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1 June 2012

Vanessa Viaggio
Principal Council Officer
Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie St
Sydney NSW 2000

By Email: workerscompinquiry@parliament.nsw.gov.au

Dear Ms Viaggio

Public Hearings: Joint Select Committee on the NSW Workers Compensation Scheme

I refer to your letter dated 29 May 2012.

Please find **attached** a scanned copy of the transcript inclusive of corrections.

Please find outlined below at Attachment A HIA's responses to questions taken on notice.

If the Committee requires any further assistance or information please contact
or at

Yours sincerely

HOUSING INDUSTRY ASSOCIATION

ATTACHMENT A: QUESTIONS TAKEN ON NOTICE

Question from Mark Speakman MP

What is your response to each of the seven recommendations by the NSW Nurses Association commencing on page 48 of its submissions?

Please note, the recommendations of the NSW Nurses Association are highlighted in RED

1. *We recommend that there be a financial incentive for employers to provide suitable work to injured workers. This could come in the form of a reduced premium.*

   HIA would agree that financial incentives may assist employers to provide suitable work for injured workers.

   HIA would however strongly oppose any correlation between premium levels and the ability of a business to provide suitable work.

   As outlined in the submissions, if a business has a strong OH&S history with limited WorkCover claims, its premium should be discounted. If a business has a poor claims history, its premium should reflect this historical level of risk.

2. *We recommend that severe penalties be imposed on employers and individuals who refuse to provide work to injured workers where such work is available. A financial disincentive could also be imposed by way of an increased premium.*

   HIA would recommend a conservative approach is taken when considering the imposition of penalties, in particular where subjective judgments may be made about suitability of work. In addition the unique circumstances of the residential construction industry must be taken into consideration.

   Whilst alternative duties work might be readily "available" to injured nursing professionals working for a large hospital, small businesses builders and contractors operate in a much different environment.

   Feedback from members in the industry is that an employer rarely outright refuses to provide work to an injured worker where such work is available, it is more often the case that there is simply no suitable work for that employee. The situation is generally that as an employee you are either on the tools or you are not, there is not really a range of 'light' or 'moderated' duties in the construction industry.

   In relation to premiums, HIA would refer to the comments above at outlined in response to recommendation 1.

3. *We recommend that insurers be given the capacity, and then be obliged, to rigorously examine whether their clients are able to provide suitable work to an injured worker prior to termination or suitable work being withdrawn and prior to requiring that worker to seek work elsewhere.*

   Please refer to comments made in response to recommendation 5 below.

4. *We recommend that in any legal proceedings dealing with the question of whether suitable work is available, the onus be on the employer to establish that no suitable work exists.*

Section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* outlines when an employer must provide suitable work:

> ***49 Employer must provide suitable work***
>
> *(1) If a worker who has been totally or partially incapacitated for work as a result of an injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the employer liable to pay compensation to the worker under this Act in respect of the injury must at the request of the worker provide suitable employment for the worker.*
>
> *(2) The employment that the employer must provide is employment that is both suitable employment (as defined in section 43A of the 1987 Act) and (subject to that qualification) so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was at the time of the injury.*
>
> *(3) This section does not apply if:*
>
> *a.* ***it is not reasonably practicable to provide employment in accordance with this section****, or*
> *b. the worker voluntarily left the employment of that employer after the injury happened (whether before or after the commencement of the incapacity for work), or*
> *c. the employer terminated the worker's employment after the injury happened, other than for the reason that the worker was not fit for employment as a result of the injury.*

HIA would submit that under s49(3)(a) (outlined above in **bold**) the onus is already on the employer to establish that no suitable work exists and as a result this recommendation should be disregarded.

To the extent they contend that in prosecutions for breach there is a reverse onus of proof on employers, HIA oppose the Nurses Association's submission.

5. *We recommend the implementation of some form of independent review which must be undertaken prior to an employer being able to withdraw suitable work or terminate injured workers and thereby cost shift to the workers compensation scheme. This review could be conducted by the Workers Compensation Commission and should involve input from the employer, insurer and the injured worker. The aim of the review should be to assess the capacity of the employer to provide work to the injured worker. Employers should then be obliged to offer any duties which are found to exist through this review. Indeed, if the Committee is to recommend Work Capacity Testing as foreshadowed on page 25 of the Issues Paper, such an assessment could be undertaken in tandem with that process. Whilst the Association is opposed to the Work Capacity Testing of workers as proposed by the Issues Paper, we believe that there is clear justification for the work capacity testing of employers. This would require only minimal legislative amendment as the Workers Compensation Commission already has the power to recommend the provision of suitable work. We propose the strengthening of this power to ensure such recommendations are a prerequisite and are binding.*

As has been outlined in both verbal and written submissions HIA broadly supports proposals that will stabilise and ultimately result in a decrease in premiums.

If it can be established that the capacity testing of employers would result in cost savings for the scheme and ultimately a reduction in premiums, HIA would broadly support the proposal by the Nurses Association.

However in order to provide a fully informed position, a broader investigation would need to be conducting considering for example the capacity of insures to carry out such testing, the imposition in relation to time, cost and resources on a business of such capacity testing and existing inbuilt protections in both the Workers Compensation and Industrial Relations systems to protect injured workers from termination.

We remain concerned that many of the contentions of the Nurses Association do not take into account the circumstances, resources and difficulties face by small business employers.

6. *We recommend that it be an offence for an employer to require a prospective employee to declare whether they had previously suffered a workers compensation injury unless that injury would prevent him or her from performing the inherent requirements of the role. An offence of this kind could be inserted into anti-discrimination legislation.*

   HIA submits that the existing disability discrimination regime adequately deals with this issue.

   HIA further adds that the Committee needs to consider the unique nature of the construction industry and that being able to adequately ascertain the physical state of an individual may be crucial to ensuring the job is performed safely.

7. *We recommend that it be an offence for an employer to inform another prospective employer that a former employee has suffered a workers compensation injury. An offence of this kind could be inserted into antidiscrimination legislation.*

   HIA would refer to the comments made in response to recommendation 6 above.

Question from the Hon Trevor Khan

Is it not the case now, with this current concept of provisional liability, that the worker does not even have to fill in a claim form?

In the limited time since the hearing, HIA has not had the opportunity to speak to members to get specific feedback about this responsibility but notes that the WorkCover website indicates that a claim for will need to be submitted if:

- *the Scheme Agent or insurer has a reasonable excuse to not commence provisional liability payments and has notified the worker*
- *weekly payments exceed the 12 week provisional liability period or medical expenses exceed $7500 and there is insufficient information to determine ongoing liability*
- *the injury has been notified but there is insufficient information to determine liability.*

On this basis, HIA agrees that a claim form generally does not have to be filled out by a worker.

I suggest that whilst it has reduced the paperwork, one thing it has done is remove any of the basic details of reporting the claim that previously fell upon the employee with regards to what they say happened that led to the claim? Do know that?

Again in the limited time since the hearing, HIA has not had the opportunity to speak to members to get specific feedback, but as we submitted on the issue of provisional liability the impression we are getting from members is that claims are automatically accepted without the necessary reviews.