**Submission No 250**

# INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

**Name**: Mr Adrian Kimber

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Liability limited by a scheme approved under Professional Standards Legislation.

16 May, 2012

Joint Select Committee
NSW Workers Compensation Scheme
Parliament House
Macquarie Street
SYDNEY NSW 2000

Honourable Members of the Committee,

**RE: NSW WORKERS SCHEME ENQUIRY**

I have had the privilege to be privy to some of the other submissions that have been made. There are five (5) issues that I submit to you that require amendment if the scheme is to be viable and reduce costs of administration.

These are:-

1 Forum Shopping within the Forum of the Workers Compensation Commission of NSW (WCC); and

2 The present law on dealing with alleged increases in the level of WPI in the WCC without the need to demonstrate a deterioration in the claimant's condition; and

3 The subjectivity of the PIRS system in the assessment of the Whole Person Impairment (WPI) of persons claiming to have a psychological or psychiatric injury; and

4 The expertise expected of case managers / claims officers of insurers; and

5 Chapter 3 Workplace Injury Management & Workers Compensation Act requires a limitation.

## 1 FORUM SHOPPING WITHIN THE WCC

Presently it is possible for a claimant to file an Application to Resolve a Dispute (ARD) for the resolution of a dispute as to the quantum of WPI, be assessed by an Approved Medical Specialist (AMS) appointed by the WCC. If the AMS assesses a level of WPI less than that which the claimant considers what they consider the level is what they want, they merely discontinue the proceedings and commence again, by filing a new ARD and in many cases will be referred to a different AMS by the WCC who will invariably come to a different assessment. This can happen as many as 5 or 6 times until the level

1 **FORUM SHOPPING WITHIN THE WCC (cont)**

of WPI desired by the claimant is assessed and recorded in the Medical Assessment Certificate (MAC).

This creates a situation whereby the WorkCover Agent, Specialised Insurer or Self-Insurer (insurers) is put to a large expense of dealing with each of these ARDs, with no recourse to having the matter dealt with as it should have been or recouping any of the cost.

It is apparent that much of this usually revolves around the issue of the monetary level of benefit and whether there is an additional entitlement to benefit pursuant to section 67 of Division IV Part 3 of the Workers Compensation Act (WCA) or whether the level reaches the threshold to entitle a claim for Work Injury Damages.

It should be that a MAC is conclusive and binding unless there is a demonstrable error on the face of the MAC, and that the MAC creates a determination of the dispute. This will save the scheme many thousands of dollars in that

a) The additional costs to the insurers in defending such multiplicity of proceedings is avoided; and
b) Reduce the need of staff in the WCC to take and file each of the repeat ARDs,thus reducing costs to the Scheme; and
c) Reduce the number of arbitrators to deal with each of the repeat ARDs, again thus reducing costs to the Scheme; and
d) The need to have to pay each of the AMS's for each repeat assessment.

No other tribunal allows such forum shopping.

2 **THE PRESENT LAW ON DEALING WITH ALLEGED INCREASES IN THE LEVEL OF WPI IN THE WCC WITHOUT THE NEED TO DEMONSTRATE A DETERIORATION IN THE CLAIMANT'S CONDITION (Abou-Haidar –v- Consolidated Wire Pty. Ltd [2010] NSWWCCPD 128 – DP. Bill Roche)**

This decision means that a claimant can file an ARD for an assessment of WPI on the same medical evidence as used in prior proceedings where the WPI has been determined. This has brought about a spate of new disputes in which claimants are being awarded increased amounts of benefits pursuant to section 66 of Division IV Part 3 of the WCA and also then being able to claim benefit pursuant to section 67 of that Division for pain & suffering.
It should be that there must be a demonstrable deterioration on clinical evidence before a claim can be made for additional WPI.

Again savings can be achieved as in 1 above.

## 3 THE SUBJECTIVITY OF THE PIRS SYSTEM IN THE ASSESSMENT OF THE WHOLE PERSON IMPAIRMENT (WPI) OF PERSONS CLAIMING TO HAVE A PSYCHOLOGICAL OR PSYCHIATRIC INJURY – (Pages 60 – 68 Workcover Guides for the Evaluation of Permanent Impairment (3rd Edition)

The evaluation of permanent impairment for psychological or psychiatric injury is based purely on the answers provided by the claimant. An AMS is only permitted to ask the claimant the questions relating to:-

a) Self care & personal hygiene;
b) Social & recreational activities;
c) Travel;
d) Social functioning;
e) Concentration, persistence & pace
f) Employability.

In respect to

a) The claimant having had at least 2 weeks notice of the examination, ceases to wash, shave, change clothes etc and answers that they don't care about their care;
b) The claimant alleges that they used to play football or netball and go fishing etc. but no longer engages in such activities as they no longer get any satisfaction from these activities;
c) The claimant declares to the AMS that they cannot travel by public transport and has had accidents when driving their car due to lack of concentration and ruminating about their problems;
d) The claimant says that he/she does not contact friends or family avoids crowds, no longer goes to church or club etc.;
e) The claimant conducts themselves in a fashion of not being able to hear or understand questions or what is going on; rambles about various topics with no discernable nexus of subject;
f) Because of the presentation and inability to travel and the lack of concentration, the employability is rated as zero.

Surveillance video should be viewable by the AMS if there is such in existence that proves that the claimant is presenting in a manner other than they are actually functioning. Presently such evidence is not permitted to be seen by an AMS.

## 4 THE EXPERTISE EXPECTED OF CASE MANAGERS / CLAIMS OFFICERS OF INSURERS

Case managers are expected to be expert in medicine, specialist medical treatment of all disciplines, rehabilitation experts and lawyers.

This expectation is not possible and leads to inefficiencies which will permit exploitation of the system by those inclined to do so.

More training is required and more allowed in the way of fees payable to specialists, that is doctors and lawyer and rehabilitation providers.

## 5 CHAPTER 3 WIM ACT OBLIGATIONS TO CONTINUE TO APPLY UP TO 94 DAYS AFTER THE DATE ON A NOTICE ISSUED PURSUANT TO SECTION 74 WIM ACT

Presently the obligation to conform to Chapter 3 WIM Act is unlimited. This is an unsustainable situation creating an opportunity for lawyers to make a very quick fee for no effort at all. All they need to show is that there is no Injury Management Plan or that it does not exactly fit to the claimant's alleged capacity and the lawyer obtains a fee of $1,100.00.

By allowing 94 days (two days for delivery and 3 months to file an ARD to have the dispute determined in the WCC, is a fair and reasonable time, given that the dispute notice must contain advice to contact WorkCover NSW, or a Union or a Lawyer.

More savings in costs and administration of WCC.

I sincerely trust that the foregoing is of assistance to the Committee.

Yours sincerely,

Adrian N. Kimber
Solicitor

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