

**Submission
No 1**

**INQUIRY INTO 2018 REVIEW OF THE WORKERS
COMPENSATION SCHEME**

Organisation: Workers Compensation Commission

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Workers Compensation
Commission

Office of the President

4 June 2018

The Hon Natalie Ward MLC
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Ward

2018 REVIEW OF THE WORKERS COMPENSATION SCHEME

I refer to the Committee's current review of the workers compensation scheme, with specific focus on the feasibility of a consolidated personal injury tribunal for Compulsory Third Party and workers compensation dispute resolution.

Whilst I do not advocate either for or against a consolidated personal injury tribunal, it may be helpful, to assist the Committee in its deliberations, to provide some information concerning the Workers Compensation Commission's processes and procedures.

Jurisdiction

The Commission commenced operation in 2002. It replaced the Compensation Court of New South Wales.

The Commission has exclusive jurisdiction to deal with a wide range of workers compensation disputes, including weekly compensation benefits, medical and treatment expenses and lump sum compensation for permanent impairment. In addition to workers compensation dispute resolution, the Commission also facilitates the mediation of work injury damages disputes.

Workers compensation dispute resolution

The procedures under which workers compensation disputes are resolved in the Commission represent a radical shift from those of the Compensation Court. Rather than adopting the procedures of the Compensation Court, which applied strict rules of evidence and conducted itself in a formal litigation setting, the Commission's procedures focus on assisting the parties to reach a resolution through alternative dispute resolution methods. A formal hearing and determination is a last resort, if the parties fail to reach agreement.

The Commission uses a blended conciliation and arbitration model to resolve disputes. Under the blended model, the Commission first uses its best endeavours to bring the parties to an agreed resolution through conciliation. If the dispute is not resolved by conciliation, the

process transitions to an arbitration hearing. Generally, the same member of the Commission conciliates and arbitrates the dispute.

When the blended model was first introduced it had its fair share of detractors, due to the informality of telephone conferences, use of conciliation, and the use of the same member to conciliate and arbitrate. However, over time the blended model has proven to be highly successful in resolving disputes.

Another feature of the Commission's operations is the requirement to exchange relevant documentation at the outset, with restrictions on the introduction of further evidence as the case progresses through the Commission. Claimants are required to attach all relevant information and supporting documents to the dispute application. Insurers are required to lodge a reply to the application within 14 days and attach all documents relevant to the insurer's decision to dispute the claim. Documents filed after this time are considered late documents and are only permitted to be relied on in the dispute resolution process if the Commission is satisfied that they are necessary to avoid demonstrable injustice to one of the parties. The early exchange of information and limitations on introducing further information ensures each party is aware of the other party's position and facilitates a focus on resolving the dispute.

The average time for resolution of workers compensation disputes, without appeals, is three months from the date of lodgment.

The Commission also arranges and meets the costs of interpreters for workers who require those services.

Triaging disputes

The Commission was one of the first tribunals in New South Wales to triage applications at the point of lodgment. Applications are triaged to ensure they proceed down the appropriate and most expeditious pathway to resolution.

Disputes are triaged according to the type of claim, the issues in dispute, the compensation claimed and the remedy available. There are three main dispute pathways: expedited assessments, legal disputes and medical disputes.

The most common application filed in the Commission is an Application to Resolve a Dispute. These applications involve disputes regarding liability and/or the quantum of compensation payable. Except for applications regarding the degree of permanent impairment, they are streamed directly to an Arbitrator for conciliation and, if needed, arbitration. Currently there are 25 full-time and sessional Arbitrators.

Disputes regarding the degree of permanent impairment resulting from an injury are fast-tracked to Commission appointed Approved Medical Specialists for independent assessment.

Telephone conferencing

The majority of matters commenced by an Application to Resolve a Dispute, except those fast-tracked to an Approved Medical Specialist, are initially listed for a telephone conference before a Commission Arbitrator. This occurs 28 days from lodgment of the application.

The telephone conference is the Commission's first opportunity to resolve the dispute by conciliation. A period of one and a half hours is allocated for the telephone conference.

A telephone conference is attended by a Commission Arbitrator, the worker and their lawyer, and the employer's lawyer. Attendance by an insurer representative is also encouraged. The telephone conference allows a worker to participate in the resolution of their dispute from the convenience and less stressful environment of their home, or in their solicitor's office.

At this point in the process Arbitrators use their skills to assist the parties to resolve any impediments to resolution that may be identified during the conciliation discussions.

The telephone conference is successful in resolving almost one-third of disputed matters.

Conciliation conferences/arbitration hearings

Where settlement does not occur at the telephone conference stage, the matter is listed for a combined conciliation conference and arbitration hearing. The conciliation conference/arbitration hearing is a face-to-face process between the parties, facilitated by a Commission Arbitrator. They are listed for a three-hour period. However, a longer period may be allocated if required.

The conciliation/arbitration hearing occurs within three weeks of the telephone conference if the parties are ready to proceed. A delay will be incurred when a party is granted leave to issue requests to third parties for the production of further documents, such as treating doctor records. This process is strictly regulated by the Commission, as the production and inspection of third party records generally adds a further five weeks to the process.

At the first stage, conciliation, Arbitrators further assist the parties to reach a resolution on terms that are mutually acceptable between the parties.

If an Arbitrator reaches the conclusion that the matter cannot be resolved by agreement of the parties, the proceedings will transition from informal conciliation to a formal arbitration hearing. The point at which that occurs is at the discretion of the Arbitrator in each case. A relatively small percentage of overall cases, less than 10%, proceed to arbitration hearing.

