Submission No 148

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Shoalhaven City Council

Date received: 16/05/2012

Submission to Joint Select Committee on the NSW Workers Compensation Scheme

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16 May 2012

Introduction

The increasing cost and ineffectiveness of the system has obvious implications for the competitiveness of New South Wales employers and the government sectors. In particular, for Self-Insurers the requirement to potentially manage injured workers until 12 months beyond retirement age is onerous and expensive.

Any reform to the Workers Compensation system must be premised on the key objective of supporting the effective return of injured workers to the workplace. We also strongly support reform elements that will align the system to employers' workplace health and safety responsibilities.

Council's submission addresses both the Issues Paper the Issues Paper circulated as part of the inquiries industry engagement and additional matters in relation to the reform of the current NSW Workers Compensation Scheme.

Issue Paper Responses

1. Severely injured workers

Improved benefits are supported for severely injured workers who have an assessed level of whole person impairment of 50% or more.

2. Removal of coverage for journey claims

Removal of journey claims is supported provided that workers have finalised their work duties. Removal of recess claims that do not pass the test of Section 9A is also supported.

3. Prevention of nervous shock claims from relatives or dependants of deceased or injured workers

Excluding employer liability for psychological injury to family members following the serious injury or death of a worker is supported.

4. Simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings

A simplification of the definition of pre-injury earnings and adjustment of pre-injury earnings is supported.

5. Incapacity payments-total incapacity

We strongly support NSW adopting a business approach that will aid injured workers back to work effectively, fairly and quickly. The approach to total incapacity payments is critical to this objective.

There should definitely be earlier step downs in weekly benefit payments at various intervals, for example at 13 weeks with a reduction to 80% of earnings, and at 26 weeks to 50% for a further 13 weeks, following which injured workers should revert to the statutory rate. The total weekly benefit payment period should be capped at 2 years.

The current approach encourages injured workers in NSW to obtain medical certificates from treating doctors for long periods which can sometimes defy reasonable evidence based recovery times.

6. Incapacity Payments – Partial Incapacity

Weekly benefits for partial incapacity also require significant reform. The current system in NSW does not encourage a timely recovery and return to pre-injury duties after minor injuries. There is currently no financial or temporal incentive for a partially incapacitated worker to attempt an increase in working hours or eventual financial independence from the Workers Compensation system.

This lack of legislated incentive provides no encouragement for injured workers to exceed the earnings difference required to achieve their pre injury wage. In order to provide motivation for workers to participate in a progressive return to employment it would be more effective to increase weekly benefits as hours worked increase, rather than the current system of artificially topping up weekly benefits to pre-injury earnings merely because the injured worker is working some hours.

Without reform to this aspect, the legislation will both continue to be counter-productive to return to work principles and place unsustainable strain on the NSW Workers Compensation system.

7. Work Capacity Testing

It is our observation that long term injured workers can obtain medical certificates from treating doctors without a stipulated requirement for regular work capacity testing or thorough clinical assessments. The current WorkCover guidelines do not support Insurers and Self-Insurers in facilitating regular assessment of injured workers to encourage them to recover and re-enter the workforce successfully.

The system needs to be able to assess workers at regular intervals using impartial medical specialists to establish binding work capacity in collaboration with the worker's Nominated Treating Doctor. A worker failing or refusing to return to work following certification of genuine work capacity or refusing to participate in this process, should be ineligible for workers compensation benefits.

8. Cap weekly payment duration

To enable the financial viability of the NSW Workers Compensation system, weekly payments should be capped for both totally incapacitated and partially incapacitated workers of lower level impairment (less severe injuries).

It is a huge burden for a Self-Insurer business to pay injured workers for many years, sometimes decades, where the Employer/Self-Insurer has no control over what the injured workers are doing in their continuing daily life. Access to weekly benefits should be limited to 2 years, following which all liability for an injury should cease.

There should also be a maximum cap on the level of medical costs for this restricted period. The exception to this cap would be for those injured workers with severe injuries of 50% whole person impairment or more.

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

Removing "pain and suffering" as a separate category of compensation is supported. Restriction should be removed on negotiation of Section 66 permanent impairment claims.

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

Lump sum impairment claims should be restricted to injured workers with a minimum 10% or more whole person impairment. Allowing injured workers to make one claim only for whole person impairment is generally supported. However, it would be reasonable to allow a further assessment should the injured worker experience major deterioration of an additional 10% or more whole person impairment.

11. One assessment of impairment for statutory lump sum, commutations and work injury damages

Allowing only one medical assessment of impairment for statutory lump sum, commutations and work injury damages is not supported. The insurer should be able to respond to the findings of the assessment by arranging a second medical assessment to confirm consistency of impairment with a view to negotiating a balanced assessment of whole person impairment.

12. Strengthen work injury damages

The proposal that workers compensation damages claims are dealt with in accordance with the 2002 Civil Liability Act principles and the current law (post 2002) of negligence is supported.

