NSW Legislative Assembly Hansard

Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill

Extract from NSW Legislative Assembly Hansard and Papers Tuesday 29 November 2005.

Second Reading

Mr DAVID CAMPBELL (Keira—Minister for Regional Development, Minister for the Illawarra, and Minister for Small Business) [5.14 p.m.], on behalf of Mr John Watkins: I move:

That this bill be now read a second time.

The bill represents a further step in the process of reform of workers compensation legislation. I will first list the major reform areas dealt with by the bill and then explain the specific provisions in more detail. As honourable members are aware, the workers compensation legislation was extensively amended during 2001 as part of major reforms to the workers compensation scheme, with subsequent amendments in 2003 and 2004. The aim of these reforms has been to build a scheme that is fair, affordable and efficient. I am pleased to report that these aims are being achieved as a direct consequence of the reform process. Injured workers are receiving payments and treatment faster, return-to-work rates have improved and the number of disputes has dropped significantly.

A number of further amendments have now been identified, as part of the first area of reform, to further improve the Workers Compensation Commission dispute resolution process. Schedule 1 gives effect to these amendments. Their purpose is to encourage earlier settlement of claims and to enhance the efficiency of both pre-dispute and dispute resolution processes. These amendments will further improve earlier reforms. The proposals follow a consultation process with various stakeholders representing employer and employee interests.

The second area of reform is contained in schedule 2 to the bill and is aimed at clarifying outworker and labour hire deemed worker provisions and also in making the premium compliance and audit system fairer. These reforms are based on recommendations of the Hon. Dr James Macken, AM, former judge of the Industrial Commission of New South Wales, in his capacity as facilitator of an advisory panel of employer and employee representatives who reviewed submissions made in response to a WorkCover discussion paper entitled "Definition of Worker" issued in January of this year.

The third area of reform encompasses various miscellaneous amendments set out in schedule 3 to the bill. The most significant of these is an increase in benefits payable to workers who suffer spinal injuries of 5 per cent in dollar terms, as announced by the Premier on 9 November 2005. Other reforms relate to improved settlement procedures and reform of legal costs provisions relating to disputed claims. I take this opportunity to acknowledge the input of the many stakeholders who have commented on various aspects of the proposed changes.

I will now outline the amendments in more detail. On early settlement of claims, the bill contains a number of measures aimed at facilitating earlier settlement of claims and ensuring that matters referred to the commission are genuinely in dispute. These measures provide for the exchange of all relevant documents and identification of all relevant issues as part of the claim and dispute process. This up-front exchange of information is key to the success of the commission. The bill requires an insurer to review a decision to dispute a claim and give to the worker the option of seeking a further review before the dispute is referred to the commission. This will make sure insurers are acting in the scheme's best interests—that they are making appropriate decisions about claims and, where they are going to dispute a claim, they can back it up.

Let me be clear—this is not about accepting every claim made on an insurer. It is about making sure matters that go before the commission are genuinely in dispute. It is not in employers' interests if scheme money is spent on disputes where one party has not had a chance to consider the issue before the dispute application is lodged, or if the insurer automatically disputes the claim because they have not considered its merits. That is why the bill contains provisions that strengthen the commission's powers to decline to deal with disputes that do not comply with statutory prerequisites and to limit consideration of disputes to matters notified prior to lodgement. In addition, the power of the commission, including the registrar, to dismiss proceedings in certain specified circumstances is confirmed. However, the commission will acquire a specific new power to deal with a matter if it is in the interests of justice to do so.

On improved dispute resolution, the bill contains a number of measures aimed at streamlining and simplifying procedures within the commission. This will be achieved by expanding the expedited assessment process, firstly, by increasing to $7,500, from $5,000, the maximum that can be awarded for medical expenses and, secondly, by enabling past period weekly benefit claims of up to 12 weeks to be dealt with as part of the

expedited assessment process. This latter reform gives the registrar the powers of an arbitrator for such purposes, whilst at the same time such decisions retain existing appeal entitlements as if an arbitrator had exercised the function. The bill also allows for clearer referral pathways in respect of medical and legal issues so as to ensure referral to the appropriate expert by the most expeditious means.

For example, the registrar will refer disputes in respect of the degree of permanent impairment directly to an approved medical specialist and disputes in respect of liability will be directed to an arbitrator. This change will contribute to the speedier resolution of disputes. The opportunity is also being taken in this bill to make it clear that the assessment of permanent impairment is to be made in accordance with WorkCover guidelines as are in force when the assessment is made. This will ensure that when performing an assessment the medical assessor will only be required to consider one set of guidelines—those in force at the time of the assessment.

