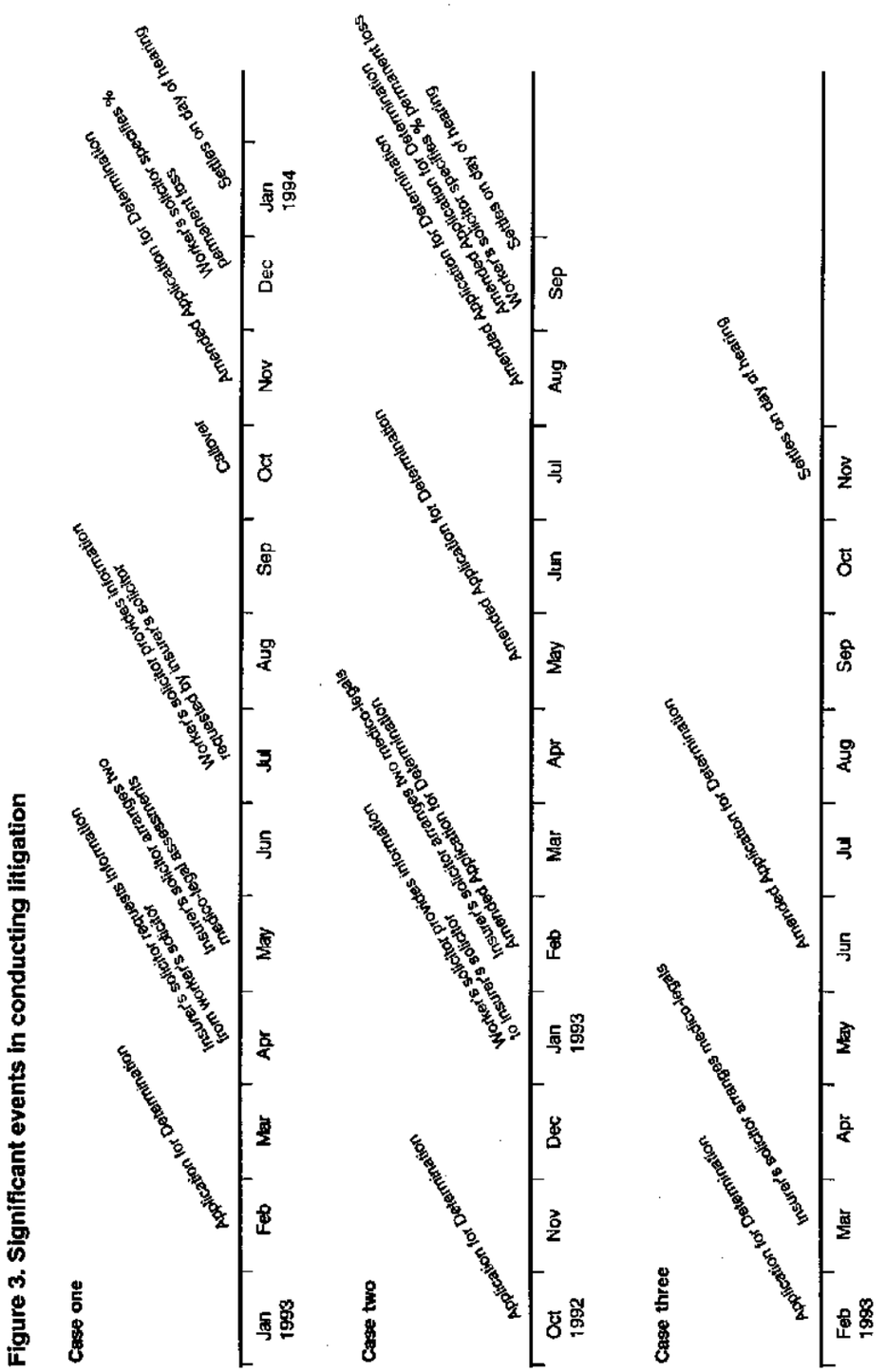
6.1 Case One

This claim concerned back strain that had arisen from a number of incidents, including loading and unloading a trailer. The worker had stopped work in September 1991 and the claim was made in December 1991. Following a request from the insurer the worker forwarded a letter explaining why he had not notified his employer of a number of the injuries claimed. Upon receiving this letter the insurer accepted liability and paid the claim. Continuing weekly payments were made to the worker.

Between August 1992 and November 1992, the worker requested that the WorkCover conciliation service help clarify a number of issues as he was unsure of his entitlement to claim particular expenses. This process was completed successfully.

In September 1992, the insurer attempted to undertake surveillance of the worker, but was unsuccessful. Later, in December 1992, the worker was notified that payments would be discontinued. On the basis of a medical assessment it was alleged that the worker had retired and no permanent impairment existed.

Following the discontinuation of payments, an Application for Determination was filed by the worker's solicitor in February 1993, claiming continuing weekly benefits and an unspecified amount for permanent impairment under S66. The worker also referred the matter to the WorkCover Authority for conciliation.



In April 1993 the insurer's solicitor requested that the worker's solicitor provide further details of the claim such as employment information and how the injuries occurred. This information was provided three months later, in July 1993.

In May 1993, the insurer's solicitor requested that the worker attend two medical assessments. Reports, provided to the solicitor in June 1993, queried whether the worker's back injuries were work related. In addition, one report said the worker was unfit for work, the other suggested that light duties could be undertaken. The latter report also assessed a 5% permanent impairment of the back.

Conciliation of the claim was stopped in July 1993, but no explanation of why this occurred was available from the file.

The matter received a callover conference in October 1993, and was listed for hearing in January 1994.[24] An Amended Application for Determination was filed in November 1993 which included further details on how the injury was sustained. In December 1993, the month before the hearing, the insurer received notice from the worker's solicitor that the worker would be claiming a lump sum under S66 for a 30% permanent impairment of the back. A medical report supporting this amount was attached.

On the day of the hearing, the worker's solicitor offered to settle the matter for $25,000. The insurer offered $10,000 and settlement at $15,000 plus medical expenses was reached. This allowed $12,586.80 under S66 for a 17% permanent impairment of the back and $2,413.20 under S67. Although claimed, no payment of weekly benefits was included in the settlement.

6.2 Case Two

In this claim the worker had slipped on the workplace floor breaking her right wrist and left knee. This injury occurred in February 1990. The insurer accepted liability after requesting and receiving the Employer's Report of Injury form. Continuing weekly payments were made to the worker.

In April 1990, the insurer received a request for information from the worker's solicitor. The insurer provided the information requested and also advised the worker's solicitor that their liability for the claim was not in dispute. A further request was received in May 1990 and the insurer again advised that liability was not in dispute, as well as providing details of the claim, such as payments to date.

The worker returned to work in June 1990, undertaking selected duties. However, after some time, she said she required further time off work as her wrist was sore. The insurer notified the worker that payments would be suspended if the selected duties were not resumed as a medical certificate certified her fit. The worker then returned to selected duties and a rehabilitation program.

