

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Rehab Options Injury Management

Date Received: 6 September 2022

The Chair
NSW State Parliament Legislative Council
Standing Committee on Law and Justice
NSW Parliament House
6 Macquarie Street
SYDNEY NSW 2000

Re: 2022 Review of the NSW Workers Compensation Scheme – Supplementary Submission

We refer to the 2022 Review of the NSW Workers Compensation Scheme.

Rehab Options Injury Management ('Rehab Options') is an Australian-owned company, established in 1989. Rehab Options specialises in return-to-work coordination, injury management, OHSE and risk management, HR/IR issues, claim reviews and case management. Rehab Options is recognised as an industry leader in terms of its results in achieving early return to work outcomes and minimising claims costs.

The NSW Parliament has published on its website 31 of the submissions provided by interested parties, including our initial submission. Rehab Options now provides this supplementary submission by way of brief comment on some of the other submissions provided to the Inquiry.

Idea #1 – A new WPI threshold for psychological injuries

The NSW Bar Association has raised the idea that the 15% whole person impairment (WPI) threshold for lump sum compensation should be lowered to 11% WPI, so it would become consistent with the 11% WPI threshold required for lump sum compensation to be payable in respect of physical injuries.

This idea has considerable merit from a fairness and equity perspective. In our view, in 2022, there is no rational reason for permanent physical disability to be treated differently from permanent psychological disability.

Next, such a change would allow for some claims to be resolved for between 11% WPI and 14% WPI, meaning that injured workers could receive relatively modest but still significant settlements (in the vicinity of \$25,900 to \$36,040 on current figures) without placing the worker in a position where their lump sum entitlement would be either \$0 (for up to and including 14% WPI) or at least \$39,420 (for 15% WPI on current figures).

In addition, the current 15% WPI threshold for lump sum compensation to be payable is the same 15% WPI threshold necessary for injured workers to be able to sue their employer for damages for negligence (work injury damages).

The above situation really entrenches an 'all-or-nothing' approach to psychological injury claims and incentivises injured workers to maximise their disability when assessed for permanent impairment under the Psychiatric Impairment Rating Scale (PIRS) so they get some form of lump sum payment out of their claim / injury.

The proposal set out by the NSW Bar Association would likely enable the settlement of a considerable number of psychological injury claims at an earlier stage and for a more reasonable sum, leading to increased flexibility in managing the cohort of psychological injury claims within the NSW Workers Compensation Scheme and potentially reducing the number of work injury damages claims to which the Scheme is exposed.

It is an idea we certainly support.

Idea #2 – Ensure psychologically injured workers receive evidence-based treatment

It is disappointing to have to state this idea as a change that the Scheme should adopt. One might have thought that all treatment of injuries (physical or psychological) under the Scheme would meet this basic requirement. Alas, according to the Black Dog Institute (BDI), that is not the case.

The BDI submission notes there is no research evidence to suggest counselling (such as EAP services) provides any measurable benefit and also prudently observes that there is a variation in the quality of treatment delivered to workers via that mechanism.

The BDI also criticises the Scheme for its failure to ensure workers receive best practice clinical treatment.

Idea #3 – Do not apply a reasonable excuse to deny weekly benefits

Idea #4 – Do not require a worker to attend an IME before treating medical evidence is considered and obtained

These two ideas were set out by Walker Legal. The ideas are related not only by their author but also thematically in our view.

As to the first idea (#3), we thoroughly agree. Accepting provisional liability for psychological injury claims is almost always the right decision, rather than instead applying a reasonable excuse not to commence weekly payments.

However, it is critical that the Scheme Agent uses this time correctly. Proper factual and medical investigations must occur so that a correct decision can be made on the evidence by the time the provisional liability period expires. Inaction during this period is not only damaging to the Scheme's financial position and its stakeholders but also has an impact on poor return to work rates for psychological injury claims in our view. Steps must be taken to identify what the injury is (correct diagnosis) and if the injury is properly compensable.

In short, it is almost impossible to assess whether an injury is compensable without knowing what it is. For that reason, identifying the correct diagnosis is (or should be) a key part of the process of managing a psychological injury claim in its early stages.

As to the second idea (#4), we strongly disagree. The referral to an IME should be about confirming the diagnosis and then considering issues such as work capacity, correct treatment and liability.

If a worker is told that an IME is being arranged at an early stage, it should be regarded as a sign that their condition is being treated both seriously and at the earliest possible opportunity (especially given the delays in obtaining IME appointments).

For the very reason that the BDI raised the issue of the need for evidence-based treatment, there is an obvious need for psychological injury claims to be the subject of expert opinion. If a correct diagnosis is not identified, treatment is unlikely to be effective, leading to further delays in recovery and return to work.

Thus, to the extent that there is any doubt regarding the correct diagnosis (bearing in mind that the RACGP-endorsed 2019 publication '*Clinical guideline for the diagnosis and management of work-related mental health conditions in general practice*' conceded that studies showed that anxiety disorders were accurately identified by GPs only 1/3rd of the time and depression was only accurately identified by GPs ½ of the time – see p36 of that document), we consider referral to a specialist for assessment at an early stage is prudent from the Scheme's perspective and should improve health and return to work outcomes.

We also observe that the early referral of psychologically injured workers to specialist psychological or psychiatric care was raised as an issue by Business NSW in its submission.

However, Business NSW also argued that claims ought to be able to be 'reasonably excused' if a potential section 11A defence is available on behalf of an employer / Scheme Agent, which in our view illustrates their lack of familiarity with the need to thoroughly prepare section 11A defences (before issuing a section 78 notice to decline liability) if they are to have any prospects of success in the NSW Personal Injury Commission (PIC).

The submission from the NSW Independent Review Office (IRO) also highlighted the importance of accepting provisional liability for psychological injury claims, noting that delays in accessing support and delays in Scheme Agents making formal liability decisions were having adverse impacts on injured workers.

Unfortunately, the IRO, like Walker Legal, suggested the use of independent medical examinations (IMEs) was excessive. The IRO also suggested the IME process may aggravate a worker's condition.

In response, we would simply point out two key principles that we consider ought to apply:

1. Claims must be appropriately investigated; and
2. An aggravation of a condition by the claims process, while regrettable, is not of itself compensable.

Conclusion

A final word for the Committee. All across Australia throughout the recent COVID-19 pandemic, decision-makers have been guided by the science. That approach should also be adopted in assessing what works, and what doesn't work, in relation to the management and treatment of workers who make compensation claims for psychological injury.

We trust the above views are of assistance to the Committee. Please contact us should there be any queries.

Kind regards

Bill Pardy
Risk & Strategy Consultant
Rehab Options Injury Management

6 September 2022