Further, requirements in respect of attendance by a worker at medical examinations requested by an employer will be contained in WorkCover guidelines rather than in the regulations. These guidelines will require insurers to be reasonable in their requests for examinations. The guidelines will be developed with the stakeholders in the workers compensation scheme—the employers and workers. A number of measures contained in the bill are aimed at streamlining appeal and review procedures in the commission. The current appeal processes have led to unnecessary delays in resolution of disputes. The new measures will provide alternatives to appeals in minor matters, and will lead to the quicker resolution of disputes in a more cost-effective way.

These measures clarify the registrar's existing power to decline to accept a medical appeal where the registrar is not satisfied that a ground of appeal is made out. They also broaden the registrar's power to refer such appeals back to the approved medical specialist for further assessment, as an alternative to appeal. Further, the registrar will be able to reject an appeal from an arbitrator's decision where the appeal does not comply with procedural requirements, for example, if the appeal does not meet the minimum monetary threshold or the appeal application does not attach all of the required supporting documentation. This will be a limited procedural power and will not affect a party's right to appeal or the outcome of such appeals. In addition, the bill provides for the development of regulations identifying interlocutory disputes that can be more efficiently dealt with by means other than an appeal to a presidential member as is currently required.

The regulations setting out these interlocutory matters will be determined in consultation with stakeholders. To lessen the need for formal appeal or review and to expedite resolution of matters the registrar, approved medical specialists and medical appeal panel are each given an additional power to reconsider their decisions provided that such reconsideration takes place within two months of a referral. Such a reconsideration power will allow, for example, an approved medical specialist to reconsider his or her decision, taking into account documentation that was available at the time but was inadvertently overlooked or was not referred on by the registrar. This reconsideration power is consistent with similar powers in other jurisdictions such as the Dust Diseases Tribunal and the Commonwealth Defence Force Remuneration Tribunal.

Throughout the year the New South Wales Government has been consulting with employers and unions on the key question of the definition of "worker" for the purpose of paying workers compensation premiums. There was extensive statewide consultation following the release of WorkCover's discussion paper in January this year. Given the diverse views expressed during the consultation, the Government asked the Hon. Dr James Macken, AM, former judge of the Industrial Commission of New South Wales, to facilitate a panel to consider this issue. The panel included representatives from small business, employer and union groups, and together they considered more than 50 submissions from the public on the definition of a worker.

The report from Justice Macken recommends the Government retain the existing common law definition of "worker" but makes five recommendations to improve the current system: first, provide more certainty on the current base definition of worker, but not in a way that would limit the common law test; second, give WorkCover the ability to issue prospective determinations on "worker" status to employers; third, enhance WorkCover's education and support to assist business, particularly small business, when determining "worker" status; fourth, review premium wage audit and related penalty arrangements; and, fifth, clarify outworker and on-hire deeming provisions. The Government accepts the recommendations and thanks Justice Macken for his report and his constructive recommendations. The Government also thanks the members of the advisory panel for their time and effort in considering this difficult but important question.

The bill provides that WorkCover can make prospective determinations on the status of workers to improve certainty for employers, particularly small business; confirms protection of outworkers if they get assistance to complete work; clarifies the labour hire agency is the employer of labour hire workers, even if they have signed a contract for service, unless they are conducting a genuine business or trade; reduces the wage audit period to three years, from seven years, where no serious non-compliance issues are identified; allows WorkCover to waive late payment fees payable as a result of an audit; and reduces the rate of late payment fees payable for workers compensation premiums, ensuring consistency is maintained with current market penalty rates and penalty rates imposed by the Office of State Revenue. These amendments will significantly improve premium compliance in New South Wales, making it fairer and simpler for employers. In support of these improvements WorkCover will enhance its education and support functions to assist business, particularly small business,

when determining the status of a worker.

Schedule 2 of the bill refines the deemed worker provisions to improve clarity without changing the scope of individuals to be generally covered. The bill includes a provision concerning "contractors under labour hire service arrangements" confirming that a labour hire agency is the employer of labour hire workers, even if they have signed a contract for services, unless they are conducting a genuine business or trade. This will cover the "Odco" type arrangement that has been promoted as a means of reclassifying workers as independent contractors to avoid attracting "worker" status and to evade premiums. The type of contract or arrangement to which this provision will apply is one which can involve the labour hire agency providing services to a contractor such as: services for finding work for the person; services for payment for work performed by the person; and services for insurance coverage in connection with any such work. These are indicative criteria only.