In October 1992 the worker provided a claim form stating that she had suffered a recurrence of the original injury. Four days later an Application for Determination was filed claiming a lump sum under S66 for a 10% loss of the use of the right arm and a 20% loss of the use of the left leg. Weekly benefits and a lump sum under S67 were also claimed, as were interest and medical expenses. The insurer instructed its solicitors to defend the proceedings, while agreeing to pay the worker weekly benefits at a reduced rate while selected light duties were undertaken.

In January 1993 the worker's solicitor served a schedule of earnings, and in February 1993, served a doctor's report with an Amended Application for Determination claiming a 25% loss of the use of the left arm and a 15% loss of the use of the left leg, as well as continuing weekly benefits. A further Amended Application for Determination was filed in May 1993, and, in addition to the previous benefits, this also claimed a 10% impairment of the right arm.

The insurer's solicitors arranged two medical assessments, the report from one, provided in May 1993, estimated a 5% loss of the use of the right arm and a 10% loss of the use of the left leg. On yet another Amended Application for Determination made in August 1993 the following was claimed under S66 for the loss of the use of:

20% of the left arm at or below the elbow

10% of the left hand

5% of the left arm at or above the elbow

20% of the left leg at or below the knee

5% of the left leg at or above the knee

5% of the right leg at or below the knee

2% of the right leg at or above the knee

A fourth Amended Application for Determination, September 1993, changed the left arm estimates to the right arm, and increased the left leg at or above the knee, to 15%.

In September 1993, in the week prior to the hearing, the insurer was advised by its solicitors that no medical evidence had been served by the worker to support any of the assessments of permanent loss. This did, however, arrive three days before the hearing. The matter settled on the day of hearing. The worker received $19,920 plus interest under S66. This was for the following losses:

10% of the right arm below the elbow

10% of the left leg at or above the knee

10% of the left leg at or below the knee

A payment of $8983 plus interest was made under S67. Payment of weekly benefits, although claimed, were not included in the settlement.

6.3 Case Three

This claim involved a soft tissue knee injury which occurred when the worker knocked her knee against a steel wheel. The initial claim was made in February 1990. It was accepted two days later by the insurer who did not query the claim.

Nine months after the initial claim, November 1990, the worker made a claim for a recurrence of the original injury. The worker alleged there had been a gradual increase in pain and swelling over a period of five months. This further claim was also accepted by the insurer who notified the worker of this five days after receiving the claim.

In January 1991 the insurer notified the worker that, in accordance with the Act, the worker's payments would be reduced. Following this, in May 1991, the worker's doctor certified that she was fit for selected duties. Then, in October 1991, the worker was notified that her employment was terminated.

No further events were recorded as having taken place in relation to this claim until one year later, October 1992, when the insurer received a letter from the worker's solicitor requesting details of the claim. In response, the insurer rang the worker's solicitor querying the need for legal involvement as there was no dispute over the claim. An Application for Determination was lodged with the Compensation Court in February 1993 claiming a lump sum under S66 for a 37% loss of the use of the right leg, at or above the knee.

The insurer instructed solicitors to act on its behalf. A defence, denying liability, was then filed in March 1993, and a medical assessment was arranged. This medical assessment estimated a 20% loss of the use of the right leg at or below the knee.

An Amended Application for Determination was filed in June 1993 claiming a 30% loss of the use of the right leg at or above the knee and a 10% loss of the use of the right leg at or below the knee. A second medical assessment by the insurer's solicitor estimated a 25% loss of the use of the right leg at or below the knee.

No further events were recorded on the file until the matter settled in November 1993, on the day of the hearing. The worker's solicitor requested $81,000 and the insurer's solicitor offered $39,993. This offer, which allowed $16,978 plus interest for a 25% loss of the permanent use of the right leg at or above the knee, and $17,500 plus interest for S67, was accepted.

6.4 Summary

A number of issues concerning the conduct of workers compensation are highlighted by these case studies. These include the findings that:

- a pro-active role is sometimes taken by the insurer. In two claims the worker's solicitor was notified that liability for the claim was not in dispute, hence there was no need for litigation;
- the extent of permanent loss, and not liability, can be a critical issue;
- in assessing permanent loss, settlement negotiations can proceed by dollar amounts and not the extent of permanent loss incurred;
- claims for weekly benefits, although initially made, may not be included in the final settlement of disputes; and
- there may be no strong reason why settlements could not occur earlier than the day set for hearing.

23 One hundred claims were selected from the 429 sampled claims in which litigation had been finalised. These 100 were considered "typical" on the basis that they settled on the day of hearing, there was no attempt to negotiate settlement before the day of hearing, two or less medico-legal assessments or factual investigations were undertaken, and lump sum benefits under S66/S67 were obtained. Three claims were selected from these one hundred claims. The claims were selected at random from the claims that were available from one insurer.

24 A callover conference allows a review of the matters on the court's calendar to take place. Both sides attend and inform the court of their progress and invite direction from the court. In the Compensation Court of New South Wales callovers are conducted for country circuit matters only.

7

Legal Costs

This section considers the research question: *What legal costs are incurred?* and the relevance of the stage a dispute is resolved to the total legal cost. A breakdown of the total legal cost into the amounts incurred for solicitors, counsel, medico-legal assessments and factual investigations will also be undertaken.

Total legal costs are made up of the professional fees and disbursements of the solicitors representing both the insurer and the worker, fees for counsel and the cost of medico-legal assessments or factual investigations undertaken after the litigation was commenced.[25] An actual breakdown of the total legal cost was only available for the insurer as the study focussed only on insurers' claim files.

Details of legal costs are only referred to if any litigation commenced was finalised at the time the study took place and full details of the legal expenditure were available. Only the legal costs paid by the WorkCover scheme are referred to here. For example, if a litigated dispute was "lost" by the worker his or her legal costs may not be covered by the WorkCover Scheme.

Table 12. Stage dispute resolved and total legal costs

Stage dispute resolved	Population estimate	Total legal cost (average $)
Resolved prior to litigation	460	1173
Settled before day of hearing	705	4882
Settled on day of/during hearing	1435	13779
Determined	413	12732
Struck out/withdrawn	*72	4381
Total	3085	9507

Source: CJRC survey. Population estimates based on 420 disputes in which legal costs were incurred, any disputes were finalised and full details of legal expenditure were available.

Table 12 illustrates the average total legal cost incurred by disputes resolved at five different stages. Where legal costs were incurred, but no litigation was commenced, the average total legal cost was $1173. The average total legal cost for disputes which settled before the day of hearing was $4882. Where disputes settled on the day of/during hearing the average total legal cost was $13,779. This was similar to that for determined cases, $12,732.

To explore the cost of resolving disputes further, Table 13 shows the breakdown of the costs incurred in resolving disputes at each of these stages.

Resolved Prior to Litigation

Legal costs were incurred by the worker in 95% of the disputes which were resolved without litigation. Legal costs were incurred by the insurer in only 6% of these disputes. The average legal cost for the worker was $1214, for the insurer it was $448.

Settled Before Day of Hearing

Legal costs were incurred by the worker in all of the disputes in which litigation was commenced and in which the case settled before the day allocated for hearing. The average total legal cost for the worker was $2614. Legal costs were incurred by the insurer in 70% of these disputes. Where legal costs were incurred, the average total legal cost for the insurer was $2861.

