Submission No 53

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Slater and Gordon Lawyers

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NSW LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

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SUBMISSIONS ON BEHALF OF SLATER AND GORDON LAWYERS

23 SEPTEMBER, 2016

Introduction

Slater and Gordon Lawyers have represented workers for the past 81 years and has a shared interest in the ongoing sustainability of a scheme which supports injured workers and their families. We welcome the Committee's ongoing interest in the scheme and commend the decision of the committee to undertake this first review of the scheme since the 2015 legislative changes were introduced.

Our submissions will address issues generally across the scheme and will also make some specific comment around issues facing workers with psychological injuries including but not limited to Police officers in the State.

ISSUES AROUND SURVEILLANCE

Investigators are engaged by Insurance companies to conduct surveillance on some injured workers. It is recognized that surveillance has been used for many years to test the injured workers capacity and credibility. In many instances, in our experience, there is no reason for the Insurance company to suspect that the workers are being less than truthful, rather, the surveillance is used, more in hope, to ascertain whether there is any information in existence that might damage the workers credibility. The problem is that surveillance has the potential to aggravate and exacerbate psychiatric injuries. It is submitted that the Committee may wish to have an in depth review of this issue with the view to recommending enforceable guidelines around the use of surveillance. We cite two examples of methods of surveillance and the effect upon injured workers:

a) Footage from monitoring the injured workers directly.
b) Desktop/screen shots from social media websites

Surveillance Footage

A former police officer was surveilled for 20 hours for the purpose of a report. The insurer was aware that the worker had attempted to return to work and failed in that endeavor as a result of chronic Post Traumatic Stress Disorder (PTSD). He was required to submit statutory declarations to the effect that he was no longer working along with doctor's certificates from treating psychiatrist.

Despite conducting surveillance for 20 hours, the investigator found no adverse evidence relevant to the claim.

The former officer was suffering the effects of paranoia associated with PTSD and noticed that someone was "watching him" and became fearful he was being targeted by criminals related to his police work. This in turn had an adverse impact on his condition.

The surveillance report stated, in part *"The claimant was observed to drive a vehicle for extended periods, attend medical...make a purchase at a Gloria Jeans' Café...the claimant was not observed to be engaged working..."*. In other words, the claimant was not working or engaged in any activity inconsistence with his medical certificate. The report goes on to state *"The subject appears relaxed and comfortable in his surroundings and does not present with any obvious signs of injury, restriction or discomfort, either physical or psychological..."*. Such observations being well and truly outside the expertise of the investigator and are matters for a doctor or ultimately a tribunal to determine.

The Committee might question the value of this type of surveillance given the potential harm to the injured workers and the forensic value to the system given its cost.

<u>Desktop Surveillance</u>

Desktop surveillance was carried out on a former officer and some 13,427 pieces of information were preserved relating to the former officer. The officer had been diagnosed with PTSD.

Facebook had become a way for the former officer to communicate. He rarely went outside or mixed socially as a result of his condition and engaged in superficial contact with other online from the comfort of his home.

The Committee might consider that the use of such intrusive methods yields no forensic benefit to the scheme. The claimant had liked several pages on Facebook and the investigative report suggested (wrongly) that the claimant had a wide variety of interests and hobbies and even suggested he owned a business as a result of observing some of the pages he had visited.

Once again the report provided no evidence to show that the claimant was in any way illegitimate or that his claim was unmeritorious, indeed his activities were consistent with his medical evidence.

EXCESSIVE USE OF MEDICAL EXAMINATIONS

It is not uncommon, especially in Police compensation matters for the insurer to arrange for numerous and potentially excessive numbers of appointments with doctors and other experts.

One of the effects of this process is to increase the pressure on the claimant and to increase the likelihood of the matter ultimately being referred to the Workers Compensation Commission and for an Approved Medical Specialist to be appointed, all at additional cost to the scheme. Apart from the additional costs the claim is delayed. In our experience in claims involving psychiatric injury the insurer will often send a claimant for a vocational assessment, a psychiatric evaluation, a psychological evaluation and sometimes a neuropsychological assessment.

There are no provisions within the legislation to limit the number of independent medical examinations that an injured workers can be required to attend. The Committee might consider that requiring the injured worker to attend numerous evaluations not only potentially exacerbates the injury and places the claimant under additional stress but it also adds significantly to the costs of the scheme.

AGGREGATION OF WHOLE PERSON IMPAIRMENT ASSESSMENTS

Currently a worker is unable to aggregate separate Whole Person Impairments (WPI) for the purposes of crossing the threshold to become a High Needs Worker. Such a classification opens up numerous ongoing benefits.

This would appear to be an anomaly in the system. It is submitted that a worker with WPI in excess of 20% or 30% as the case may be, from the effects of two or more injuries needs, the additional and ongoing benefits that such a finding would bring with it had the WPI been the result of a single injury.

