

The Office of the WorkCover Ombudsman South Australia

Submissions to the Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008 Review Team

Introduction

Schedule 2 of the *Workers Rehabilitation and Compensation (Scheme Review) Amendment Act 2008* (“the Amendment Act”) requires the Minister for Industrial Relations to appoint an independent person to review the impact of the Amendment Act on the work injured, on levies paid by employers and on the sufficiency of the Compensation Fund to meet liabilities. In accordance with Schedule 2, the Minister appointed Mr Bill Cossey AM and Mr Chris Latham (“the Review Team”) to undertake the review commencing on 24 January 2011.

My Office presents submissions to the Review Team on the following topics:

1. Amendments to section 4 – Average Weekly Earnings
2. Amendments to section 35, and insertion of sections 35A, 35B, 35C – Entitlement to weekly payments
3. Amendments to section 36 – Discontinuance of Weekly Payments
4. Amendments to section 43 and insertion of sections 43A and 43B – Lump Sum Compensation
5. Part 4, Division 7A – Provisional weekly payments
6. Part 6C – Medical Panels
7. Part 6D – WorkCover Ombudsman
8. Section 123B – Code of Claimant’s Rights

1. Amendments to section 4 – Average Weekly Earnings

The amendment to section 4 has been generally well accepted by injured workers. The requirement that average weekly payments be calculated on a purely historical basis (subsection 4(1)) rather than on an assessment of what the worker may have earned if he/she had not been injured has given more certainty and less cause for disagreement. The inclusion of overtime in the calculation (subsection 4(12)) has also received a favourable reception.

The one area of concern is the discretionary nature of subsection 4(6) which allows the compensating authority to calculate average weekly earnings by reference to the earnings of a comparable employee in certain circumstances. The reluctance by Employers Mutual Limited (EML) to apply this subsection in some obvious cases was disappointing. The Workers Compensation Tribunal has now judicially determined some disputes relating to this subsection in favour of injured workers¹. This may help to

¹ *Rennie v WorkCover/EML Ltd (Extrastaff Pty Ltd)* [2009] SAWCT 42; *Frape v WorkCover/Employers Mutual Limited (DP World Adelaide Pty Ltd)* [2009] SAWCT 39

resolve the problem. Nevertheless consideration should be given to making this alternative method of calculating average weekly earnings mandatory if a fair average cannot be achieved by the historical approach.

2. Amendments to section 35, and insertion of sections 35A, 35B, 35C – Entitlement to weekly payments

The provisions of section 35 and 35A have not caused too many difficulties. However, the definitions of the first, second and third entitlement periods (subsection 35(8)) allow the calculation of each period to include any week in which the worker has an entitlement to a payment of weekly payments. This has meant that even if a worker has received weekly payments for a few hours off work in a week, that week has been included in the entitlement period. Many workers have been taken by surprise by this. I question whether this was the Parliamentary intention and submit that it would be fairer if for the first 2 entitlement periods the periods were calculated according to whether the worker had received the equivalent of 13 weeks of average weekly payments. This would increase the incentive to a worker to return to work at least on a part time or reduced hours basis as it would extend the overall period for which they will be paid at the 100% or 90% level of average weekly payments.

Sections 35B and 35C have resulted in changes to entitlements and procedures and had a major impact on injured workers. Unfortunately, these sections are unnecessarily complicated and obscure. Due to their ambiguous terms, use of double negatives, many references to other sections and uncertain relationship to sections 38 and 36 of the Act, I expect that many challenges will be mounted in the Tribunal and Supreme Court on grounds of statutory construction. In my view, it has to be considered whether the cost of litigation that will surround these provisions and the consequential delays this will cause to case management will outweigh their perceived benefit to the Scheme.

