Submission No 125

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Department of Trade and Investment

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NSW GOVERNMENT | Trade & Investment

15th May, 2012

Dear: **The Hon Robert Borsak MLC**
Committee Chair

Re: **Joint Selection Committee on the NSW Workers Compensation Scheme,**

Thank you for the invitation to provide comment and personal recommendations on the proposed changes to the NSW Workers Compensation (WC) Scheme. The views expressed within this submission is on behalf of NSW Trade & Investment, however comments and recommendations are my own opinions and are based on personal experience, knowledge and conceptual thinking.

Background:

I am an allied health professional, having worked in varying positions within the WC scheme, such as a rehabilitation provider, and senior manager for private & public sectors, having direct responsibilities for claims management, return to work, premium management and legislative compliance etc. I also have had a significant insight into the operations and practices of claims managers and insurers (including self-insurers) having dealt with the majority of scheme insurers in NSW over the past decade.

I will endeavour to breakdown the terms of reference, and reference the Issues paper which was recently released. There are varying issues that need to be addressed that encompasses many layers and stakeholders within the WC scheme. The proposed changes in the Issues Paper, highlighted a number of positive reforms, however there still remains an avenue for injured workers and medical treating parties to not be financially motivated to attempt to return to work in a timely and efficient manner.

1 (a) The performance of the Scheme in the key objectives of promoting better health outcomes and return to work outcomes for injured workers:

- **Wages: - average weekly earnings:**

The simplification and refined definition of pre-injury earnings is critical to allow employers and insurers the ability to have a consistent understanding of what the average weekly earnings (AWE) of the injured worker are for the duration of the WC claim. This figure should not have to fluctuate by potential overtime and penalty award rates for injured parties whilst remaining on WC benefits. This will reduce the administration and need to provide make-up pay and comparable earnings for injured workers.

My recommendation for calculating the AWE is to simply take total gross earnings of the past six months of earnings divided by 26weeks. For employees that have a variance in salary due to seasonal or fluctuating work should be given the opportunity to seek an approval to have their earnings calculated over an extended period, for example 52 week average to include seasonal employment and earnings. For injured workers that cannot provide past earnings, then there should be a standard statutory rate, in alignment with Federal agreed upon rates of weekly earnings e.g. $600/wk.

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- **Wages: - incapacity periods:**

I agree with the shortening of the step down entitlements to occur at periodic intervals. However, consideration needs to take place of further step downs greater than the proposed (Issues paper) recommendation of 80% for protracted and drawn out claims. For example, if an injured worker is financially comfortable at remaining totally unfit and receiving 80% of pre-injury earnings, there is no incentive to return to work. The present system of dropping to the statutory rate is actually more of an incentive in this situation than the proposed 80% of AWE.

I would suggest that further step downs occur at set intervals. For example if an injured employee receives 100% Average Weekly Earnings (AWE) for the first six weeks of the claim, then 95% (AWE) for 6-12wks from date-of-injury (DOI), then 90% AWE for 12-18wks from DOI, then 85% AWE for 18-24wks and so on until they have remained totally unfit for such an extended period that they have reached a total of say 60% AWE which would then be limit of the drop down model.

The above pro-rata system of systematic downgrades of wages based on the duration of claim will show all parties that there is a significant emphasis placed on returning to work in a timely manner to be rewarded financially. The downgrades need to happen frequently as the medical guidelines for recommended recovery rates for majority of injuries are not protracted; as such the wage downgrades should be alignment with injured workers being able to return to work following in most cases a maximum of 6wks.

In my opinion, the wages structure clearly needs to support those workers with significant workplace injuries and not have these workers penalised in the first six weeks of an injury as such I believe they should be entitled to 100% AWE for the first period (6wks).

- **Wages: - partial capacity:**

The scheme needs to be able to develop a model of promoting return to work (RTW) in a timely, safe and durable manner. There has to be associated financial incentive for staff to be able to RTW. In the proposed issues paper, it is stating that 15hrs per week be the figure that is used to provide this financial incentive. My concern by using this threshold of 15hrs/ wk, is that it may then cause a stalling factor once the injured worker has reached this figure and failure to get them upgraded past 15Hrs/ wk.

The onus of responsibility on employers needs to be that they can identify and provide meaningful duties that take into account the medical restrictions and duty of care for all injured workers. Employers that do not provide suitable duties should be held accountable, and be made to explain and qualify why they are not endorsing the principles of the early intervention and the RTW hierarchy. If there is not a valid explanation from the employer than the regulator and legislation should allow for significant penalties towards the employer. The regulator should have the powers to investigate and make a determination.