It would, we suggest, be uncontroversial to suggest that the medical and other needs of the injured worker who has a 25% WPI, for example as a result of multiple injuries are the same as a worker with the same assessment as a result of one injury. Given that it has been longstanding practice to apportion liability across multiple insurers it is submitted that there would be no difficulty in apportioning the costs of benefits across multiple insurers in circumstances not withstanding the total WPI has been contributed to by multiple injuries.

LINKING THE RIGHT TO RECEIVE MEDICAL EXPENSES TO WEEKLY COMPENSATION AND WHOLE PERSON IMPAIRMENT

The scheme continues to link the right to claim hospital and medical expenses to whether the workers is receiving weekly compensation and/or to their level of Whole Person Impairment.

We would suggest that no evidence has been produced to support the view that the need for medical treatment ceases at any specific point in time, indeed we would suggest that such an issue is very specific to the individual. On-going management by a doctor, physiotherapy, chiropractic, remedial massage and other conservative types of treatment should be a matter for ongoing assessment based on need and benefit rather than on an artificial legal concept.

WORK CAPACITY ASSESSMENT DISPUTES

Work Capacity assessments were introduced to facilitate return to work of an injured worker and improve return to work outcomes. Properly used they could become an effective tool to periodically review a worker's capacity to fulfil work duties and progress in returning to work and thereby assist a claims manager in determining a return to work plan in conjunction with the worker's doctors and treatment providers. That would depend on WCA's being used passively rather than as a tool to cut worker's benefits, remove the worker from the scheme as quickly as possible and thereby reduce the liability of the insurer.

WCA's are designed under the reform legislation to lead to a WCD. The definition of what constitutes a WCD (s.4 1987 Act) elevates mere pronouncements by an insurer of the quantum of weekly benefits or the acceptance or rejection of a doctor's pronouncement as to a worker's work capacity to the level of 'reviewable decision'.

It is the weight that the legislation gives to WCD's and the consequent convoluted, multi-tiered and heavily skewed 'review process' (against workers) that creates inequity and unfairness and is a preventative to the scheme achieving its main purpose and function. (s.44 1987 Act) This inequity and unfairness is further illustrated by the worker having to navigate the process without the assistance of legal representation.

Prior to the amendments the Workers Compensation Commission was able to hear disputes concerning liability, quantum, benefits and return to work to speedy and satisfactory resolution with independent decision makers qualified and experienced to make decisions about all aspects of the Scheme. This process was duly assisted by legal representatives instructed both by the worker and the insurer.

The Committee might consider that the concept of 'Work Capacity Decision' should be redesigned to assist in the primary objectives of the scheme/system of restoration to health and return to work.

Disputes which arise in the course of a claim must return to the Commission for quasi judicial determination in an environment that provides proper process, transparent outcomes, legal advice and legal representation to all parties.

Importantly, The Government saw fit to introduce a provision that would enable the injured workers to seek the assistance of a lawyer in a Work Capacity Assessment dispute and for the costs to be met by the scheme. To date that provision has not been backed up with the provision of a regulated fee. In other words, a lawyer is unable to receive a fee for assisting a worker in such circumstances

RETURN TO WORK

Our observation is that an anomaly has arisen around the issue of weekly benefits and work capacity. Currently partial incapacity benefits re not available post 2.5 years in circumstances where the workers is not working more than 15 hours per week. We refer here to section 38 of the Workers Compensation Act.s

We have observed circumstances where rehabilitation providers will place pressure on injured works and their treating doctors to certify that the works has some modest capacity for work, for example, up to 15 hours per week. This, in our submission speaks to a worker with a substantial incapacity for work. From a practical point of view, a person with such a limited work capacity has poor prospects, with all the good will in the world, of finding work. To then remove their ability to receive benefits based upon the fact that they are not working 15 hours per week would appear to be unfair. The Committee might consider that this provision ought be removed or modified.

FUNDING FOR THRESHOLD DISPUTES

At this time, ILARS will provide legal funding for disputes in relation to whole person impairment for the purposes of a claim under section 66. It is submitted that there are other reasons why a worker might be in need of an assessment of WPI. For example, their condition might not be stable for the purposes of a section 66 claim yet they need to establish that they are a High Needs Workers/seriously injured worker, they may have used up their one-time claim for section 66 benefits but have deteriorated and be in need of an assessment for the purposes of considering a Work Injury Damages claim.

In the examples cited there is no provision for funding for the work that needs to be carried out to obtain an assessment. This we submit could lead to a worker being unfairly treated by the system. The Committee should consider recommending an appropriate level of funding for this purpose.

ADDITIONAL INFORMATION

We thank the Committee for embarking upon this enquiry and are more than happy to offer additional material and comment in support of the matters raised or in relation to any other matter that comes to the attention of the Committee.

Stuart Barnett
General Manager
Accredited Specialist in Personal Injury Law

SLATER AND GORDON LAWYERS
117 Scott Street, Newcastle New South Wales 2300
D (02) 4915 4816 | T (02) 4915 4800 | F (02) 4926 5542
W slatergordon.com.au