While I do not advocate for the complete dismantling of the procedure created by sections 35B and 35C, I do submit that the following changes need to be considered:

- Subsection 35B(1) contains a double negative and is convoluted. Its wording creates uncertainty as to whether an assessment of work capacity must be undertaken before weekly payments cease at the end of the third entitlement period. The phrase “likely to continue indefinitely to have no current work capacity” is clumsy and vague. Subsection 35B(1) should be amended to read: “A worker’s entitlement to weekly payments ceases at the end of the third entitlement period. However, the Corporation cannot discontinue a worker’s weekly payments at the end of the third entitlement period unless it has assessed the worker as (a) having a current work capacity or (b) likely to have a work capacity within 3 months of the assessment.”
- It should be expressly stated that an assessment under section 35B must be undertaken in the context of and in accordance with the procedure of a section 38 review. This will afford workers with fair notice of the assessment and allow them to provide relevant information to the compensating authority before a decision is made to discontinue their payments².

² See *Davey v WorkCover Corporation (Construction Industry Training Board)* [2011] SAWCT 1 for Full Tribunal’s view on the importance of procedural fairness to section 35B assessments.

- Subsections 35B(4), (5), (6), (7) and (8) should be deleted. Having a separate process and notice period for workers who are in receipt of weekly payments on the basis of total incapacity when they reach the end of their third entitlement period is unnecessarily complicated³. The relationship of subsection 35B(6) to section 36 is unclear in light of subsection 36(3a)(bb)⁴. Provided that the section 35B assessment follows the procedure under section 38, workers will have sufficient warning of the decision that is likely to be made whether or not they have gainful employment at the time the process is commenced.
- Section 35C is a mess. Besides having several vague and ambiguous terms, it has managed to create a mind twisting tangle of concepts. The intention is to provide an exception to section 35B(1) so that workers who have reached the end of their third entitlement period will continue to receive their weekly payments if they are gainfully employed and working to their maximum capacity. It takes several readings to discover what it is trying to achieve. It is in desperate need of redrafting before it consumes an inordinate amount of the time and resources of injured workers, compensating authorities, Medical Panels and courts. I also question why the exception to section 35B(1) created by section 35C is only considered if a worker makes an application to a compensating authority. Why not require the compensating authority to consider whether the worker is working to his/her full capacity at the time of making the assessment under section 35B(1)?

3. Amendments to section 36 – Discontinuance of Weekly Payments

The amendments to section 36 effect significant changes to the Scheme and have had a substantial impact on injured workers. The amendments are working reasonably well in the sense that they are intelligible and functional. However, the change to subsection 36(4) removing the automatic continuation of weekly payments upon lodgement of a dispute against the section 36 decision has caused financial hardship and anguish to many injured workers. The government is under pressure to ameliorate the affects of the change.

One response is to “fast track” the dispute resolution process so that a determination of the correctness of the section 36 decision is made within weeks rather than months. The problem with this is that for the merits of a section 36 decision to be properly assessed there needs to be a hearing of evidence and submissions made on behalf of the protagonists. This will ordinarily take more than a few weeks to arrange if it is done fairly and thoroughly. In particular, workers will not be in a position to present their cases within a few weeks of receiving notice of the decision. A fast tracked process is more likely to be detrimental to the interests of injured workers than helpful.

In November 2010, the Minister for Industrial Relations introduced the *Workers Rehabilitation and Compensation (Dispute Resolution) Amendment Bill 2010* which has the aim of expediting the dispute resolution process for section 36 disputes. In my submission to the Minister in relation to the Bill I have asked the Minister to defer the progress of the Bill until completion of your review. I have also pointed out that the procedure proposed by the Bill is impractical and unworkable. In my view, the better

³ See for example, *Creek v WorkCover Corporation (Glenn Industries Pty Ltd)* [2011] SAWCT 3

⁴ See comment by DP McCouaig in *Taylor v WorkCover Corporation/Employers Mutual Ltd (Burnside War Memorial Hospital Inc)* [2011] SAWCT 2 at para 21.

approach to the issue is to focus on improving the standard of decision making by compensating authorities. If section 36 decisions are of a high quality and, therefore, likely to be upheld by the Tribunal, it will be better for workers to have to adjust to the loss of weekly payments soon after the decision is made than to be faced with having to repay the total of weekly payments received while the dispute is proceeding in the Tribunal.