As per my above suggestion for totally unfit workers, I feel that a pro-rata system of financially rewarding a person for being able to work and sustain a return to work, is where the scheme will obtain significant improvements in return to work and subsequently minimise the present financial deficits. The financial rewarding system for RTW should be alignment with an injured worker being able RTW as per the ***Medical Recovery Guideline*** which I will now explain:

- **Return to work: - Medical Recovery Guideline:**

The method that I would adopt would relate to creating and utilising a medically agreed upon timeframe that is available to provide recommended medical recovery rates. The model would take into account factors such as age and gender, however dismiss external psychosocial factors and personal information, as this would be become impossible to include all individual factors. I would suggest that the recovery timeframes model be utilised to provide the

excepted return to work, standard medical treatment approach for an average person of that age and gender based on reasonable and realistic rates of recovery and tolerance levels.

The medical associations will argue that all individuals are different and recover at different rates, but this model would work on a guideline to recovery only. For conditions such as Psychological diagnosis, the predicted recovery guideline model could still work as it would be based on a concept of average anticipate duration for a reasonable person with appropriate medical treatment.

The Medical Recovery Guideline should also include what would be deemed reasonable and necessary medical treatment for each injury that would allow less disputes and conflicts between the insurers vs. medical treating parties that is presently happening.

- **Work capacity assessments:**

At present the scheme is not effective at managing medical barriers and longstanding concerns with protracted treatment plans. All authority and empowerment presently resides with the nominated treating doctor, with employers and insurers often limited in their ability to positively influence recovery and upgrades if the medical parties are not willing to move forward.

There is presently a process of obtaining Earning Capacity Assessments (section 40) for longstanding claims based on factors such as functional, vocational and labour market variables etc. However these assessments do not provide any significant benefits to actual medical or return to work outcomes, other than potentially impacting on injured workers financial entitlements after an extended period of time already spent on WC benefits.

However the proposed Work Capacity Assessments (WCA) should be performed by a branch out of the regulators (WorkCover). They should be independent, with allied health professionals and occupational physicians completing the WCA only. Insurers and employers should be able to escalate to a Work Capacity assessment when an injured worker has failed to be able recovery in accordance to the previously described model of the **'Medical Recovery Guideline'**.

The regulator branch providing these assessments should be given full background and history, and provide face to face independent assessment using methods such as functional and diagnostic testing. The WCA should have enhanced authority to provide medical reports and certificates, and as such override the nominated treating doctors (NTD)- general GP's who provide the present WorkCover Medical Certificates. Consultation with the NTD should form part of the assessment; however the WCA assessment and recommendations should be used for strategy, medical restrictions and upgrades instead of relying upon the local GP's for this information.

Medical disputes or appeals against the WCA and their improved ability to override the NTD should form part of a medical tribunal panel which can oversee such issues and complaints. This medical tribunal panel, should again be aligned within the regulations and functions of the regulator such as WorkCover NSW, and should not be part of the legal jurisdiction.

- **Medical Treatment, surgical options:**

As above, there is a major issue within the current system, where medical treating parties are actually discouraged to upgrade and finalise treatments due to the ongoing financial advantage of protracting and stalling Workers Compensation claims. Most medical parties get paid above the normal Medicare gazetted rates for WC clients, and they can continue to provide services knowing that their patient is not subsidising the payments, and the scheme is subsequently being abused as a result.

Insurers are often restricted in their ability to stop treatment that is not necessary or protracted due to not being allied health professionals, and the recent changes to the ability to seek independent medical examinations.

It is my opinion, there needs to be a financial incentive for medical treating parties to get their clients to pre-injury duties in a suitable, safe and durable time frame. Again, my proposed **Medical Recovery Guideline** document could be used as the reference document to determining if the medical parties are adhering to best practice treatment and principles of early intervention, early return to work etc. If the medical parties achieve the successful and durable return to work within the guideline for significant injuries, than they should be rewarded by receiving a nominal financial lump sum to counteract there current system of protracting and drawing out treatment plans.

The above mentioned Work Capacity Assessments (WCA) should be used to monitor and potentially decline further treatment, for treating medical parties that fail to follow the **Medical Recovery Guideline** or where surgery requests are being challenged as not being appropriate and necessary.

