WORKERS HEALTH CENTRE
People I Recovery I Work

Parramatta
Tel: (02) 9749 7666
Fax: (02) 9897 2488
Email: admin@workershealth.com.au

Newcastle
Tel: (02) 4926 2129
Fax: (02) 4929 1960
Email: newcadmin@workershealth.com.au

Website: **www.workershealth.com.au**

7 October 2022

Standing Committee on Law and Justice
2022 Review of the Workers Compensation Scheme

Post-hearing responses
Answers to supplementary questions

1. ***Where do you believe the failure of employers to provide suitable duties as outlined on page 14 of Hansard originate from?***
a. Is it driven by the legislation or are other factors at play?
b. If so, what are they?

In my evidence to the committee, I stated as follows:

"The impediments to that all too often are a failure to provide suitable duties and in the large employers, in the public sector in particular, a failure to allow someone to transfer to another area where the exposure to that psychological danger, and particularly, but not necessarily or exclusively, aspects relating to workplace conflict—bullying and harassment et cetera. There seems to be a reluctance in many respects to provide suitable duties and to allow people to shift to another environment where they can thrive in a safe way"

I was referring specifically to firstly the early stages of injury management and rehabilitation when recovering from a workplace injury at work (either physical or psychological) if it is determined by the medical evidence that it is safe to so. The evidence suggests that in these circumstances the likelihood of a successful return to work to preinjury duties is maximised. Secondly, I was referring to situations where a durable return to permanently modified duties is possible. In both situations the legislation and cultural issues in some workplaces combine to result in assistance to injured workers being suboptimal and a reduction in return to work outcomes.

Whilst the legislation imposes an obligation on employers to provide suitable duties to injured workers the penalties do not provide sufficient disincentive against failures to comply. In addition, the legislation provides a defence which is relatively easy to assert (see below). The result is that the legislation is often not enforced, and a culture has developed where some employers pay lip service to their obligations to assist injured workers to recover at work and will often use the system to exit injured workers from employment at the first available opportunity - usually six months from the date of injury provided under the statute. This is often the case in respect to psychological injuries and at times is used as a de facto dismissal process instead of engaging in proper disciplinary practices.

Our experience is that many employers in the public sector will not often provide assistance to injured workers via the provision of permanent alternate duties who have approved claims as a consequence of being subject to bullying and harassment or other workplace conflict. This includes not permitting them to transfer to other locations despite this being the only 'modification' to their duties required. Too often we see agencies prefer their HR transfer policies to their obligations under the legislation. This results in an exacerbation of the injured workers' illness, longer time off work and in many cases medical exit. This is doubtless contributing to the increase in the number and cost of psychological injury claims in the TMF and the general scheme.

I cite the following extract from a recent article published by Bartier Perry Lawyers
No employer obligation to provide 'suitable duties' to an injured employee indefinitely | Bartier Perry Lawyers
"Section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (**1998 Act**) obliges an employer to provide suitable employment to an injured worker following workplace injury. Failure to comply can incur a penalty of up to $5,500.

This obligation is not absolute. It only applies where:

- there is a work-related injury
- the employee recovers a capacity to resume work, full-time or part-time and whether or not to the pre-injury role, following a period of incapacity resulting from the injury
- the employee requests provision of suitable employment.

The obligation to provide suitable employment does *not* apply if it is not reasonably practicable to do so in accordance with section 49. That means the circumstances of the worker and injury must be considered. Relevant issues also include any operational requirements and administrative burden to the employer."

2. In terms of the work capacity assessment process where vocational options are being used for work capacity decisions, referred to on page 15 of Hansard, please outline how you believe the workers compensation system should be working?

I have asked Workers Health Centre Matthew Buxton to provide a response in respect to this question given his experiences and knowledge.

3. Other than changing the Act to ensure that workers know that they can choose their own injury management provider, how else should the legislation be changed to ensure that workers return and are fully integrated back into the workplace?

Pursuant to my answer to question one above I submit that the Act be amended to increase the penalties against employers who do not provide suitable duties to permit injured workers to recover at work and give them the best possible chance to rehabilitate and return to preinjury duties. The Act should also be amended to impose positive obligations for employers to permanently modify duties to accommodate workers who have reached maximum medical capacity.

One model worth exploring is the Canadian law which prohibits discrimination based on any of the 11 grounds identified in human rights legislation. Employers have a duty to accommodate employees to avoid such discrimination which includes disability and injury. This "duty to accommodate is a legal obligation, which has been confirmed and clarified by the courts, including the Supreme Court of Canada. The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship."

See Pocket Guide on the Duty to Accommodate | The Professional Institute of the Public Service of Canada (pipsc.ca)

4. What do you think is causing the lack of early intervention for psychological claims that you refer to on page 19 of Hansard?

In many respects the lack of early intervention in respect to psychological injuries is no different from the problems experienced in the scheme more generally in terms of timeliness for all injury treatment and provision of rehabilitation services. This includes caseloads for claims managers as well as their education and experience. The positive role that can be played by rehabilitation providers, especially if they are involved at an early stage, seem not to be understood by many of the claims agents and there has developed, over time, a reluctance to approve our services until much later in the process.

In respect to psychological claims, I reiterate the view that early involvement of rehabilitation providers will result in better outcomes. This is especially the case in bullying and harassment situations where mediation

Yours faithfully

Peter Remfrey
Chief Executive Officer