

**INQUIRY INTO REVIEW OF THE EXERCISE OF THE  
FUNCTIONS OF THE WORKCOVER AUTHORITY**

**Organisation:** New South Wales Nurses' Association

**Date received:** 18/03/2014

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**Supplementary 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**

**March 2014**

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## Introduction

In January 2014 the New South Wales Nurses and Midwives' Association (the Association) made a submission to the New South Wales Legislative Council's Standing Committee on Law and Justice regarding the *Reviews of the Workcover Authority of NSW and Workers' Compensation (Dust Diseases) Board*. This is a supplementary submission designed to build upon our earlier submission and hopefully assist the Committee further.

## Workers Compensation Enquiries

The Association has approximately 59,790 members. We represent both the industrial and professional interests of our members and often provide advice and representation to members who have suffered an injury in the course of their employment.

Generally, the Association receives between 700 and 800 enquiries from members regarding workers compensation issues each year. Below is a table detailing the number of enquiries over the last 5 years.

<b>Year</b>	<b>Workers Compensation related enquiries from members</b>
2009	756
2010	689
2011	718
2012	759
2013	774
2014 (up until 12 March 2014)	148
<b>Total</b>	<b>3844</b>

As stated in our previous submission, the *Workers Compensation Legislation Amendment Act 2012 No 53* (the 2012 Amending Act) introduced 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.

The 2012 Return to Work Provisions did not take effect until proclamation on 1 October 2012.

Since 1 October 2012, there has been no change in the volume of workers compensation related enquiries received by the Association. The total number of enquiries received in the just over 15 months since that date is 1121. This is roughly equivalent to the 700-800 enquiries the Association tends to receive over a calendar year.

## Return to Work Problems Continue

In May 2012, the Association made a submission to the *Joint Select Committee on the NSW Workers Compensation Scheme*. A large extract from that submission has been annexed to our earlier submission to this Review. That extract contains 10 de-identified case studies of injured workers who had been denied suitable duties in dubious circumstances. Below are a further 5 de-identified case studies which have arisen since the 2012 Return to Work Provisions were introduced on 1 October 2012. These case studies are just a sample of the matters dealt with (or being dealt with) by the Association and do not represent an exhaustive list of all the return to work disputes which have arisen.

### *Case Study 1 – Brenda's Experience*

Brenda is an Enrolled Nurse who suffered a back injury in late 2006 whilst working for the ABC Local Health District (ABCLHD). She re-injured herself at work in early 2007 and was unable to return to work for a significant period.

In early 2012 Brenda underwent a Vocational Assessment which identified her suitable employment options as including Medical/Ward Receptionist, Ward Administration Assistant and Customer Service Officer. She subsequently was certified fit for such work. Despite repeated requests however, the ABCLHD has not provided any suitable duties to Brenda.

Since early 2012, Brenda has applied for over 100 positions either within the ABCLHD, in other public health organisations or in the private sector. These

applications have been unsuccessful either because of her injury or because she has limited experience in clerical work. In the latter half of 2013 Brenda applied for 12 different clerical positions in the ABCLHD. At no stage has the ABCLHD considered whether Brenda should be placed in a particular vacant position prior to that position being opened to competitive recruitment. This is despite Policy Directive 2012\_028 *Recruitment and Selection of Staff of the NSW Health Service* requiring as follows;

*"Injured staff*

*Where occupational illness or injury prevent a member of staff from returning to the duties of his/her existing position, workers compensation legislation requires that, as far as practicable, every effort is made to place the staff member into another more suitable position of similar grading, classification and remuneration.*

*Therefore, the possibility of placing such staff to vacant positions, either temporarily or permanently, should be explored prior to opening the position to competitive recruitment. NSW Health agencies must have a process in place to identify injured staff members suitable for redeployment.*

*A vacancy can be filled through redeployment of an injured staff member where:*

- The staff member meets the selection criteria for the vacant position, or can demonstrate a capacity to meet the criteria within an agreed period, and, if necessary, supported by training, and*
- The duties of the vacant position are consistent with medical opinion regarding suitable duties for the staff member, and with the requirements of the staff member's injury management plan."*

As a result, Brenda has had to compete for vacant positions against other applicants who are more experienced in clerical work and have not suffered an injury of any kind. Through this dispute it has become apparent to the Association that the ABCLHD has no system in place to attempt to assess whether their injured workers may be suitable for particular vacant positions.



In mid 2013, Brenda's Rehabilitation Coordinator arranged for a Functional Assessment. That Functional Assessment concluded that Brenda was able to work in clerical, sedentary or light work roles. At around the same time, the Rehabilitation Coordinator encouraged Brenda to apply for two vacant positions; one as an Admissions Officer and the other as a Telephonist. Once again, these roles were open to competitive recruitment and no attempt had been made by the ABCLHD to explore placing Brenda in those roles beforehand as required by their policy and workers compensation legislation.