- **Duration of a WC Claim:**

While the current statutory rate is presently a good financial incentive to encourage and drive workers to upgrade their capacity for work, there are still many injured workers that are financially comfortable or not motivated to attempt to return to work or be redeployed. Therefore the number of legacy and tail claims currently within the scheme is having dramatic impact on the scheme's performance and subsequent deficit. The Issues paper highlighted that the maximum duration for a significant WC claim will be capped at 9 years. In my opinion this is too great a timeframe, and I feel that that all there will still be a remaining large number of staff who will exhaust this timeframe.

A more suitable maximum timeframe for someone to remain on WC benefits for a significant injury should be 5 years. From an insurance perspective this could then allow premium calculations with future forecast liabilities and hindsight's to be more accurately predicted and as such, employers will be able to better control their budgeting and financial predictions if the maximum claim life was 5 years for significant claims.

Injuries that are not deemed to be significant, by a suitable qualified medical assessment (e.g. Work Capacity Assessor) should be capped at a maximum duration of 2 years from date of injury.

- **Reduce the ability for legal claims by streamlining any lump sum benefits, and allowing commutations where required:**

At present there are too many opportunities for injured workers to seek multiple legal claims for various factors such as pain and suffering, whole person impairment, work injury damages, negligence- common law etc.

If the regulator arm utilised the Work Capacity Assessments (WCA) as an independent and fair process in determine severity and significant injuries, then this would significantly reduce the scheme costs mammoth legal fees, and free up the legal courts and resources.

The current WC Commission is an inconsistent and unfair process, that is costly and their decision making is often questionable. Having the regulator form a medical tribunal panel for disputes and minimising the opportunities for multiple claims will save the scheme an enormous amount, and also act as a method for taking away any potential motivation for injured workers to use a Workers Compensation claim as a mechanism to generate legal proceedings and seek extensive lump sums.

- **Change 'No-Fault' system for injured workers:**

The current WC system is largely a 'no-fault system' towards the injured worker, and relies upon acceptance of provisional liability for majority of all WC claims. The reason behind accepting all claims provisionally was to enable less disputes and earlier access for injured workers to seek medical treatment.

Whilst provisional liability should still remain, there are significant areas of improvements and legislation reforms to enhance the ability of the employers and/or insurers to prove that the injured workers actions or behaviour have been wilful, misconduct or deliberately placed themselves in a higher risk category to be injured. Responsibility for injuries has been solely on the employer; however more accountability needs to be given to investigate the actions of the injured worker and modify the perception of 'no-fault' for the injured worker. This is extremely prevalent in the case of psychological claims for interpersonal and staffing disputes.

Potentially, if an injured worker has caused themselves an injury by inappropriate or risk taking behaviour and this has been demonstrated by suitable investigation by an independent party, then they should be entitled to medical treatment only, without weekly benefits. They would then need to utilise their own sick or leave entitlements for periods of absenteeism unless they can show that their employer failed to provide supervision, and a safe working environment.

- **Remove journey & recess claims:**

The present system of employers being covered for journey (to and from home to work) and recess claims should never have been in the NSW WC scheme. The employer has extremely limited risk management controls on activities that occur outside of work premises, and as such should not be responsible for claims made travelling to and from home to work.

However, injuries sustained where it has been identified that the employee was travelling between work sites during a shift, should still be accepted on the basis that they were performing a work based activity.

Injuries sustained by employees who are travelling away on overnight trips for employment should only be accepted, if the injury occurred during their working hours and not involve activities being completed for social/ recreational or activities of daily living outside work hours.

- **Exclude Heart & Stroke disease, & nervous shock claims by family members:**

The employer is unlikely to have contributed to Heart or Stroke related illnesses and conditions as it is predominately caused by pre-existing, hereditary or non-work related factors. Therefore, this should have always been excluded from WC.

Secondary claims made by family members should be excluded based on them not being employees and not meeting the definition of a worker. In the event of a death, than the family should be supported and receive the appropriate death lump sum entitlements.

- **Redeployment/ retraining:**

When situations arise that after attempting to return injured workers to their pre-injury duties has failed, and no alternative duties are available internally, then redeployment/ retraining needs to occur.