Fees for counsel were incurred by the insurer in 15% of these disputes. Where a cost was incurred for counsel, the average fee was $1225. Medico-legal assessments were undertaken as part of the litigation in 49% of these disputes, the average cost per dispute being $415. Factual investigations were undertaken as part of the litigation in 19% of these disputes, the average cost per dispute being $993.

Settled on Day of/During Hearing

Legal costs were incurred by the worker and the insurer in almost all of the disputes in which litigation was commenced and the case was settled on the day allocated for hearing, or at some point before the hearing of the matter was complete. The average total legal cost for the worker was $6137, the average total legal cost for the insurer was $7699.

Fees for counsel were incurred by the insurer in 97% of these disputes. Where a cost was incurred for counsel, the average fee per dispute was $1359. Medico-legal assessments were undertaken as part of the litigation in 93% of these disputes, the average cost per dispute being $708. Factual investigations were undertaken as part of the litigation in 66% of these disputes, the average cost per dispute being $1624.

Table 13. Details of legal expenditure

Item	Resolved prior to litigation		Settled before day of hearing		Settled on day of/during hearing		Determined		Struck out/ withdrawn	
	Population estimate**	Average ($)	Population estimate**	Average ($)	Population estimate**	Average ($)	Population estimate**	Average ($)	Population estimate**	Average ($)
Worker total	435	1214	705	2614	1425	6137	338	5833	*10	*1570
Insurer total	*26	448	559	2861	1433	7699	413	7968	70	4225
Insurer breakdown:										
Solicitor's professional fees	*26	433	485	2343	1433	4141	413	4619	*70	2978
Solicitor's disbursements	*22	18	461	128	1429	502	413	*521	*70	216
Fees for counsel	*0	0	*103	1225	1391	1359	413	1540	*19	1265
Medico-legal assessments	na***	na***	342	415	1338	708	401	654	*54	*781
Factual investigations	na***	na***	*137	*993	949	1624	*225	1120	*31	*441
Total	460	1173	705	4882	1435	13779	413	12732	*72	4381

Source: CJRC survey. Population estimates based on 420 disputes in which legal costs were incurred, any litigation commenced was finalised and full details of legal expenditure were available.

** Population estimate: refers to the population estimate for the number of disputes in which a cost was incurred for the item. The average is based on this number of disputes only

*** To distinguish the medical assessments and factual investigations undertaken as part of the normal administration of claims these costs were only included for those conducted after litigation was commenced

Determined

Legal costs were incurred by the worker in 81% of the disputes in which litigation was commenced and the case was determined. The average total legal cost for the worker was $5833, the average total legal cost for the insurer was $7968. In the disputes in which no legal costs were incurred the determination went against the worker and no award of compensation was made, hence no legal costs were incurred by WorkCover.

Fees for counsel were incurred by the insurer in all of the determined disputes, the average fee being $1540. Medico-legal assessments were undertaken as part of the litigation in 97% of these disputes, the average cost per dispute being $654. Factual investigations were undertaken as part of the litigation in 54% of these disputes and the average cost per dispute was $1120.

The insurer's total legal costs tended to be somewhat higher than those of the worker. Where factual investigations were undertaken the cost formed a sizeable proportion of the total legal cost. Fees for counsel were incurred in most of the disputes which reached hearing. Solicitor's professional fees formed the largest proportion of the legal costs incurred by the insurer.

Further research focussing on the specific amounts incurred in conducting litigation could be undertaken to see if expenditure on professional fees, medico-legal assessments or factual investigations are cost effective.

25 The cost of medico-legal assessments and factual investigations were only recorded after litigation was commenced. This was to distinguish costs incurred as part of the litigation from those that were part of normal administration of a claim.

For each litigated claim, legal costs were only recorded for the first instance of litigation. That is, from the date the Application for Determination was filed to the finalisation of that dispute. If litigation was commenced on a second occasion, legal costs were not recorded. This was to obtain an understanding of the cost of resolving disputes through litigation, rather than the cost of claims overall.

8

What Does Contesting Litigation Achieve?

In Section 4 it was seen that, in most cases, the insurer will immediately contest any litigation commenced by the worker. In this section, the question *What does contesting litigation achieve?* is looked at from the perspective of a simple "cost-benefit" analysis. Claims for benefits under S66/S67 only are considered here. This is because of the difficulties inherent in quantifying open ended claims for weekly benefits.

Table 14 lists the details of 97 of the surveyed claims in which the litigation was used to obtain benefits under S66/S67, and in which all the required information in relation to these claims was available. The first column lists the amount claimed under S66 at the time the litigation was commenced. This amount was recorded from the initial Application for Determination. The second column lists the actual amount obtained under S66 at the completion of the litigation.

The third column of Table 16 lists the difference between the amount claimed by the worker at the commencement of litigation and the actual amount received. That is, the "benefit" achieved by the insurer in contesting the litigation. The fourth column lists the total legal costs incurred in achieving this "benefit".

The amount obtained under S67 is listed in the final column. The worker is only entitled to make a claim for a lump sum under S67 if the compensation payable under S66 is greater than or equal to 10% of the maximum amount applicable for the whole body as at the date of the injury.[26] Where a worker is eligible to claim an amount under S67, the amount received is in most cases proportional to the percentage of permanent loss established under S66.

Because this direct relationship usually exists between the amount received under S66 and amount received under S67, the latter amount is not assessed to be part of the benefit achieved by contesting the litigation.

There were 56 claims in which the worker received less than the amount claimed (Table 14, Section 1). For these 56 claims, the median "benefit" achieved by the insurer in contesting the litigation was $3764.[27] However, the median total legal cost incurred for the conduct of the litigation relevant to these 56 claims was higher, $5395.

Table 14. The difference in amounts claimed and amounts received under S66, and total legal costs

Section 1 Worker received less than amount initially claimed

	Amount claimed (S66)	Amount received (S66)	Difference	Total legal costs	Amount received (S67)
1	12676	12449	227	2748	6000
2	6791	6551	240	6446	0
3	2173	1901	272	3503	0
4	3918	3581	337	1550	0
5	4712	4110	602	1022	0
6	5896	5241	655	3837	0
7	14261	13582	679	1372	8000
8	57725	57045	680	13355	20000
9	2700	1998	702	4062	0
10	8568	7631	935	1064	0
11	7765	6767	998	6843	0
12	4206	3206	1000	8667	0
13	17272	16178	1094	3495	14000
14	6338	4980	1358	1525	0
15	6814	5408	1406	2184	0
16	15480	13852	1628	9716	6147
17	5309	3602	1707	1743	0
18	8475	6709	1766	1500	0
19	7861	5241	2620	602	0
20	13563	10866	2717	10633	1633
21	32077	29121	2956	6045	18000
22	17380	14422	2958	8480	5000
23	13582	10186	3396	12484	8000
24	13867	10400	3467	12047	5700
25	6791	3169	3622	2400	0
26	6791	3169	3622	10146	0
27	14512	10866	3646	13722	9060
28	13301	9593	3708	7162	7406
29	10290	6471	3819	4709	0
30	9171	5241	3930	4368	0
31	19543	15365	4178	2288	0
32	8516	3843	4673	1365	0
33	26833	21849	4984	18718	3500
34	14542	9525	5017	4042	474
35	19750	14203	5547	6395	5796
36	8546	941	7605	4744	0
37	13830	6000	7830	2621	0
38	12582	3169	9413	3658	0
39	24961	14560	10401	10528	14190
40	16641	5547	11094	27044	5000
41	12536	1021	11515	4087	0
42	16299	4074	12225	7352	0
43	23543	9507	14036	11462	5400
44	35088	21052	14036	13871	10000
45	24961	10400	14561	11986	11000
46	25000	9707	15293	13059	8000
47	15846	0	15846	3013	0
48	25000	8828	16172	4271	0
49	31692	14940	16752	11608	17500
50	30305	8149	22156	12643	0
51	31201	4853	26348	9334	0
52	50000	20374	29626	13665	39626
53	45000	9914	35086	12274	5084
54	56777	6115	50662	1226	0
55	67912	16978	50934	10631	17500
56	102500	7533	94967	1079	0
Median			3764	5395	