In September 2013, the Association wrote to the ABCLHD requesting the provision of suitable duties. Shortly thereafter, Brenda was told that no suitable duties would be provided. Later in September 2013, the Association and the ABCLHD held a disputes meeting. The matter was subsequently the subject of proceedings in the Industrial Relations Commission of New South Wales where the ABCLHD eventually agreed to provide Brenda with a paid work trial for the Admissions Officer role. This work trial is scheduled to begin in around April or May 2014 and has been delayed to allow Brenda to undergo surgery.

**Between early 2012 and 2014 the ABCLHD has repeatedly failed to consider providing Brenda with suitable work which has clearly been available through vacant positions. Instead, she has been required to compete for such positions against able bodied workers and workers with more clerical experience. Consequently, Brenda was left to rely upon weekly workers compensation payments until they ceased on 10 September 2013. Since that time she has been left to rely upon her family and friends to cover living expenses as she is ineligible for any kind of Centrelink benefits.**

## *Case Study 2 – Kathleen's Experience*

Kathleen started working for IJK Retirement as an Assistant in Nursing in 2000. In early 2012, Kathleen was assaulted by a colleague in the course of her duties. Thereafter she made a workers compensation claim in relation to injuries she sustained during the assault. Liability was initially accepted by the workers compensation insurer.

Kathleen was unfit for work until around July 2012 when she returned to work on suitable duties. At this time her medical restrictions were as follows;

- Fit for 3 four hour shifts per week
- No lifting more than 2 kg
- No standing for longer than 15 minutes
- No working in the same area as the colleague who assaulted her

IJK Retirement provided Kathleen with suitable duties in accordance with her medical restrictions until around February 2013 when the workers compensation insurer denied liability. At this time, IJK Retirement informed Kathleen that they do not provide suitable duties in circumstances where the insurer has denied liability. This is despite section 41A of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) requiring employers to continue to provide suitable work even when liability has been denied.

Between around February 2013 and August 2013, IJK Retirement failed to provide suitable work to Kathleen. In August 2013, a representative of IJK Retirement

telephoned Kathleen and informed her that she was terminated as she was medically unfit. Kathleen's medical restrictions had remained relatively constant since July 2012.

**By failing to provide Kathleen with suitable duties after February 2013, IJK Retirement forced her to seek to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme.**

### *Case Study 3 – Penny's Experience*

Penny was an Assistant in Nursing employed by LargeForProfit Aged Care. In June 2010 she suffered an injury to her back whilst moving a resident. Penny was able to continue working but re-injured herself around two months later. She returned to work on light duties in June 2011. Since then she has performed a large array of light duties without any problem including;

- Short walks with ambulant independent residents
- Attending to resident dining and meals
- Feeding residents
- Dressing and undressing residents
- Attending to resident meal preference requests
- Washing and sponging residents
- Washing resident's faces and hand cleaning
- Assisting staff doing bed baths
- Oral hygiene for residents

- Hand care
- Hair washing and grooming
- Giving residents fluids and drinks
- Assisting residents with newspapers, CDs, music and books
- Answering phones and buzzers
- Sanitising and disinfecting equipment
- Recognising and reporting infection risks
- Restocking and tidying the facility
- Assisting with deliveries and resident mail
- Assisting to manage glasses, hearing aids and dentures
- Toileting ambulant independent residents
- Cleaning resident rooms, monitoring noise, odours, lighting and temperature
- Checking on resident clothing
- Organising resident clothing to be repaired or replaced
- Ear care
- Administrative tasks including filing, photocopying and restocking stationery
- Assisting with posture positioning, seating and resident comfort
- Observing and reporting changes in residents' condition
- Attending to visitors and family members
- Giving instructions about the use of mobility aids
- Packing resident bags
- Preparing residents for outings
- Assisting with residents' communication, social skills and community access
- Changing linen on beds
- Distributing laundered articles and removing soiled articles

- Shaving
- Updating documentation and patient charts
- Observing skin integrity and reporting skin conditions
- Monitoring resident sun exposure
- Mopping up spillages
- Removing and cleaning bed pans
- Pressure area care and simple wound dressings
- Assisting in social and group activities
- Escorting residents to other areas within the facility
- Weighing and measuring residents
- Ensuring patient safety from falls, self harm and confusion
- Identifying triggers for resident unrest and aggression
- Settling residents for sleep and rest
- Assisting in emergency, fire and grief situations
- Reporting unsafe conditions, practices and hazards
- Attending training as required
- Assisting in arranging Last Offices and property for deceased

In May 2013, the employer invited Penny to a meeting to discuss her medical condition and "*review her employment*". During this meeting Penny indicated that she believed she was "*nearly back to normal*" and able to perform her duties as an Assistant in Nursing. In June 2013, Penny was referred to an Independent Medical Examiner who concluded that she would never be able to return to pre-injury duties and hours.