In regard to clothing workers, all members will be aware of the vulnerable situation of many clothing outworkers in our community. To confirm protection of outworkers the bill makes it clear that outworkers continue to be a "worker" for workers compensation purposes even if they get help to complete work. For example, a person working in the clothing industry from home altering garments, who gets family members or friends to complete part of the work under contract and does not earn a profit from this work-sharing arrangement, will continue to be deemed a worker. In regard to private rulings, in an important step forward the bill gives WorkCover the ability to provide prospective determinations, called private rulings, on "worker" status to assist employers, particularly small business, in meeting workers compensation obligations. This is similar to a service provided by the Australian Taxation Office and will be an important new function for the authority, and I am sure will provide enormous help to those businesses who want greater certainty up front about the status of their work force. Private rulings will apply only for premium collection purposes. As workers will not be involved in the ruling process, the rulings will have no impact on "worker" status for claiming workers compensation, and will be inadmissible in proceedings concerning an entitlement to benefits.

I turn to wage audits. The bill also provides some changes to the provisions dealing with late payment fees, to provide greater equity for employers. WorkCover will be provided with the discretion to approve the waiver of some or all of a late payment fee where an employer has understated wages, where the circumstances warrant waiver. Guidelines will be developed regarding appropriate circumstances for the exercise of this discretion in consultation with the WorkCover Advisory Council. The bill also proposes that the rate of late payment fees be set annually in the Insurance Premium Order, to ensure consistency is maintained with current market penalty rates and penalty rates imposed by the Office of State Revenue. Currently the rate is set in the Act at 1.2 per cent compounded monthly. The rate of the Office of State Revenue is approximately 13.68 per cent per annum or 1.074 per cent compounded monthly and is more consistent with market interest rates

In addition, in February the Minister for Commerce announced that the workers compensation wage audit period would reduce from seven years to three years where no serious non-compliance issues are identified. The bill confirms that policy in legislation. Where serious non-compliance issues are identified, WorkCover will still conduct an audit over the seven-year period. To assist in the implementation of this reform package, WorkCover will provide a comprehensive education, information and support program to ensure employers, particularly those engaged in small to medium businesses, are better able to meet their workers compensation obligations. Schedule 3 to the bill provides for a 5 per cent increase in dollar terms in the benefit payable to workers who suffer spinal injuries. This increase will apply to impairment that results from injuries occurring on and from I January 2006.

The bill makes a number of miscellaneous amendments, including a provision to ensure that an injured worker has been properly advised before proceeding with a permanent impairment and pain and suffering settlement. The change will require an insurer to be satisfied that a worker has obtained independent legal advice prior to accepting a lump sum payment from the insurer. This will not affect a worker's legal representative's entitlement to costs. The bill also introduces a new system for recording lump sum compensation settlements. Currently parties may register a permanent impairment and pain and suffering settlement with the commission. Approximately half are not registered and the bill removes the registration provision. Regulations will be developed to ensure access to records and certification by insurers as to details of complying agreements, that is to say, settlements. WorkCover will audit insurer compliance with this provision.

An amendment is also made to the commutation provisions to require legal practitioners assisting workers to certify they have advised the worker of the desirability of obtaining independent financial advice. This is similar to provisions in civil liability legislation. The legislation currently includes several cost sanction provisions in relation to unsuccessful and unmeritorious disputes and appeals. It is proposed to clarify and confirm their intended operation. The new provisions will require legal practitioners to certify reasonable prospects of success as a prerequisite to lodging applications, replies and appeals in similar terms to section 345 of the Legal Profession Act 2004. To ensure scheme funds are not used for unmeritorious disputes, where the commission is satisfied that any party's costs in a claim have been unreasonably incurred, the commission will be required to order that those costs are not to be paid by any other party to the claim, or the insurer. Similarly, if an appeal to a presidential member is unsuccessful, the commission will be required to order that the costs of the appeal are not to be paid by any other party to the appeal.

Finally, schedule 3 to the bill contains an amendment of a consequential nature enabling WorkCover to access documents of the registries of the commission or the District Court rather than the Compensation Court. In conclusion, the bill continues the program of reform and improvement to the workers compensation scheme operating in this State, in the interests of workers, employers and the broader community. I commend the bill to the House.