As reported in both of my annual reports to date, the threshold for a compensating authority to avoid a suspension of a decision by the WorkCover Ombudsman under section 36(15) is quite low. Provided the decision is “reasonably open”, I have no discretion to suspend the decision. This means that decisions that are of a poor quality may still avoid being suspended by me because they meet the test of being reasonably open. In my view, the standard of decisions needs to be quite high if they are to take effect while a dispute proceeds in the Tribunal.

To this end I have recommended to the Minister that he consider amending:

- (a) Regulation 35 of the *Workers Rehabilitation and Compensation Regulations 2010* (“the Regulations”) to require that decisions contain an outline of the evidence, facts and law on which the Corporation is relying to discontinue or reduce the weekly payments, and
- (b) Section 36(15)(b) of the Act to allow the WorkCover Ombudsman to suspend the decision “if it appears to the WorkCover Ombudsman that the decision is not compelling or fails to comply with the Act or Regulations or is otherwise unsound.”

Another issue relating to the amendments to section 36 is that the WorkCover Ombudsman’s review function created with the introduction of sections 36(15), (16) and (17) of the Act is exclusive of decisions to reduce weekly payments. Since commencing the review function on 1 July 2008 I have reviewed approximately 10% of section 36 disputes lodged with the Tribunal over that period. Part of the reason for the low percentage of disputed decisions coming to me for review is that my power of review is confined to decisions to discontinue weekly payments only. I cannot review decisions to reduce weekly payments. I do not know why the review power has been limited in this way. Given that many reductions to weekly payments pursuant to section 36(2) of the Act are substantial and have a significant impact on workers’ entitlements, the limitation on my review power seems unfair and illogical. In my submission, section 36(15) should be amended to allow the review function to cover all section 36 decisions, whether they result in a discontinuance of weekly payments or a reduction in weekly payments.

4. Amendments to section 43 and insertion of sections 43A and 43B – Lump Sum Compensation

My office has not received much feedback on the operation of these amendments. People I have spoken to regarding their entitlements to a lump sum are accepting of the 5% threshold (section 43(4)). I have not received any negative feedback about the quantum of lump sum compensation payable for particular percentage impairments.

However, I am surprised by the level of variation between medical practitioners in their assessments of percentage impairment. I believe there is more disputation over section 43 entitlements than was anticipated when the amendments were conceived. I believe part of the problem is that Schedule 4 of the Regulations prescribes a higher dollar amount for every one percentage point from 5% and above. In the higher ranges, an

increase of 1% permanent impairment can result in several more thousand dollars. The variation of expert assessments would matter less if the lump sum was the same over a range of percentage impairments. For example, currently the difference between having a 6% impairment rather than a 9% impairment is approximately \$4,500, but if the one lump sum figure of say, \$15,000, applied to all impairments between 5% and 10% it would not matter if a person was assessed as having a 6% or 9% impairment. I believe consideration should be given to amending Schedule 4 to set lump sums for a range of percentage impairments instead of for each percentage point.

5. Part 4, Division 7A – Provisional weekly payments

The concept of providing an injured worker with up to 13 weeks of weekly payments while the claim is being investigated and determined has merit. It has benefitted injured workers by reducing their levels of financial hardship and anxiety while they await the determination of their claim. The payment of provisional payments also adds incentive to compensating authorities to be prompt with their determination of claims.

My office has investigated a number of complaints from injured workers about compensating authorities refusing to commence provisional weekly payments. It appears to me that the Provisional Liability Guidelines are causing some problems. In particular, the reasonable excuses in paragraph 2.1 of the Guidelines are complicated and require the decision maker to discharge a higher onus of proof than if the claim itself was rejected. In most of the cases I have investigated, it is evident that the decision maker has not understood the reasonable excuse criteria and has wrongly applied a reasonable excuse for refusing to commence provisional weekly payments. Some compensating authorities appear to be distracted by the availability of reasonable excuses and spend a lot of effort in trying to establish a reasonable excuse to refuse provisional weekly payments instead of focussing on investigating and determining the claim.

