Submission No 104

INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

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Date received: 16/05/2012

16 May 2012

Joint Select Committee on the NSW Workers Compensation Scheme
Parliament House
Macquarie St
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Submission

I write in response to the establishment of the committee in relation to matters concerning the NSW Workers Compensation Scheme.

Introduction

I have some 10 years' experience with the Commonwealth Workers Compensation System and some 19 years with the NSW System.

I have been a Solicitor since 2000. I currently work for a NSW State Owned Corporation as their Workers Compensation Claims Manager.

I begin with one of many fundamental issues confronting the scheme. That is, what injuries should be covered?

Injury

There has been much written about what constitutes an injury "at or in the course of employment" Section 9 (Workers Compensation Act 1987) as well as what constitutes "employment being a substantial contributing factor (Section 9A Workers Compensation Act 1987). The case law is quite extensive in relation to extending the period of employment that is currently covered as an injury under the Act. The clearest source for an extension of coverage under the Act may be found in the often quoted principles from *Hatzimanolis v ANI Corporation Ltd [1992] HCA 21;173 CLR 473*. These principles have been applied to provide coverage for injuries as diverse as a snow skiing accident: *Badwai v Nexon Asia Pacific Pty Ltd [2009] NSWCA 324*, a worker being injured whilst having sex in a motel room: *PVYW v Comcare (No 2) [2012] FCA 395 (19 April 2012)* and a worker injured falling down stairs whilst working from home: *Hargreaves and Telstra Corporation Ltd [2011] AATA417 (17 June 2011).* There are many other examples and in many of these matters it has taken an appeal level judge to determine the application of the law.

If it is the intention of the Government that such matters should be covered by any Workers Compensation Scheme then the law should be clarified so as to better define the extent of employment coverage. However, given the current state of the scheme, the Government, through this committee should consider amendments that would restrict the coverage to "employment only" related activities. In *Mercer v Anz Banking Group Ltd [1998] NSWCC 55; (1998) 17 NSWCCR 264 (15 December 1998,* His Honour, Bishop J, of the then Compensation Court of NSW found against the injured worker under the then new Section 9A provision. He rejected the claim on the basis that the mechanism of the injury *"... was not an activity with any employment characteristics about it..."* The

NSW Court of Appeal overturned his judgement. It has been disappointing that the efforts to address the coverage of injuries have not been better clarified by the legislature. The current state of the law undermines the general view of what is appropriate to be covered by any workers compensation scheme, in particular, the Telstra matter, makes it difficult for an employer to agree to flexible working arrangements such as the ability to work from home.

Disease Claims

Following on from the above the definitions contained in Sections 15 & 16 of the Workers Compensation Act 1987 need to be amended. They have become by and large a retirement benefit mechanism. Issues of a complex medical nature are simplified far too often and "penalise" the "last employer". It is too easy for a degenerative condition to be aggravated by a minor incident thereby opening the way for an open ended claim. This creates a disincentive for employers to retain or hire older workers at a time when there are attempts to provide incentives for employers to hire older workers. No incentive currently being offered would counteract the negative impact many disease claims have upon an employer by way of an increase in premiums. The firm I work for undertook a study of litigated claims between 2005 and 2009. Ninety present of the 164 matters were disease type claims.

Also the current "deeming" provision in s15 "..date in incapacity…" for determining a date of injury, ignores situations where a worker has been receiving treatment, in some cases for a number of years but has not suffered any incapacity. In such matters the deeming provisions can result in a date of injury as being the date the claim is made. This undermines the injury management provisions of the Acts as a worker can effectively circumvent effective injury management by failing to disclose a condition which is later claimed as being work related.

Stress Claims – Conduct of the Worker – WorkCover "guidelines"

Stress claims are once again becoming a problem. When this was last thought to be getting out of control Section 11A was inserted into the Act. However, the defence in this section by and large rests on an examination of whether the actions of the employer have been reasonable or not. In *Department of Education & Training v Jeffrey Sinclair [2004] NSWWCCPD 90 (16 December 2004)* (quite a complex case) a number of criticisms were made of the employer's actions with regard to a complex investigation. Without going into too much detail it established such a high bar for an employer to meet that it renders the envisaged defence quite ineffective. More recent *Attorney General's Department v K [2010] NSWCCPD 76 (21 July 2010)* demonstrated the difficulty of applying the S11A defence as well as illustrating how difficult it is to deal with a worker's perception of "real" events. The so called "eggshell psyche" principle was highlighted. Whilst employers generally accept that one should "take the worker as you find them" it has become practically impossible to determine a workers fitness for a position in relation to psychological health.