13. Cap medical coverage duration

As stated earlier, medical costs should be both capped at a reasonable amount, and time limited to 2 years. It is important to protect the Workers Compensation system from exploitation in relation to future degenerative changes that are not associated with the worker's employment - related injury.

14. Strengthen regulatory framework for health providers

Self-Insurers and other insurers should be able to influence medical and related treatment for injured workers based on the value each service contributes to the worker's rehabilitation, its duration, associated costs, prospects of return to work and/or evidence-based health information. Long- term conservative treatment is both costly to the Insurer and usually ineffective to the worker. We observe that treating doctors often support this treatment without any evidence that it is assisting recovery, together with common over- servicing by chiropractors, physiotherapist, osteopaths and exercise physiologists.

15. Targeted Commutation

Unrestricted commutation is supported where all the parties agree and have been given legal advice. The requirement for WorkCover or Workers Compensation Commission to approve commutations should be removed.

16. Exclusion of strokes / heart attack unless work a significant contributor

Excluding strokes and heart attacks from the Workers Compensation system is supported.

Additional reforms required

1. Section 9A (1) – Workers Compensation Act 1987

This part of the Act should be amended to read "No compensation is payable under this Act in respect of an injury unless the employment concerned is **the** substantial contributing factor to the injury." The system currently makes it possible for compensation payments to be required for workers who have begun employment with pre-existing injuries and diseases that are later aggravated through employment and lifestyle choices **but were not caused or contracted through work**. These aggravations should not be accepted as workers' compensation claims.

2. Section 4B (i) and (ii) – Workers Compensation Act 1987

Supporting the above, the Act's definition of injury should be amended to read "the aggravation, acceleration, exacerbation or deterioration of any disease, where employment was **the substantial** contributing factor to the aggravation, a*cceleration, exacerbation or deterioration.*

3. Section 11A – Workers compensation Act 1987

This part of the Act should be amended to read "No compensation is payable under this Act in respect of an **injury** that is a **psychological injury** if the **injury** was wholly or predominantly caused by any reasonable action taken or proposed to be taken by or on behalf of the employer."

The use of this defence should not be limited to those currently stated, such as demotion, performance appraisal etc. It is currently open for workers to claim workers compensation benefits where the Employer has taken reasonable action for genuine business/operational reasons. These types of claims should not be accepted as workers compensation claims.

4. Section 74 Dispute Notice Amendments

Dispute notices need to be short and concise, and simply state the reasons for the disputation and attach any documents relied upon. WorkCover Guidelines currently require detailed, complex and long-winded dispute notices to be forwarded to the injured worker. In most cases, the information is so extensive and complex that the worker cannot understand the meaning of the document. WorkCover Guidelines should reduce this red tape and compliance burden and make it simple for injured workers to understand the system.

5. Injury Management and Return to Work Plans

WorkCover's requirement to develop injury management plans in addition to return to work plans for less severe injuries is both onerous and superfluous. Injury management plans should not be required unless an injured worker is totally incapacitated for more than 21 days. Treating doctors should not be required to agree to return to work plans, given that the plan will reflect medical advice already received, and the agreement requirement slows down the return to work process.

6. Requirements by WorkCover

It is not necessary for WorkCover to audit self-insurers as part of licencing requirements Self-Insurers are additionally and already involved in comprehensive auditing each 12 months which is documented in the annual return to WorkCover. Self-insurers hold their licence because they have the resources, finances and experience to manage workers compensation liability. The licence –linked auditing that WorkCover currently undertakes is costly and time consuming for all concerned and unnecessary. In addition it is entirely unnecessary for WorkCover to require financial bonds from the Self –Insurer equating to 1.5 times their liability. It will be much more reasonable for the financial bond to reflect the average claims cost for the last 3 years.

7. Retrospectivity

Due to the urgency of the financial deficit, any reforms to the Workers Compensation system should be fully retrospective and apply to both current and future injured workers to enable employers and self- insurers to reduce costs and red tape.

8. Access to medical and previous claims records

Allowing employer or insurer access to workers' medical and previous claims history would assist case managers in quickly and reasonably determining liability.

9. Injury & disease

The concept of 'nature and conditions of employment' should be tightened to exclude age related degenerative process where the link between employment and progression of a disease is questionable. If aggravation of disease is to remain compensable there should be a deduction in the nature of a section 323 adjustment applicable to claims for weekly compensation and medical costs in line with claims for permanent impairment.

10. Section 38

The section 38 process (1987 act) was introduced to encourage partially fit workers to return to work. It has had the opposite effect. Compliance by workers to job seek is low and impossible to track. It is a difficult process for Insurers and self insurers to manage in terms of costs relating to functional and vocational assessments, job seeking assistance and rehabilitation options. It delivers higher benefits to workers for an additional year without the worker's sincere commitment to retraining or obtaining employment with another organisation.