This process of redeploying someone into the workforce should not be managed by allied health professionals or rehabilitation providers; instead it needs to be managed by suitably qualified employment consultants. This will enable an outcome focused financial reward for successful placement in work-trial, job placement and secured employment. Compliance measures outlining responsibilities for injured workers and the employment consultants need to be monitored and reviewed by the regulator and scheme agents (or self-insurers where applicable).

1 (b): the financial sustainability of the Scheme and its impact on the NSW economy, current and future jobs in NSW and the State's competitiveness:

It is clearly evident that the current scheme is not sustainable and the reform is urgently required to reduce the deficit and enable a future surplus.

My only comment on this matter is that the scheme needs to take empowerment away from insurers to manage WC claims and outcomes, and endorse and encourage more businesses and organisations to become self- insured, without the current administrative and auditing burdens and processes that presently discourage businesses from attempting to be self-insured.

Insurance agents are not the answer to solving the current deficit, as their costing's and financial arrangements within premium calculations mean that NSW businesses are continually being burdened with increased annual premiums, without seeing an enhanced service delivery model or outcome focussed practices by the Scheme agents.

1 (c): the functions and operations of the WorkCover Authority:

As previously mentioned in the above comments, I feel that the functions of the regulator needs to be significantly changed and amended in order to completely overhaul the present scheme. The regulator should drive and concentrate on enforcing accountability and responsibilities, but provide financial incentives for outcome focused return to work for injured worker, medical treating parties, scheme agents etc.

I will address my proposed changes the regulator- which is presently WorkCover as follows:

- **Financial incentives/ penalties:**

The only way to return the scheme to surplus is to provide financial incentives for all parties to adhere to the best practice of early intervention and return to work. Failure to meet the previously described time frames which would be outlined in the **Medical Recovery Guideline,** should then invoke financial penalties such as reduction of weekly wages for injured workers, or no nominal bonus payment to medical treating parties.

- **Work Capacity Assessments:**

I would encourage the regulator to design a branch within their organisation to create a team of allied health professionals that actually perform the WCA's. If the functions are outsourced to external organisations or doctors to complete the WCA, then there will be inconsistencies and issues with integrity, referrals, document control, appeals etc.

By having the medical professionals working for the regulator, this will minimise and streamline the process and ensure that the recommendations and opinions based on the WCA override the injured workers medical treating parties and potential barriers to return to work, finalisations etc.

- **Medical Appeal Tribunal:**

The regulator should have a medical appeal tribunal set up internally, that can oversee the complaints and disputes that occur in relation to definitions of significant/ severe injuries, liability disputes, medical treatment, surgical requests that are questionable etc.

This would reduce the avenue for legal disputes and allow the regulator the capacity to rule in accordance to the legislation and Workers Compensation best practice principles of early intervention and return to work for a safe and durable return to work.

- **Auditing:**

The regulator, should be more willing and supportive of businesses moving towards self-insurance models that are more in alignment with allowing cost effective WC claim management. At present the auditing approach by WorkCover is administratively a massive burden and disincentive for businesses to take on more internal accountability and responsibility with adopting a self-insurance model.

Self-insurance can work well if the business has the knowledge, skills and resources to complete the tasks of the scheme agents. Successful self-insurance models have a great

impact on driving the cost of WC premiums down for NSW business. The current audit practices by WorkCover fail to correctly identify outcome focused case management and risk management, instead focusing on administrative and document control.

- **Legislative reform:**

The regulator should be always focussed on reviewing and enhancing the legislation to ensure that the scheme does not get to the present state of affairs, whilst allowing for a fair and just system for all parties and stakeholders.

- **Service providers:**

The regulator has to ensure that all service providers and stakeholders are monitored and controlled to ensure consistency and service delivery standards are being met. These reviews of service providers and stakeholders should be transparent wherever possible, and the results shared for public scrutiny. This will drive better performance from rehabilitation providers, employment consultants, scheme agents etc.

Conclusion:

I hope that the above comments and opinions are considered and included in discussions relating to the proposed reforms. The NSW WC Scheme urgently needs this overhaul, and the essential approach in my opinion, should be obtaining a Medical Recovery Guideline that allows all injured workers, claims managers, medical treating parties and various stakeholders the capacity to review anticipated time frames and medical treatments.

Adopting financial incentives for early return to work, early intervention and efficient treatment plans will see an enormous improvement from all parties.

If you would like further comments or clarification on any of the above, can you please contact me on : or email:

Again, thank you for the opportunity to provide this submission.

Best wishes,

Steven Mullins
Manager Workers Compensation & Wellness

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