Section 2 Worker received amount initially claimed

	Amount claimed (S66)	Amount received (S66)	Difference	Total legal costs	Amount received (S67)
1	5433	5433	0	2053	0
2	15286	15286	0	2732	9713
3	6338	6338	0	1495	0
4	6551	6551	0	4143	0
5	9171	9171	0	4015	11628
6	15846	15846	0	9563	14154
7	1941	1941	0	2902	0
8	15000	15000	0	9051	0
9	3057	3057	0	550	0
10	6338	6338	0	8257	0
11	12677	12677	0	8751	12323
12	1834	1834	0	3847	0
13	1629	1629	0	700	0
14	4980	4980	0	715	0
15	56141	56141	0	3830	20000
16	8735	8735	0	8268	15000
17	12480	12480	0	9660	10000
18	7861	7861	0	6913	0
19	3169	3169	0	2871	0
20	3882	3882	0	2979	0
21	5528	5528	0	9143	0
22	5648	5648	0	1137	0
23	8040	8040	0	2361	0
24	12677	12677	0	13381	17252
25	10866	10866	0	11151	8000
26	34940	34940	0	10831	10000
27	7873	7873	0	16787	0
Median			0	4015	

Section 3 Worker received more than amount initially claimed

	Amount claimed (S66)	Amount received (S66)	Difference	Total legal costs	Amount received (S67)
1	24458	92278	−67820	11563	25000
2	9827	24458	−14631	10193	15000
3	9507	24019	−14512	12084	10980
4	17374	24348	−6974	4781	20000
5	19350	24548	−5198	5852	15462
6	5677	9936	−4259	6083	6500
7	12018	15023	−3005	9072	18000
8	20373	23146	−2773	4589	15000
9	9417	11771	−2354	8359	9000
10	3590	5848	−2258	1621	0
11	13102	15286	−2184	8548	9713
12	5300	5588	−288	1169	0
13	6160	6369	−189	745	0
14	23000	23090	−90	10725	20000
Median			−2889	7221	

In 27 claims the worker received the same amount as had been initially claimed (Table 14, Section 2). That is, no "benefit" was achieved by contesting the litigation. However, the median total legal cost incurred for the conduct of this litigation was $4015.

In 14 claims the worker received more than the amount initially claimed (Table 14, Section 3). That is, a cost was incurred in the insurer contesting the litigation, both in terms of the benefit paid and the legal costs incurred. A median cost of $2889 was incurred in relation to the amount of benefit paid, and the median total legal cost was $7221.

While this analysis is based on only a small number of claims, it would appear that litigation is not a cost effective mechanism for administering claims for benefits under S66 and S67. If the intention of the WorkCover legislation is to reduce legalism, it must be asked whether there is not a better, more cost effective, way of making claims for such benefits.

26 The maximum amount applicable as at April 1990 was $92,450 under S66(1) and $112,500 under S66(2).

27 The median provides a measure of the mid-point in a frequency distribution. It is the point at which half the measurements fall above, and half below.

9

Which Claims are More Likely to Involve Litigation?

This section considers the research question: *Which claims are more likely to involve litigation?* Seven different factors were considered. The first five concerned characteristics of the worker: gender, occupation, industry, age and place of residence. The remaining two were the type of injury claimed for and the amount of time taken off work.

Litigation was commenced in 41% of claims. Of these claims 92% involved workers compensation proceedings commenced in the Compensation Court and 8% involved common law proceedings in either the Supreme Court or the District Court.

9.1 Gender

Claims from women (52%) were more likely to involve litigation than claims from men (38%). Overall, however, as more claims were made by men, more litigation was commenced by men than women.

Table 15. Gender and whether litigation was commenced

Gender	Litigation commenced		No litigation		Total	
	Population estimate	%	Population estimate	%	Population estimate	%
Male	3365	38	5467	62	8831	100
Female	1200	52	1122	48	2322	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.2 Occupation[28]

Claims from labourers and related workers (49%) were more likely to be litigated than claims from the other occupational groups. Claims from managers, administrators, professionals, para-professionals (13%) were the least likely to be litigated.

Table 16. Occupation and whether litigation was commenced

Occupation	Litigation commenced Population estimate	%	No litigation Population estimate	%	Total Population estimate	%
Managers, administrators, professionals, para-professionals	164	13	1064	87	1228	100
Tradespersons	1443	44	1808	56	3251	100
Clerks, salespersons	333	45	403	55	736	100
Plant and machine operators	590	33	1187	67	1777	100
Labourers and related workers	2035	49	2126	51	4161	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.3 Industry[29]

Claims from the community services, recreation, personal and other services industry (31%) were the least likely to involve litigation, claims from the "other"[30] category (76%) were the most likely. Overall, as a larger number of claims were made by the manufacturing industry, more litigation was commenced by workers from this industry.

Table 17. Industry and whether litigation was commenced

Industry	Litigation commenced Population estimate	%	No litigation Population estimate	%	Total Population estimate	%
Agriculture	380	45	469	55	849	100
Manufacturing	1564	43	2045	57	3609	100
Construction	674	36	1217	64	1891	100
Retail, wholesale trade	704	43	946	57	1650	100
Transport, storage	264	45	321	55	585	100
Finance, property and business services	265	36	469	64	734	100
Community services, recreation, personal, and other services	469	31	1046	69	1515	100
Other	244	76	76	24	320	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.4 Age

Workers aged between 40 and 50 years (52%) were more likely to make claims in which litigation was commenced. Workers over sixty (17%) were least likely to make a claim in which litigation was commenced.

Table 18. Age and whether litigation was commenced

	Litigation commenced		No litigation		Total	
Age	Population estimate	%	Population estimate	%	Population estimate	%
< 20 years	268	46	310	54	578	100
20–30 years	776	33	1570	67	2346	100
30–40 years	1149	49	1199	51	2348	100
40–50 years	1345	52	1235	48	2580	100
50–60 years	839	39	1338	61	2177	100
> 60 years	188	17	935	83	1123	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.5 Worker's Place of Residence[31]

Workers residing in the Sydney metropolitan area (43%) were more likely to make claims in which litigation was commenced than workers in other areas (37%).

