Submission No 211

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Date received: 17/05/2012

A SUBMISSION TO THE NSW WORKERS COMPENSATION SCHEME COMMITTEE

I have had the opportunity of reading the Issues Paper published by the Workcover Authority and also the Actuarial Valuation Report as at 31 December 2011 and External Peer Review as at 31 December 2011. I am concerned that a number of "Options for Change" will, if implemented by this Government, result in some substantial reductions to the rights and entitlements of injured workers.

For ease of reference I have adopted the same numbering that is used in the Issues Paper in that section entitled "Options for Change".

2. Removal of coverage for journey claims

In the document entitled "Comparison With Other Australian Jurisdictions" which accompanies the Issues Paper, it is noted that most other jurisdictions have abolished journey claims. The implication is that if journey claims have been abolished elsewhere then there is no reason why they should remain in NSW.

But the fact that journey claims have been abolished elsewhere in Australia does not make it acceptable in NSW. If a person provides his or her labour so that another person or business has the potential to make a profit, then that worker should be adequately covered for workers compensation not only during the time he is in the workplace but also in getting to and from the workplace. There are already proper exemptions in place for serious and wilful misconduct on a journey (such as consumption of alcohol or excessive speeding) or for interruptions in the journey.

8. Cap weekly payment duration

The argument advanced in the Issues Paper is that ceasing the payment of weekly benefits within a certain timeframe would assist an injured worker in getting back into the workforce.

I would submit that it is very likely that such a change would have the opposite effect. The current provisions for weekly payments of compensation for partial incapacity are governed by s.40 of the Workers Compensation Act (previously s.11(1) in the 1926 Act). It provides that if an injured worker returns to work and is losing income (such as not being able to overtime or not being able to undertake pre-injury hours of work) then that worker receives what is commonly referred to as "make up pay" under s.40. This in fact acts as an incentive or reward for an injured worker to get back to work. If a cap is placed on weekly payments of compensation then that incentive will no longer exist. Further, such a proposal contradicts clause 6 of the "Options for Change" which seems to support increasing benefits as workers increase their hours of work.

What is also not stated in the Paper but which will undoubtedly occur is that injured workers who do not return to work within a fixed timeframe will be forced onto social security benefits, thereby transferring the liability of the injured worker to the Federal Government.

9. Remove "pain and suffering" as a separate category of compensation

The statement made in the Issues Paper that "while common law provisions were restored and modified in 1989, the lump sum payment for pain and suffering was not removed" omits to mention that there were further changes to common law entitlements for injured workers in 2002 that abolished pain and suffering or general damages or non-economic loss entirely.

There should remain a "subjective measure" of a worker's impairment (which the pain and suffering entitlement under s.67 of the 1987 Act provides) because the effects of an injury are peculiar to each individual. No two injuries can or should be regarded as the same. This is particularly so as there is now no provision in work injury damages claims for an entitlement to pain and suffering or general damages no matter how severe the injuries suffered by a worker.

10. Only one claim can be made for whole person impairment

Recent reviews undertaken by both PricewaterhouseCoopers and Ernst & Young identify what are commonly termed "top-up claims" as one of the major causes for a blow-out in costs under the Workcover scheme. There are suggestions of deliberate exaggeration and "doctor-shopping" in order to maximise a worker's prospects of obtaining a further lump sum for impairment and pain and suffering. It has been suggested that an injured worker will only have "one bite of the cherry" in regard to a claim for permanent impairment.

If such an amendment to the legislation were to be considered I would submit that there should be an exception if there is an increase of at least another 10% of whole person impairment (for injuries sustained post- 1 January 2002) and another 10% permanent loss of a limb or part of the body (for injuries sustained pre-1 January 2002).

It strikes me as being inherently unfair that if a worker initially accepts a lump sum payment for an injury to the back which does not involve an operation (which usually attracts a whole person impairment of between 7% and 12%) but at some later date (perhaps many years later) the aching and pain in the back becomes so unbearable that the worker chooses to undergo a fusion or disc replacement (which usually attracts a whole person impairment of between 22% and 25%) that worker is not able to recover a further lump sum for that significant increase in permanent impairment.

12. Strengthen work injury damages

The suggestion in this option is that common law claims arising from the workplace should be covered by the same legal principles as the Civil Liability Act. This represents a fundamental departure from the common law as it currently relates to negligence claims made by employees against their employer. The common law has recognised for decades that there is a higher duty of care owed by an employer to an employee than there are in other legal relationships, such as an occupier of premises or head contractor on a work site. Whilst an occupier or head contractor has a duty of care to ensure the safety of others, an employer has a duty to take all reasonable steps to

ensure that an employee is working in a safe environment and free from risk of injury. An employer has a higher duty of care and an added obligation to ensure safety in the workplace. If this option were implemented it would in effect lessen the obligations of employers to ensure a safe workplace.

Conclusion

The reports and reviews of the Workcover system in recent years indicate that there has been no increase in workplace injuries, actual claims or legal costs. The blow-out in the financial viability of the scheme is primarily due to administrative costs and claims management. The Issues Paper does not seriously consider problems arising from poor management of claims. If these "Options for Change" are implemented by the Government, the injured worker who will suffer a reduction in benefits but no effort will have been made to reduce the red tape that is a substantial financial strain on the workers compensation system in this State.

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15 May 2012