In this regard the conduct of the worker needs to be examined. Currently, the Acts contain a number of compliance provisions. (s44 & 61 (WIM) Notice of injury to be given to employer, s48 (WIM) Injured worker's obligations to return to work, s57 (WIM) so called suspension provision, s71 (WIM) Duty of claimant to co-operate. It also provides exclusion for cases of serious and wilful misconduct where the injury is not serious (s14 WCA). These provisions are either practically unenforceable and in the case of s14 too high a test for a claim to be declined. In relation to stress claims they present no avenue for an employer or insurer to effectively manage a claim. Too often they have no information as to what a claim may be about. Quite often the worker presents an unfit WorkCover medical certificate and no other information. WorkCover has a number of "Operational Instructions" and guidelines which compel insurers to manage claims in a particular fashion. That includes payment of limited treatment costs even when the worker has not complied with all of their obligations under the Act. The suspension provisions are too impractical to disentitle a worker. The process for obtaining an Interim Payment Direction from the Workers Compensation Commission is all too easy.

In addition the restriction on insurers and employers to refer off early to an Independent Medical Examiner has been almost done away with by WorkCover's Operational instructions. The ability to gain an independent medical used to provide insurers and employers with the ability to put injury and incapacity at issue. Not being able to obtain such medical evidence undermines the scheme's ability to address stress claims.

There needs to be a change so that simple misconduct or failure to comply with WH&S provisions or employer's directions or policies and procedures, disentitles a worker to bring a claim. In addition any entitlement to benefits should not be allowed prior to the worker lodging a formal claim in circumstances where there are questions of the worker's compliance.

Section 66/67 Permanent Impairment

Following on from the above, WorkCover's operational instructions in relation to permanent impairment claims provide little or no avenue for early settlement. Firstly, Insurers, until recently had very little scope to refer an injured worker off for an Independent Medical Examination. Secondly, in matters where there are differing assessments WorkCover prevent compromise settlements between any two Whole Person Impairment assessments. Accordingly, matters tend to need assessment by the Approved Medical Specialist who provides a binding assessment. This requires that the matter is litigated.

In relation to s67, the issues paper quite rightly points out the anomaly with this section being retained after Common Law entitlements were re-instated in 1992. If as expected, there is significant opposition to the removal of this provision then at the very least section 67 entitlements should be regulated to be at the same percentage value as Section 66 once the 10% threshold is reached so as to remove the avenue for litigation that currently exits.

However the need for any litigation on the basis of the dollar value of a claim remains a puzzle where opportunities for reform have been missed over many years.

The following is a suggested process to remove the litigious elements for injured workers. Workers should obtain a certificate of "maximum medical improvement" being met from a treating medical practitioner. No claims for lump sums should be allowed where there is no existing claim.

The Insurer would then refer the file to the Workers Compensation Commission Registrar for an Approved Medical Specialist to be allocated. The AMS would issue a Medical Assessment Certificate and provided there is no liability dispute the insurer would make a payment without the need for a Complying Agreement.

The current process of compelling workers to seek legal advice before they "accept" any lump sum payments is a throwback to a previous time. Then, acceptance of a section 66 payment was making an "election". This had the effect of surrendering one's Common Law rights. Whether or not that was strictly true is a matter of some debate. However as the "election" provisions were abolished some years ago the retention of the guideline that a worker MUST have legal advice to accept any lump sum offer is no longer valid.

The above is the minimum reform that should be aimed at. However my own preference would be for the WPI loss to be factored into a formula so as a worker could receive an increase of any weekly pay once they had reached the first step down rate for weekly benefits. The desire would be to remove the lump sum mentality from the scheme if it is considered desirable to run a pension scheme. If not then the WPI percentage could be put into a formula to completely payout the worker all entitlements at a specific time. Such a recommendation was made in the 1997 Grellman Report. The committee may like to revisit that document.

Weekly Benefits Step Down Provisions

I note in the issues paper the suggestions around weekly benefits. Whatever the preferred option, there are some key elements I would suggest that need to be addressed. Whatever turns out to be

the preferred limitation of full weekly benefits, the formulas for calculating the step down should be on a percentage basis. The current provisions are too cumbersome and provide as many inequities as they try to address. There also needs to be a prohibition on any Industrial Award Provisions for so called “accident pay”. These have the effect of undermining the intention of the step down provisions even in their current form.

There also needs to be a removal of the additional payment under section 38 WCA. Currently, after 26 weeks a worker is able to avoid the step down to the statutory rate if they participate in rehabilitation. (subject to some conditions). Whilst the intention was to provide an incentive (80% of their award rate) for an injured worker to participate, experience has not showed this to be a successful or desirable measure.