Table 19. Residence of worker and whether litigation was commenced

	Litigation commenced		No litigation		Total	
Residence of worker	Population estimate	%	Population estimate	%	Population estimate	%
Sydney metropolitan	2838	43	3695	57	6533	100
Other	1727	37	2893	63	4620	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.6 Injury[32]

Claims for sprain and strain injuries (46%) were more likely to be litigated than claims for other injuries. Claims for fracture or dislocation injuries were the least likely to be litigated (34%)

Table 20. Injury and whether litigation was commenced

	Litigation commenced		No litigation		Total	
Injury	Population estimate	%	Population estimate	%	Population estimate	%
Fracture or dislocation	671	34	1300	66	1971	100
Sprain or strain	1971	46	2306	54	4277	100
Other injury	1083	36	1889	64	2972	100
Disease	840	43	1093	57	1933	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.7 Time Off Work

Claims in which the worker had taken 6–12 months off work (68%) were more likely to be litigated than claims in which the worker had taken 1 day–3 months (24%). Overall, however, more litigation was commenced by workers who had taken more than 12 months off work.

Table 21. Time off work and whether litigation was commenced

Time off work	Litigation commenced Population estimate	%	No litigation Population estimate	%	Total Population estimate	%
0	529	55	440	45	969	100
1 day–3 months	976	24	3159	76	4135	100
3–6 months	519	25	1588	75	2107	100
6–12 months	655	68	302	32	957	100
> 12 months	1885	63	1099	37	2984	100
Total	4565	41	6589	59	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

9.8 Conclusion

It is clear that there are differences between certain types of claims and the amount of litigation that is commenced. If legislative or procedural changes are made to reduce legal costs the types of claims more likely to involve litigation should be explored further. It is intended that the workers compensation claim survey will allow for further analysis to take place, for example, by considering the types of claims more likely to incur high legal costs.

28 Australian Bureau of Statistics, 1986, Australian Standard Classification of Occupations (ASCO), ABS 1222.0.

29 Australian Bureau of Statistics, 1983, Australian Standard Industrial Classification (ASIC), ABS 1201.

30 The "other" category is a combination of the following ASIC groupings: mining, electricity gas water, communication, public administration and defence.

31 The worker's place of residence is based on the residential postcode. These were classified into the Sydney metropolitan and other zones based on the Australian Bureau of Statistics statistical division classification.

32 National Occupational Health and Safety Commission, 1990, *Type of Occurrence Classification System*, AGPS, Canberra.

10

Conclusion

The level of legal costs currently generated by the WorkCover scheme is a source of some concern. This problem is being addressed by the WorkCover Authority from a number of perspectives. As a part of a wider strategy the CJRC received a request to undertake a study of workers compensation claims. This was to provide a better understanding of the way in which the workers compensation dispute resolution system was working by addressing the following questions:

- Why do disputes arise?
- How are disputes resolved?
- How long does it take to resolve disputes?
- Why does litigation occur?
- How is litigation conducted?
- What legal costs are incurred?
- What does contesting litigation achieve?
- Which claims are more likely to involve litigation?

It was intended that the answers to these questions would address the broader issue of whether the WorkCover scheme had achieved an "atmosphere of reduced legalism"[33] and provide a sound empirical basis for recommendations as to areas in need of legislative or procedural change if legal costs were to be reduced.

The findings are based on a sample of claims in which the total incurred cost was greater than $5000. This focus on more expensive claims was deliberate as most legal costs incurred by the WorkCover scheme were found to stem from such claims. Information to address the questions was collected from both insurers' claim files and the WorkCover claims database.

10.1 Summary

Why do disputes arise?

To classify when and why disputes arise, four claim events were defined: the initial claim, an unlitigated claim for S66/S67 benefits, an unlitigated claim for further benefits, and a notification of discontinuation. It was observed that disputes were commonly preceded by one of these claim events. Details of the disputes arising from each of these events were recorded from the claim files.

Twenty-three percent of disputes arose in relation to the initial claim. Only 10% arose when the worker made an unlitigated claim for S66/S67 benefits. In 11% the dispute arose when the worker made an unlitigated claim for further benefits. A larger proportion of the disputes, 24%, arose when the insurer provided notification that weekly payments would be discontinued.

It was often observed that litigation arose without a preceding event. In 32% of disputes, litigation did not arise from one of the four claim events defined. Why litigation did arise in these circumstances will be considered under the question *Why does litigation occur?*

How are disputes resolved?

Overall, only a small proportion of disputes, 20%, were resolved without litigation. Litigation was commenced in 80% of disputes. This brings into question the "reduced legalism" intended by the WorkCover legislation.

Although a sizeable proportion of unlitigated disputes, 45%, were referred to and resolved by the WorkCover conciliation service, it must be emphasised that the proportion of unlitigated disputes overall is only small.

It would appear that insurers do not often refer disputes to WorkCover for conciliation unless they are required to do so by legislation. Likewise, matters are rarely referred by workers unless they have received a Notice of Discontinuation. In such circumstances the worker is usually informed on the Notice of the availability of the service.

How long does it take to resolve disputes?

Where disputes were resolved without litigation it took an average of five months from the date the initial claim was made. Unlitigated disputes arising out of claims for S66/S67 benefits took longer, an average of nine months.

Overall, litigated disputes took an average of 12 months to be resolved. Where litigated disputes settled before the day of hearing it took an average of 10 months.

Why does litigation occur?

The question *Why does litigation occur?* was looked at in terms of the benefits claimed by the worker on the Application for Determination. Did the litigation arise out of a claim for weekly benefits, a claim for permanent loss (S66), a claim for pain and suffering (S67), or some combination of these? The question of whether the litigation followed any disagreement, or indeed, whether the insurer knew the benefit was claimed prior to the commencement of the litigation, was also considered.

Weekly benefits (only) were claimed in 15% of the litigated disputes. A lump sum under S66/S67 (only) was claimed in 34% of the litigated disputes. In 50% of the litigated disputes, a claim was made for both weekly benefits and a lump sum under S66/S67.

Where weekly benefits (only) were claimed on the Application for Determination, in 33% of the disputes there had been no disagreement over the worker's entitlement to the weekly benefit claimed.

Where a lump sum benefit under S66/S67 (only) was claimed on the Application for Determination, in 68% of these disputes no previous claim for this benefit had been made. That is, the insurer only became aware the benefit was claimed by the worker when an Application for Determination was served.

Where the Application for Determination claimed both weekly benefits and a lump sum under S66/S67, it was found that in 58% of these disputes a disagreement had arisen over the weekly payments claimed. However, 96% of these disputes involved a claim for lump sum benefits that, prior to the commencement of litigation, had not even been made.

This finding could indicate that workers often only become aware of their right to claim lump sum benefits when seeking legal representation in relation to a disagreement over a claim for weekly benefits. Also, it would appear that litigation often occurs when there is no disagreement concerning the worker's entitlement to the benefit claimed.

WorkCover has encouraged a "pro-active" approach from insurers in relation to claims for benefits under S66/S67. The survey revealed that the insurer had notified the worker of their entitlement to the lump sum benefit in 29% of the unlitigated claims for S66/S67 benefits.

