

LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

FIRST REVIEW OF THE EXERCISE OF THE FUNCTIONS OF
THE WORKCOVER AUTHORITY

SUPPLEMENTARY QUESTIONS ON NOTICE ARISING FROM PUBLIC HEARING
12 MAY 2014

The WorkCover Independent Review Officer canvassed a hypothetical situation whereby an injured worker and the scheme agent are unable to negotiate an agreed position to resolve a dispute over a whole person assessment, which can lead to a costly, time consuming process to resolve the issue.

Have concerns been expressed to WorkCover regarding such situations?

WorkCover is aware of the WIRO's concerns regarding the level of disputes around whole person impairment (referred to as permanent impairment in the workers compensation legislation). Recent WIRO data indicates approximately 66 per cent of all applications for legal assistance relate to whole person impairment claims. WorkCover's data is not specific as to the number of concerns raised regarding such whole person impairment dispute situations.

Has any consideration been given to allowing workers and scheme agents to directly negotiate an outcome?

The *Workplace Injury Management and Workers Compensation Act 1998* requires that for injuries received on or after 1 January 2002, an assessment of permanent impairment must be made in accordance with the WorkCover Guides for the Evaluation of Permanent Impairment. The Guides require that any payment for permanent impairment must be made in accordance with the level of permanent impairment assessed by a trained assessor of permanent impairment.

Most personal injury schemes around Australia have adopted a similar approach to assessing permanent impairment/permanent loss.

Where the worker's or insurer's assessment of permanent impairment differs from the other, it is open to either party to accept either assessment if it can be justified on the basis of the medical information available.

However, it is WorkCover's policy that the parties cannot negotiate and agree on a 'split difference' permanent impairment level and associated lump sum somewhere in between the assessed levels, because that notional level of assessment has not been made by a trained assessor in accordance with the Guides (for injuries from 1 January 2002).

To do otherwise would undermine the purpose of the Guides of ensuring an objective, fair and consistent methodology of permanent impairment assessment, and could potentially result in arbitrary outcomes for workers and insurers.

Where the parties are unable to reach an agreement, the matter is to be determined by an Approved Medical Specialist in the Workers Compensation Commission. Approved Medical Specialists are highly experienced and provide an independent and unbiased assessment of injuries.

Another pertinent factor in this consideration is that permanent impairment assessment has assumed a far greater significance post the 2012 amendments. A permanent impairment assessment can have several purposes which include:

- accessing any lump sum compensation (the greater than 10 per cent threshold);
- determining the amount of lump sum compensation payable;
- reaching the threshold for work injury damages and commutation (the 15 per cent threshold);
- remaining in receipt of weekly benefits post 260 weeks (the greater than 20 per cent threshold); and
- determining eligibility for seriously injured worker threshold (the greater than 30 per cent threshold).

In addition, most workers are now limited to only one assessment of degree of permanent impairment, making an accurate evaluation of their impairment even more critical. Consequently, there are currently no proposals to alter the approach to assessing permanent impairment/permanent loss in the New South Wales workers compensation system.

2. The assessment of whole person impairment (WPI) for injured workers has been discussed throughout the inquiry.

What are the current thresholds for WPI assessments, and are there any plans to review those thresholds?

A workers assessment of whole person impairment (WPI), referred to as permanent impairment in the workers compensation legislation, will determine entitlements to lump sum compensation and ongoing entitlements to weekly benefits and medical and related costs under the New South Wales Workers Compensation Scheme. To be eligible for lump sum compensation for permanent impairment the thresholds are:

- Greater than 10 per cent whole person impairment arising from physical injuries.
- 15 per cent or greater whole person impairment arising from primary psychiatric and psychological injuries.

Cessation of weekly benefits occurs at 260 weeks unless a workers assessment of whole person impairment is greater than 20 per cent WPI. These workers are still subject to additional requirements for payment of entitlements.

A worker is considered a seriously injured worker when their assessment of whole person impairment is greater than 30 per cent WPI. A seriously injured worker is entitled to ongoing weekly benefits and medical and related treatment expenses. The threshold for applying for commutation or work injury damages is 15 per cent permanent impairment.

Changes to the permanent impairment thresholds are a policy matter for the Government.

3. Some inquiry participants have expressed concern over work capacity assessments and the role that insurers play in determining an injured workers ability to return to work.

How are work capacity assessments undertaken?

Work capacity assessments are designed to review the worker's medical, functional and vocational status and are used to inform decisions by the insurer about the worker's ability to return to suitable employment and subsequently, a worker's entitlement weekly payments of compensation.

A work capacity assessment is the insurer's assessment of a worker's capacity to work, based on all of the relevant information made available to and accumulated by the insurer during the ongoing management of the claim. Relevant information may include reports from treating doctors and allied health professionals, certificates of capacity, independent medical reports,

worker's self-reports, workplace rehabilitation provider reports and information from the employer.

Injured workers receiving weekly benefits are required to undertake work capacity assessments throughout the life of their claim, and at least once every two years. However, assessments can occur at any point in the life of a claim to assist with getting the injured worker back to work.

Workers who have a degree of impairment of greater than 30 per cent, known as seriously injured workers, will not be required to have a work capacity assessment. However, they may request to undergo a capacity assessment should they wish to explore return to work options.

What action can injured workers take if they disagree with their work capacity assessments?

If an injured worker disagrees with the findings of the work capacity assessment there are a number of avenues for review. Under section 44 of the *Workers Compensation Act 1987*, the review process available to a worker who is dissatisfied with a work capacity decision comprises three tiers.

If the work capacity assessment results in a work capacity decision, the worker can request an internal review of the work capacity decision by the insurer. If the worker is not satisfied with the outcome of the review, they can then request a merit review of the decision by WorkCover's Merit Review Service. If the worker disagrees with the Merit Review Service decision, they can then apply to the WorkCover Independent Review Office (WIRO) for a procedural review.

4. Please update the committee on the status, details and potential implications of *Goudappel v ADCO Constructions Pty Ltd*.

The 2012 workers compensation reforms introduced a threshold of greater than 10 per cent whole person impairment, which must be reached to access a permanent impairment lump sum payment. In addition, the reforms put forward that an injured worker could only be assessed for permanent impairment once.

In *ADCO Constructions Pty Ltd v Goudappel [2013] NSWCA 94*, the Court of Appeal found the permanent impairment lump sum entitlement reforms do not apply to pre-19 June 2012 workers compensation claims.

The Nominal Insurer appealed the decision to the High Court. The High Court recently ruled a transitional regulation which dealt with the application of the amendments to claims for lump sum compensation from 19 June 2012, where the worker had previously made a workers compensation claim, was valid.

WorkCover is aware that the WorkCover Independent Review Office has stated that it will continue to fund claims made by workers for one further claim for lump sum compensation, where claims for lump sum compensation were made prior to 19 June 2012.

WorkCover is currently considering the High Court's decision.

The Nominal Insurer will not seek to recover lump sums that have already been paid to injured workers.