Submission No 3

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

Organisation: New South Wales Nurses' Association

Date received: 19/12/2013

Submission of the New South Wales Nurses and Midwives' Association

to the

New South Wales Legislative Council's Standing Committee on Law and Justice

re the

Reviews of the Workcover Authority of NSW and Workers' Compensation (Dust Diseases) Board

January 2014

New South Wales Nurses and Midwives' Association
50 O'Dea Ave
Waterloo NSW 2017

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Introduction

The New South Wales Nurses and Midwives' Association (the Association) is a union which represents nurses, midwives and nursing assistants in both the public and private sectors across New South Wales. Currently we have approximately 59,000 members. The Association represents both the industrial and professional interests of its members. We often provide advice and representation to members who have suffered an injury in the course of their employment.

We thank the Committee for this opportunity to make a submission to the *Reviews of the Workcover Authority of NSW and Workers' Compensation (Dust Diseases) Board*. This submission will focus upon the role of the Workcover Authority under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) in facilitating the return to work of injured workers.

The Association's Submission to the *Joint Select Committee on the NSW Workers Compensation Scheme*

In May 2012, the Association made a submission to the *Joint Select Committee on the NSW Workers Compensation Scheme*. In that submission we argued that the main problems with the workers compensation scheme at that time were the fault of employers, not workers. In particular, we submitted that the Association had encountered a persistent reluctance from both NSW Health and private sector employers to provide injured workers with suitable work. Such attitudes result in injured workers being either dismissed, pressured to risk re-injury by returning to work too early or pressured to seek work elsewhere. This then forces workers to rely upon weekly workers compensation payments whilst they search for work elsewhere, hence adding to the liability of the scheme generally.

Attached at **Annexure A** is the Association's submission to the Joint Select Committee. We direct the Committee's attention to the section headed *"The Failure of Employers to Facilitate a Return to Work"* on pages 10 to 50. This section contains 10 de-identified case studies. The Association also made a separate confidential submission with the actual identities of those involved. The Association went on to make the following recommendations;

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.*

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.*

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.*

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.*

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.*

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.*

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 anti-discrimination legislation."*

The Government subsequently enacted the *Workers Compensation Legislation Amendment Act 2012 No 53* (the 2012 Amending Act). Whilst the Association was generally opposed to this legislation because it dramatically reduced the entitlements of injured workers, we welcomed the introduction of the following reforms (the 2012 Return to Work Provisions) regarding return to work obligations;

- The 2012 Amending Act made section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (which obliges employers to provide suitable work in certain circumstances) a civil penalty provision.
- The 2012 Amending Act provided WorkCover Authority inspectors with the power to issue improvement notices to employers for failing to provide suitable work to injured workers.

Unfortunately, we do not believe that these reforms have sufficiently addressed the reluctance of many employers to provide suitable work to injured employees.

Return to Work Problems Continue

Since the 2012 Amending Act, the Association has not observed any significant change in the way in which many employers deal with injured employees. Instead, we have continued to see many employers fail and/or refuse to provide injured employees with work. We have also observed many employers continue to attempt to remove injured employees from their operations by either terminating them or changing their return to work goal to *"seek work elsewhere"* (or words to that effect). In our experience, conduct of this kind by employers has continued without abeyance since the introduction of the 2012 Return to Work Provisions.

If anything, we have noticed that the desperation of injured employees in these situations has become more acute in light of the looming prospect of losing their weekly payments of compensation due to the remainder of the 2012 Amending Act.

This is not to say that the 2012 Return to Work Provisions are not positive. In dealing with disputes regarding injured workers, the Association generally attempts to resolve such matters directly with the employer at first instance. If necessary, the relevant dispute resolution clause in the applicable industrial instrument will then be invoked and followed. Since the 2012 Amending Act, the Association has not yet had occasion to formally refer an employer to the Workcover Authority for a civil penalty or improvement notices. Accordingly, we cannot comment upon the efficacy or otherwise of action taken by the Workcover Authority. However, the Association has put a number of employers on notice of its intention to invoke the 2012 Return to Work Provisions. In this regard, the new provisions have undoubtedly helped to resolve many such disputes.

Despite this, we believe that the 2012 Return to Work Provisions are not doing enough to change the behaviour of many employers. For every employee who is willing to have the Association (or the Workcover Authority) advocate on their behalf and possibly notify the employer of a dispute, there are many who are unwilling to do so or simply unaware of their rights. In those circumstances, an employer is able to ignore their obligations to provide suitable work, force injured workers to rely

upon weekly compensation (where it is payable) and thereby increase the liability of the workers compensation scheme generally.

Recommendations

The Association believes that in order to negate the financial, market driven incentives for employers to not provide suitable work to injured workers, more vigorous reform of the following kind is needed.

1. We recommend that the Committee reconsider the Association's recommendations to the *Joint Select Committee on the NSW Workers Compensation Scheme*. In particular;

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

    - We recommend that the civil penalty for breaching section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) be increased.

    - We recommend that the workers compensation premiums of employers who fail to provide suitable work to injured workers be dramatically increased.

    - 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.

    - 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.

    - 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.

- 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.

- 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 anti-discrimination legislation.

2. We recommend that the Government implement programs designed to educate employers regarding their obligation to provide suitable work to injured employees. This should include reference to the civil penalties which may apply and the ability of the Workcover Authority to impose improvement notices.

3. We recommend the removal of the requirement in section 49, *Workplace Injury Management and Workers Compensation Act 1998* (NSW) for workers to request suitable work from their employer before the employer has an obligation to provide that work. Requiring a request of this kind is illogical and inconsistent with the strong return to work focus within the legislation.

4. We recommend that recalcitrant employers be required to reimburse insurers for weekly payments of compensation which would not have been paid had the employer complied with its return to work obligations.

Brett Holmes
General Secretary