How is litigation conducted?

In 90% of litigated disputes the insurer responded to the service of an Application for Determination by instructing solicitors. In the remaining 10% the insurer either indicated there was no need for litigation as the claim was not disputed, or,

the insurer attempted to resolve the matter without instructing solicitors and incurring immediate legal costs. It would appear that once litigation is initiated by the worker, the adversarial process will proceed.

Most litigated disputes required two or less medico-legal assessments (82%) or factual investigations (90%). This could suggest that workers compensation litigation does not concern disputes in which the medical or factual basis is highly contested.

The proportion of matters settling "at the door of the court" was particularly high in the Compensation Court, 57%. A recent study of Supreme Court matters reported that only 27% settled "at the door" and 65% settled at an earlier stage.[34]

To what extent are the parties beginning the early negotiation of settlements in the Compensation Court? It was found that there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes.

A number of issues concerning the conduct of workers compensation litigation were highlighted by three case studies. It was found that:

- a pro-active role is sometimes taken by the insurer. In two claims the worker's solicitor was notified that liability for the claim was not in dispute, hence there was no need for litigation;
- the extent of permanent loss, and not liability, can be the critical issue;
- claims for weekly benefits, although initially made, may not be included in the final settlement of disputes; and
- there may be no strong reason why settlements could not occur earlier than the day set for hearing.

What legal costs are incurred?

Where legal costs were incurred, but no litigation was commenced, the average total legal cost was $1173. The average total legal cost for disputes which settled before the day of hearing was $4882. Where disputes settled on the day of/during hearing the average total legal cost was $13,779. This was similar to that for determined cases, $12,732.

The insurer's total legal costs tended to be somewhat higher than those of the worker. Where factual investigations were undertaken the cost formed a sizeable proportion of the total legal cost. Fees for counsel were incurred by the insurer in most of the disputes which reached hearing and this cost was also significant. Solicitors' professional fees formed the largest proportion of the legal costs incurred by the insurer.

What does contesting litigation achieve?

The question *What does contesting litigation achieve?* was looked at from the perspective of a simple "cost-benefit" analysis. Claims for benefits under S66/S67 only were considered because of difficulties inherent in quantifying open ended claims for weekly benefits.

The amount claimed under S66 at the time the litigation was commenced was recorded from the Application for Determination. This was compared to the actual amount obtained under S66 at the completion of the litigation. The difference between the amount claimed by the worker and the amount received was the "benefit" achieved by the insurer in contesting the litigation. This was compared to the total legal costs incurred in achieving this "benefit".

Where the worker received less than the amount claimed the median "benefit" achieved by the insurer in contesting the litigation was $3764. The median total legal cost incurred in achieving this benefit was higher, $5395.

Where the worker received the same amount as had been initially claimed, that is, no "benefit" was achieved by contesting the litigation, the median total legal cost incurred was $4015.

Where the worker received more than the amount initially claimed, that is, a cost was incurred in the insurer contesting the litigation, a median cost of $2889 was incurred in relation to the amount of benefit paid, and the median total legal cost was $7221.

While this analysis is based on only a small number of claims, it would appear that litigation is not a cost effective mechanism for administering claims for benefits under S66 and S67. If the intention of the WorkCover legislation is to reduce legalism, it must be asked whether there is not a better, more cost effective, way of making claims for such benefits.

Which claims are more likely to involve litigation?

Claims from women were more likely to involve litigation than claims from men. Overall, however, as more claims were made by men, more litigation was commenced by men.

Claims from labourers and related workers were more likely to be litigated than claims from the other occupational groups. Most litigation was commenced by workers from the manufacturing industry.

Workers aged between 40 and 50 years were more likely to make claims in which litigation was commenced. Workers residing in the Sydney metropolitan area were also more likely to make claims involving litigation.

Claims for sprain and strain injuries were more likely to be litigated than claims for the other injury categories.

10.2 Recommendations

This research was conducted to provide a sound empirical basis for recommendations as to areas in need of legislative or procedural change if legal costs are to be reduced. While the CJRC does not advocate specific policy changes, a number of recommendations are made. These are intended to assist policymakers in their efforts to improve the system for resolving workers compensation disputes and to meet with the intention of the legislation to provide a system that operates with "a minimum of delays, a minimum of legalism, and a minimum of cost".[35]

In making these recommendations, it should be noted that they are based largely on the information that was available from insurers' claim files. Further perspectives in dealing with the legal costs problem could arise from other sources. For example, research focussing on the specific amounts incurred in conducting litigation could be undertaken to see if expenditure on professional fees, medico-legal assessments or factual investigations is cost effective. Also, differences between certain types of claims and the likelihood that litigation will be commenced could be explored further.

10.2.1 Resolving Disputes Without Litigation

The study found that non-litigious mechanisms such as negotiation and conciliation were successful in resolving disputes. Overall, however, the proportion of disputes resolved in this way was only small. Typically, disputes resolved by non-litigious mechanisms were resolved more quickly and more cheaply than disputes in which litigation was commenced.

Recommendation 1

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

The use of non-litigious mechanisms for resolving disputes be increased

10.2.2 Claiming Benefits Under S66/S67

The study found that litigation is often commenced claiming benefits under S66/S67 when no previous claim for these benefits had been made on the insurer. Also, it would appear that litigation is not a cost effective mechanism for administering claims for such benefits.

There is some indication that workers may often only become aware of their right to benefits under S66/S67 when seeking legal advice in relation to another dispute, although, in some circumstances insurers were taking a "pro-active" role in notifying workers of this right.

The study revealed that even unlitigated disputes concerning claims for benefits under S66/S67 took longer to be resolved than other types of unlitigated disputes; litigation, which processed most claims for such benefits, took longer still. A number of case studies indicated that the extent of permanent loss can be the critical issue in the conduct of litigation.

Recommendation 2

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

A timely, non-legal and cost effective procedure for claiming benefits under S66/S67 be introduced

10.2.3 Application for Determination

The study revealed that in many cases an Application for Determination is made when there is no disagreement concerning the worker's entitlement to the benefit claimed.

Once an Application for Determination is made, litigation will tend to proceed, typically, until a settlement is achieved on the day set for hearing, 15 months later and incurring an average total legal cost of $13,779. Disputes resolved by legal representatives without making an Application for Determination incurred an average total legal cost of $1173.

Recommendation 3

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

An Application for Determination is only made when legitimate disagreements require a Court determination

10.2.4 Conducting Litigation

The proportion of matters settling "at the door of the court" is particularly high in the Compensation Court. The study found that there was no attempt to negotiate settlement before the day of hearing in 64% of litigated disputes.

Where litigated disputes were settled before the day of hearing the average total legal cost was $4882. In contrast, disputes which were settled on the day of hearing incurred, on average, a total legal cost of $13,779.