I also note the discussions around limiting ongoing payments (make up pay) under section 40. Whatever desired limitations may be preferred there needs to be an amendment to the Act to provide that any loss of earning under s43 is calculated as a percentage of the “award” rate. Any adjustments over time should be governed by the CPI as published by the ABS. Currently many matters are litigated merely because there is an argument over valid comparable employees earnings. There also needs to be the removal of the notion that there are such things as continuing awards. Rather if one has a pension type of process to provide for ongoing benefits then one needs the same processes one would use in the “centrelink” context rather than a notion that one only needs to convince a judge or arbitrator once to get indefinite benefits.

WorkCover Administration

The roll of WorkCover in NSW is quite daunting. It would appear that the scheme going into deficit is a recurring theme in NSW. WorkCover as an organisation needs to bear primary responsibility for this notwithstanding how unfair that may be for the individuals who work there with great diligence under difficult circumstances. Accordingly the Committee may like to consider dividing WorkCover into separate component parts as it exists in other States. In particular the premium setting arm of WorkCover should be independent and more industry oriented. The Inspectorate is primarily focused on enforcement of WHS law and it seems an anomaly that it sits within the WorkCover Authority.

With regard to claims administration, quite a significant overhaul needs to be made. I have already mentioned above the aspect of WorkCover issuing operating instructions to the insurers. There seems little consultation or little understanding of the implications of their instructions. I once had a discussion with a former colleague at WorkCover after the HIH collapse and suggested that WorkCover should take over that licence to see if they could follow their own instructions. He readily admitted there was no way WorkCover could follow their instruction to the insurers.

A primary example already noted above relates to the inability of insurers to arrange independent medical examinations. Another has been WorkCover restricting Appeals from the WCC to a higher court. I attended a function in December 2011 where His Honour Judge Greg Keating, President of the Workers Compensation Commission made mention of the improvements in the operation of the Commission over the previous 12 months. One of the measures mentioned was a decrease in appeals. It was apparent he was not aware that this improvement, may have more to do with WorkCover taking administrative action preventing insurers lodging appeals than the actual operation of the Commission. There are many other examples. The Committee would do well to conduct a complete review of these administrative actions of WorkCover, their validity and their impact on the scheme.

My own view is that WorkCover should have a licencing roll with regard to which insurers can handle Workers Compensation matters but they should not be able to determine how an insurer managers their business.

Other matters

There should be some adjustment to the prohibition of touting provisions s131 to 142 (WIM). Currently only hearing loss claims fall under these provisions. All claims should be covered. Legal practitioners

should have to disclose any third party arrangements they have. (i.e. with trade unions). All claimants should have to make a declaration about how they came to consult a legal practitioner prior to the partitioner being paid. There also needs to be some mechanism to address claimants bringing subsequent claims via their legal practitioner, in some cases many years after a small matter was settled, often on a compromise basis.

My company has many examples similar to the following. A worker via a lawyer brings a claim for 3% WPI hearing loss ($3750.00). The costs of disputing such a claim appear disproportionate. In addition WorkCover guidelines restrict one's ability to obtain necessary evidence to dispute such a claim. The claim is accepted and legal costs are paid as per the Regulations (say up to $3275.00) Cost of the claim rounded up to take account of a medical examination say all up $8000.00. The premium impact of such a claim for a large employer could be three times that figure. Three years later (see S69B), an additional claim is brought for a new medical examination which whilst showing no deterioration in hearing loss now recommends hearing aids. The cost of this claim could be as high as $9000.00. With additional legal costs the total value of the claim could now be $21,000.00. So the decision taken three years earlier not to investigate the claim or obtain any independent medical advice does not seem all that cost effective.

Given that claims generally only impact an employer's premium for three years, the employer may be protected from the further cost of this claim. However the scheme will not.

Finally, something needs to be done about the validity of a GP to simply tick a box on a WorkCover medical certificate. This relates to the question as to whether or not employment is a substantial contributing factor. I mentioned above the complexities of the case law on this matter. Unfortunately far too great a weigh is given to the GP's opinion in this regard. Rarely would one expect a GP to have a detailed understand of section 9A of the Act (WCA). GP's are also put in an inherently difficult position having as they must the interests of their patient as paramount. They rarely have any dealing with the employer. However insurers are restricted in what inquires they can make and the time periods imposed upon them mean they must often accept liability to comply with WorkCover requirements. To illustrate this, Provisional Liability provisions require the insurer to make a determination within seven days. However they must allow ten days for a GP to respond to any query. Unless a GP responds within the seven days an insurer will generally be obliged to determine in the workers favour.

I trust the committee finds the matters raised above assists in there inquires.

Regards

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