During the arbitration stage, the Arbitrator will hear evidence and submissions from the parties, following which the Arbitrator will determine the dispute. The arbitration hearing is sound recorded. The sound recording is available to the parties and, where appropriate, a transcript of the proceedings is produced. Parties are usually legally represented during Commission proceedings. Often the parties are content to rely on the documents lodged and the formal submissions of their legal representatives. However, in limited cases witnesses may be called and cross-examined.

Following an arbitration hearing, Arbitrators may deliver an oral decision or reserve their decision. The Commission requires reserved decisions to be delivered, with clear reasons, within 21 days of the arbitration hearing.

Most conciliation/arbitration hearings take place in Sydney. However, the Commission also regularly sits in 18 regional and rural locations. The Commission also has capacity to engage in video conferences if it deems it appropriate or at the request of the parties.

Expedited assessments

During the triaging phase following lodgment of the application, matters that are identified as suitable for expedited assessment are referred to a delegate of the Registrar. Expedited assessment disputes include appropriate workplace injury management to facilitate an injured worker's timely return to work, entitlements to weekly compensation of up to

12 weeks and entitlements to medical expenses compensation of up to \$9,178 (amount periodically indexed).

Expedited assessment disputes are listed for telephone conference 14 days from lodgment of the dispute.

While the vast majority of these disputes are resolved by agreement, a Registrar's delegate may direct an insurer to pay compensation and may make recommendations to resolve a work injury management dispute.

Noting that the New South Wales Government has recently announced an intention to utilise the Commission's processes to resolve work capacity disputes, it is intended that such disputes will initially proceed through the expedited assessment pathway. Where those disputes involve relatively straightforward matters, for example, the quantification of the worker's pre-injury average weekly earnings, they will be dealt with to finality through this process. Where they involve more complex disputed issues, they will be referred to an Arbitrator to resolve the dispute utilising the telephone conference, conciliation and arbitration dispute resolution processes.

Medical disputes

As President, I appoint a panel of specialist medical practitioners (Approved Medical Specialists) to assess medical disputes referred to the Commission for resolution. Currently, there are 134 Approved Medical Specialists appointed to the panel. Approved Medical Specialists are drawn from a wide range of specialties.

Where a dispute concerns only the degree of impairment resulting from an injury, a worker will be immediately referred to an Approved Medical Specialist who will conduct an assessment. The assessment usually requires an examination of the worker and review of relevant supporting material, including medical reports and investigations lodged with the application and reply.

Following the assessment, an Approved Medical Specialist will issue a certificate that quantifies the extent of any impairment and the reasons for that assessment.

Subject to certain limitations, assessments of Approved Medical Specialists as to the degree of permanent impairment are conclusively presumed to be correct and the Commission will issue binding decisions for entitlement to lump sum compensation consistent with the assessments.

Appeal mechanisms – arbitral appeals

The workers compensation legislation provides mechanisms for internal appeals.

An appeal is available from a decision of an Arbitrator, subject to satisfying a monetary threshold. An appeal is limited to determination of whether the decision was affected by legal, factual or discretionary error. An appeal is not a review of the evidence or a rehearing of the dispute.

Appeals are heard by Presidential Members. There are currently three full-time Presidential members, including myself. Appeals are heard by a single Presidential member, that is, the Presidential members do not sit as a panel. Generally, appeals are dealt with "on the papers", however, appeal hearings are held if required. Appeals are typically determined

within six weeks of the conclusion of the timetable of proceedings for the filing and serving of submissions.

An appeal lies from a decision of a Presidential Member to the New South Wales Court of Appeal on point of law only.

Appeal mechanisms - medical appeals

An appeal from a decision of an Approved Medical Specialist is available on limited grounds. Appeals are dealt with by a Medical Appeal Panel, which is comprised of an Arbitrator and two Approved Medical Specialists.

Appeals are generally determined “on the papers”, however, the Medical Appeal Panel may elect to conduct a formal hearing of the appeal. Depending on the circumstances, the appeal process may involve a re-examination of the worker by one or both Approved Medical Specialists on the Medical Appeal Panel.

A party may apply to the Supreme Court of New South Wales on judicial review grounds to review a Medical Appeal Panel decision.

Work injury damages dispute resolution

In addition to resolving disputes concerning workers compensation entitlements, the Commission is required to mediate work injury damages disputes. Parties to these disputes are required, subject to certain exemptions, to participate in mandatory mediation prior to commencing court proceedings in the District Court of New South Wales for damages.

As President, I appoint a panel of nationally accredited mediators to assist in the resolution of these disputes. Currently there are 26 mediators appointed to the panel.

Mediations generally take place within 28 days of a response to an application for mediation being received from the insurer.

The mediation process differs from the conciliation and arbitration processes. The role of the mediator is facilitative. The mediator does not provide the parties with advice and does not determine the dispute. As the mediator’s role is not determinative, there is scope to engage in separate private sessions with each of the parties to assist in resolving any deadlocks in the negotiations.

The mediation process has been particularly successful. Approximately 70% of work injury damages matters are resolved at mediation. This results in substantial savings in time, legal costs and the resources of the District Court of New South Wales.

Commission performance

In the 2016/2017 year, the Commission:

- received 7,046 dispute applications;
- held 3,898 telephone conferences;
- held 2,018 conciliation conferences/arbitration hearings;
- held 1,230 mediations;
- conducted 2,253 medical assessments;
- finalised 5,832 workers compensation disputes;
- finalised 1,375 work injury damages disputes;

- resolved 91% of workers compensation disputes without arbitration hearing and determination;
- resolved workers compensation disputes, without an appeal, on average within three months, and
- settled 69% of work injury damages disputes.

Conclusion

I trust this information will assist the Committee in its deliberations. If I can be of any further assistance, please do not hesitate to contact me.

Yours sincerely _____

Judge Greg Keating
President