Recommendation 4

If the dispute resolution system is to work as intended by resolving disputes with "a minimum of delays, a minimum of legalism, and a minimum of costs" it is recommended that:

The early settlement of litigated disputes be facilitated

33 The Hon Mr P Hills, op cit.

34 Baker, J, op cit.

35 The Hon Mr P Hills, op cit.

APPENDIX 1
The data collection form

CJRC
CIVIL JUSTICE RESEARCH CENTRE
A PROJECT OF THE LAW FOUNDATION OF NEW SOUTH WALES

Checked ☐

Entered ☐

CJRC WORKCOVER LEGAL COSTS PROJECT

Initials of coder

Date

APPENDICES

Appendix 1 The data collection form

Appendix 2 Information abstracted from the WorkCover database

Appendix 3 Sampling frame: target population, sample estimates, selected and actual sample

Appendix 4 The number of claims with disputes and the number of claims in which each claim event took place

Event A: The initial claim

1 When the initial claim was received, were there details of

Use code

Employment relationship

Tick all that apply

Previous injury/problems with the body part 1

Injury contracted by a gradual process 2

Hospitalisation 3

The employer querying the claim 4

A claim for a lump sum payment under S66 5

A claim for a lump sum payment under S67 6

The initial claim was made by a lawyer 7

An Application for Determination 8 ▶ Go to 27, page 6

A Statement of Claim 9 ▶ Go to 27, page 6

2 When the claim was received, what did the insurer do?

Tick one only

Paid the initial claim 1 ▶ Go to 8

Disputed the initial claim 2 ▶ Go to 5

Requested further information 3 ▶ Go to 3

Other (specify) 4 ▶ Go to 4

3 What further information was requested?

Tick all that apply

Medical certificate 1

Treating doctor's report 2

Medical assessment 3

Medical Panel assessment 4

Permanent impairment % 5

Factual investigation 6

Legal advice 7

Other (specify) 8

4 What happened next?

Tick ONE only

Claim paid after information received 1 ▶ Go to 8

Claim disputed after information received 2 ▶ Go to 5

An Application for Determination 3 ▶ Go to 27, page 6

A Statement of Claim 4 ▶ Go to 27, page 6

Other (specify) 5 ▶ If disputed, go to 5 otherwise, go to 8

5 Why did the insurer dispute the initial claim?

Use code

6 What activities were undertaken in attempting to resolve the dispute?

Tick all that apply

Referred to WorkCover by insurer 1

Referred to WorkCover by worker 2

Insurer sought legal advice 3

Worker had legal representation 4

An Application for Determination 5 ▶ Go to 27, page 6

A Statement of Claim 6 ▶ Go to 27, page 6

Negotiations took place 7

Other (specify) 8

7 Is the dispute of the initial claim resolved?

Yes ▶ At what stage was this initial dispute resolved? Use code

What agreement was reached? Use code

Date initial claim was resolved

No ▶ At what stage are the negotiations currently? Use code

2

Event B: Weekly payments – notification of discontinuation *(prior to litigation)*

8 Did the worker receive notification that weekly payments will/may be discontinued?

No 1 ▶ Go to 13
Yes 2

Date of notification by insurer

Employment relationship — Use code

9 Why did the insurer decide to discontinue weekly payments?

Tick all that apply

On the basis of information obtained from a medical assessment 1
On the basis of information obtained from a factual investigation 2
Worker's incapacity no longer covered by medical certificates 3
Worker reached retirement age 4
No reason available 5
Other (specify) 6

10 How did the worker respond to the notice of discontinuation?

Tick ONE only

Worker disputed the discontinuation 1
An Application for Determination 2 ▶ Go to 27, page 6
Worker did not respond 3 ▶ Go to 13
Other (specify) 4 ▶ If disputed, go to 11 otherwise, go to 13

11 What activities were undertaken in attempting to resolve this disputed discontinuation?

Tick all that apply

Referred to WorkCover by insurer 1
Referred to WorkCover by worker 2
Insurer sought legal advice 3
Worker had legal representation 4
An Application for Determination 5 ▶ Go to 27, page 6
A Statement of Claim 6 ▶ Go to 27, page 6
Negotiations took place 7
Other (specify) 8

12 Is the dispute of the discontinuation resolved?

Yes ▶ At what stage was this disputed discontinuation resolved? — Use code
What agreement was reached? — Use code
Date disputed discontinuation was resolved

No ▶ At what stage are the negotiations currently? — Use code

3

Event C: A further claim for benefits which is disputed, *(not a litigated claim or a claim under S66/S67)*

13 Apart from the initial claim, did the worker make a claim for further benefits which was disputed?

No 1 ▶ Go to 19
Yes 2 ▶ Go to 14

14 What further benefits was this disputed claim for?

Tick all that apply

Medical expenses 1
Back pay of weekly payments 2
Weekly payments at a higher rate 3
Other (specify) 4

15 How was this disputed claim for further benefits made?

Tick ONE only

By worker 1
By employer 2
By solicitor representing worker 3
Other (specify) 4

Date of further claim

Employment relationship — Use code

16 Why did the insurer dispute the further claim?

Use code

17 What activities were undertaken in attempting to resolve this dispute?

Tick all that apply

Referred to WorkCover by insurer 1
Referred to WorkCover by worker 2
Insurer sought legal advice 3
Worker had legal representation 4
An Application for Determination 5 ▶ Go to 27, page 6
A Statement of Claim 6 ▶ Go to 27, page 6
Negotiations took place 7
Other (specify) 8

18 Is the dispute of the further claim resolved?

Yes ▶ At what stage was this initial dispute resolved? — Use code
What agreement was reached? — Use code
Date this dispute was resolved

No ▶ At what stage are the negotiations currently? — Use code

4

Event D: A claim for benefits under Section 66/67 *(unlitigated)*

19 Apart from the initial claim, did the worker make a claim for lump sum benefits under S66/67?

No 1 ▶ Go to 21
Yes 2 ▶ Go to 20

20 Had the insurer notified the worker of their right to a lump sum benefit under S66/67?

No 1
Yes 2

21 How was this claim for a lump sum benefit made?

Tick one only

By worker 1
By employer 2
By solicitor representing worker 3
Other (specify) 4

Date of claim
Use code
Employment relationship

22 When the claim was received, what did the insurer do?

Tick one only

Paid the claim 1 ▶ Go to 27
Disputed the claim 2 ▶ Go to 24
Requested further information 3 ▶ Go to 23
Other (specify) 4 ▶ Go to 23

23 What happened next?

Tick one only

Claim paid after information received 1 ▶ Go to 27
Claim disputed after information received 2 ▶ Go to 24
An Application for Determination 3 ▶ Go to 27
A Statement of Claim 4 ▶ Go to 27
Other (specify) 5 ▶ If disputed, go to 24 otherwise, go to 27

24 Why did the insurer dispute the claim?

Use code

25 What activities were undertaken in attempting to resolve this dispute?

Tick all that apply

Referred to WorkCover by insurer 1
Referred to WorkCover by worker 2
Insurer sought legal advice 3
Worker had legal representation 4
An Application for Determination 5 ▶ Go to 27
A Statement of Claim 6 ▶ Go to 27
Negotiations took place 7
Other (specify) 8

26 Is the dispute of the claim for a lump sum benefit resolved?

Yes ▶ At what stage was this initial dispute resolved? *Use code*
What agreement was reached? *Use code*
Date this dispute was resolved