In July 2013, the employer met with Penny again where she was informed that LargeForProfit Aged Care had no roles available for her. This is despite Penny having performed the duties set out above since 2010. The employer simply claimed that “[t]hese duties are, however, no longer available at the facility” and consequently her employment was terminated.

After the termination, LargeForProfit Aged Care asked Penny if she would like to volunteer to care for residents at the facility. Clearly therefore, there is work available for Penny to perform. Penny is now seeking weekly workers compensation payments.

**By terminating Penny, LargeForProfit Aged Care has forced her to seek to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme.**

#### *Case Study 4 – Josie’s Experience*

Josie started employment with XYZ Aged Care in around 2001 as an Assistant in Nursing Team Leader. She fractured her left shoulder after falling whilst attending to a resident in January 2011. As a result, Josie was off work for approximately 12 months. At the time of her injury, she was working Saturday and Sunday shifts between 2:45pm and 10:45pm.

Josie returned to work on suitable duties in early 2012 working weekday shifts with some lifting restrictions. Later in 2012 she was reinstated to her pre-injury Saturday and Sunday shifts but the employer employed an additional nurse on these shifts to



assist her. In or around January 2013 the employer no longer employed this additional nurse and Josie continued to work her ordinary shifts until October 2013.

Between January 2013 and October 2013, Josie performed all her ordinary pre-injury duties as an Assistant in Nursing Team Leader with the exception that she could not perform a heavy two person lift with a lifter or slide sheet. This kind of lift was not often required as she was the Team Leader and this is ordinarily managed by other Assistants in Nursing. In other words, it was not an inherent requirement of her role.

Josie's employment was terminated in October 2013 on the grounds that she could not perform all her pre-injury duties. The employer also claimed that Josie would not be able to evacuate residents in a fire (although this was never considered an issue before).

**By terminating Josie, XYZ Aged Care has forced Josie to seek to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme.**

#### *Case Study 5 – Janet's Experience*

Janet started as a Registered Nurse with the EFG Local Health District (EFG LHD) in 1986. She suffered an injury to her back in 2007. Thereafter she worked various periods of suitable duties. In July 2009, Janet suffered a reoccurrence of her injury and has worked suitable duties since that time.

In May 2013, Janet's treating doctor indicated that her medical restrictions were as follows;

- Fit for work 8 hours per day, 4 days per week in one week and then 8 hours per day 3 days per week in the following week
- Lifting/carrying capacity between 5-10kg
- Standing tolerance up to 90 minutes
- Limit bending/twisting/squatting and pushing heavy equipment trolleys/beds without assistance
- No wearing a lead apron for more than 30 minutes

The treating doctor also indicated that these restrictions were permanent. Despite this, Janet continued to work in the Pre-admissions Clinic, Day Surgery and Admissions Office doing work that needed to be performed and which was able to be carried out with minimal adjustment by the EFGLHD. She worked without problems and with no re-aggravation of her injury.

In November 2013, Janet underwent a Functional Assessment requested by the EFGLHD which concluded that she could now only work in a sedentary role. The Vocational Assessment identified three job options for Janet which were more sedentary than the medical limitations in her WorkCover certificates permitted and more sedentary than the work she was actually performing at the hospital.

In March 2014, whilst Janet was working in the Admissions Office, the EFGLHD indicated that the work she was performing would cease because:

- this work was *“not in line with the job options identified in the Vocational Assessment and will not provide her with skills, knowledge or experience that will achieve a return to work outcome”*, and



- that Janet's insurer requires job seekers to apply for ten jobs per week and it *"would not be reasonable to expect an employee to be working on average 28 hr per week ... as well meeting this requirement"* [sic].

In short, EFGLHD is refusing to provide Janet with suitable work in order to allow her to look for suitable work elsewhere. Clearly, EFGLHD is not complying with its obligation to provide suitable work to Janet under section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (NSW). That section does not limit the employer's obligation to circumstances in which the provision of such work will facilitate a return to *pre-injury* duties or to some other work goal defined by a Vocational Assessment. Nor is it acceptable for an employer who is liable for compensation to refuse to provide work so as to give an injured worker time to seek work elsewhere. EFGLHD is simply attempting to shift its responsibility for Janet onto the wider workers compensation scheme.

**By failing to provide Janet with suitable duties, the EFGLHD is forcing her to seek to rely upon weekly workers compensation benefits at the expense of the insurer and the wider workers compensation scheme.**

Brett Holmes

General Secretary