No ▶ At what stage are the negotiations currently? *Use code*

Event E: Litigation

27 Was litigation commenced?

No 1 ▶ Go to 30
Yes 2 ▶ Go to 28

28 How was litigation commenced?

Statement of Claim 1 ▶ Go to 30
Application for Determination 2
Date of Application
Use code
Employment relationship

29 How did the insurer respond to the Application?

Tick one only

Instructed solicitors 1
Indicated the claim was not disputed 2
Attempted to resolve the matter 3
Other (specify) 4

30 Did the worker claim weekly payments?

No 1 ▶ Go to 32
Yes 2 ▶ Go to 31

31 Had the insurer already disputed this claim for weekly payments? (eg by discontinuing or reducing payments)

No 1
Yes 2

32 Did the worker claim a lump sum for permanent loss? (S66 provisions)

No 1 ▶ Go to 35
Yes 2 ▶ Amount (exclusive of interest)

33 Had the worker made a prior claim for this lump sum?

No 1
Yes 2

34 Had the insurer already disputed this claim for a lump sum?

No 1
Yes 2

35 Did the worker claim a lump sum for pain and suffering? (S67 provisions)

No 1 ▶ Go to 39
Yes 2 ▶ Amount (exclusive of interest)

36 Had the worker made a prior claim for this lump sum?

No 1
Yes 2

37 Had the insurer already disputed this claim for a lump sum?

No 1
Yes 2

38 Is the litigation finalised?

No 1 ▶ Form is finished
Yes 2 ▶ Go to 39

39 Number of MEDICAL ASSESSMENTS requested by the insurer/solicitor after the Application was made

40 If more than two medical assessments, why?

Tick all that apply

Conflict with worker's assessment(s) 1
Insurer searching for a more "favourable" assessment 2
Updated assessment(s) required 3
Other (specify) 4

41 Was a MEDICAL PANEL used?

No 1 ▶ Go to 44
Yes 2 ▶ Go to 42

42 Was the medical panel's estimate used?

No 1 ▶ Go to 43
Yes 2 ▶ Go to 44

43 Why was the medical panel's estimate not used?

Event E: Litigation *(continued)*

44 Number of FACTUAL INVESTIGATION reports requested by the insurer/solicitor after the Application was made. ☐☐

45 If more than two factual investigation reports, why?

Tick all that apply

Concern about the incapacity of the worker 1☐
Concern the worker has alternative undisclosed employment 2☐
Concern about a witness 3☐
Updated assessment(s) required 4☐
Other *(specify)* 5☐

46 Dates allocated for hearing

First date ☐☐☐☐☐☐☐☐
Second date ☐☐☐☐☐☐☐☐
Third date ☐☐☐☐☐☐☐☐
Fourth date ☐☐☐☐☐☐☐☐

If more than one date, why?

47 Were any offers of settlement made prior to the day of hearing?

No 1☐
Yes 2☐

48 At what stage was the litigation finalised?

Use code ☐☐

Date litigation finalised ☐☐☐☐☐☐☐☐

49 Particulars of compensation received

Weekly payments? No 1☐ Yes 2☐

A lump sum payment for permanent loss (S66 provisions) No 1☐ Yes 2☐ Amount (exclusive of interest) ☐☐☐☐☐☐

A lump sum payment for pain and suffering (S67 provisions) No 1☐ Yes 2☐ Amount (exclusive of interest) ☐☐☐☐☐☐

Event F: Legal costs

50 Were legal costs incurred?

No 1☐ Form is finished
Yes 2☐ Go to **51**

51 Was litigation commenced?

No 1☐ Go to **52**
Yes 2☐ Go to **53**

52 Why were legal costs incurred?

Tick all that apply

Advice on recovering payments from another insurer 1☐
Insurer requested advice in case worker commenced litigation 2☐
Worker had lawyer conduct claim 3☐
Other *(specify)* 4☐

53 Provide details of legal costs incurred. Use **"0"** if no costs were incurred.

Insurer's solicitor

Professional fees ☐☐☐☐☐☐
Disbursments ☐☐☐☐☐☐
Counsel ☐☐☐☐☐☐
Factual investigations (after litigation commenced) ☐☐☐☐☐☐
Medical assessments (after litigation commenced) ☐☐☐☐☐☐

Worker's solicitor

Total costs ☐☐☐☐☐☐

7

APPENDIX 2
Information abstracted from the WorkCover database

Claim number

Date claim entered on insurer's system

Closed claim

Industry code ASIC

Occupation code ASCO

Nature of injury code

Disease code

Claimant's postcode

Claimant's sex

Claimant's date of birth

Claimant's award rate

Number of days off work

APPENDIX 3

Sampling frame: target population, sample estimates, selected and actual sample

Nature of injury code	Claim closed flag											
	Open claims						Closed claims					
	Males			Females			Males			Females		
	Legal cost			Legal cost			Legal cost			Legal cost		
	No legal cost	Up to $2,000	More than $2,000	No legal cost	Up to $2,000	More than $2,000	No legal cost	Up to $2,000	More than $2,000	No legal cost	Up to $2,000	More than $2,000
	No	No	No	No	No	No	No	No	No	No	No	No
Fracture or dislocation												
Selected sample	12	26	17	33	15	10	26	12	62	12	10	7
Actual sample	12	26	17	33	13	10	25	11	61	12	10	6
Population	236	88	166	44	15	29	968	63	144	179	11	28
RSE	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0
Sprain or strain												
Selected sample	13	17	12	14	14	14	12	13	23	10	11	12
Actual sample	13	16	11	13	14	14	11	11	22	10	11	10
Population	383	169	509	149	79	210	1648	56	435	449	16	174
RSE	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0
Other injury												
Selected sample	31	21	22	18	16	15	25	29	42	17	5	34
Actual sample	30	21	22	17	16	14	25	28	42	17	5	31
Population	222	114	221	73	37	93	1402	186	349	182	19	74
RSE	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0
Disease												
Selected sample	20	46	60	14	8	14	10	23	23	10	4	14
Actual sample	18	44	59	14	8	14	9	23	20	10	3	12
Population	85	48	92	49	36	86	671	319	257	170	4	116
RSE	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0	20.0
Total												
Selected sample	76	112	111	79	53	53	73	77	150	49	30	67
Actual sample	73	107	109	77	51	52	70	73	145	49	29	59
Population	926	419	988	315	167	418	4689	624	1185	980	50	392
RSE	18.8	16.2	16.0	16.8	18.0	19.6	20.2	23.2	19.4	19.0	13.4	19.0

APPENDIX 4

The number of claims with disputes

	Population estimate	%
No dispute	5785	52
Unlitigated dispute only	804	7
Litigated dispute only	4245	38
Litigated dispute and unlitigated dispute	320	3
Total	11153	100

Source: CJRC survey. Population estimates based on full sample of 894 claims.

The number of claims in which each claim event took place

	Number of claims in which event took place		Number of claims in which event did not take place	
	Population estimate	%	Pop. est.	%
Event A: initial claim	11153	100	0	0
Event B: claim for S66/S67 benefits	1318	12	9835	88
Event C: dispute of a claim for any further benefits	607	5	10546	95
Event D: notification of discontinuation	2204	20	8949	80

Source: CJRC survey. Population estimates based on full sample of 894 claims.

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