In my 2009/2010 Annual Report (at page 10), I have stated that the problem could best be addressed by dispensing with the reasonable excuses except for the one relating to whether the injured person is a worker under the Act. I still believe that would be worth implementing.

6. Part 6C – Medical Panels

There is considerable opposition by injured workers and their representatives to the concept and function of Medical Panels. Much of the opposition is due to the fact that Medical Opinions are final and conclusive on medical questions (section 98H(4)) and Medical Panel assessments of workers take place without the presence of advocates. The constitutionality of Medical Panels will be determined by the Supreme and High Courts in due course and it is, therefore, unnecessary for me to comment on this issue.

However, a range of other criticisms have come to my attention and warrant my comment. These relate primarily to the way in which case managers have gone about the process of referring an injured worker to Medical Panels. I specify some of the criticisms that have been reported to me as follows:

- The case manager failed to give the worker any explanation for the referral.
- The referral by the case manager was premature and based on inadequate information.

- The referral by the case manager was unnecessary because medical evidence had already been obtained and is uncontroversial.
- The case manager designated some medical practitioners as having a conflict of interest without providing reasons.
- The questions on a referral were inappropriate or invalid.
 - E.g. Questions about the compensability of an accepted disability or about the reasonableness of medical treatment when the compensating authority has already paid the accounts for the treatment;
 - E.g. Questions that require Medical Panels to assess the worker's credibility.
- The compensating authority made the referral without attempting to agree facts.
- The referral contained a multitude of questions, e.g. 60 or more questions in the one referral. The referral sought to cover all possible issues relating to the claim rather than those that actually require a resolution.
- The worker was subjected to 2 referrals to Medical Panels in the one month and had to attend assessments by 2 separate panels.
- The worker received no forewarning of the referral by the case manager.
- Referral documentation submitted by compensating authorities omitted highly relevant documents such as recent medical reports.
- Compensating authorities submitted documents to Medical Panels which are prejudicial and irrelevant.
 - E.g. Reports by investigators summarising surveillance film.
- Fees charged by representatives of workers for preparing submissions to Medical Panels are not recoverable when there is no current dispute in the Tribunal.

In my view, many of these criticisms would have been avoided if compensating authorities had a fully developed set of internal guidelines for determining when and how referrals will be made. I am unsure about how many of the self-insured employers currently have guidelines for Medical Panel referrals. I know that Crown agencies and Employers Mutual Limited have developed theirs in the last few months. It is too early to say how effective these are.

If compensating authorities continue to refer injured workers to Medical Panels without proper care or consideration, the Minister may have to issue guidelines that apply to the procedures of Medical Panels under section 98B(5) of the Act and have the effect of controlling the way in which referrals are made to them. The Minister's guidelines may be able to stipulate such matters as to how frequently a worker may be referred, what attempts a compensating authority must make to agree facts with the worker and what documents should be included with or omitted from a referral.

The question about recovery of representation costs associated with Medical Panel referrals is an important one. A Medical Panel opinion will often be conclusive of a worker's entitlements under the Act. It is therefore understandable that injured workers will consult a lawyer to assist with their preparation for a Medical Panel assessment. Workers will often need advice on the possible ramifications of a Medical Panel opinion and on what information should be submitted to a Panel. In particular, they may need the help of a lawyer to ensure that all relevant documents are collated and provided to the Panel. If the referral is by a compensating authority prior to there being any dispute in the Tribunal, there is no prescribed representation fee that is payable by the

compensating authority for the service provided by the worker's lawyer. The worker has to pay the entire legal fee themselves. Therefore, a compensating authority's referral to a Medical Panel can result in financial detriment to a worker.

In contrast, if the referral occurs in the course of dispute proceedings before the Tribunal, workers can recover some costs that will help towards their lawyers' fees that are related to their involvement in assisting workers to prepare for their assessment by the Panel.

In my submission, consideration should be given to amending section 98G of the Act to allow for representation costs incurred in the referral process to be prescribed.

7. Part 6D – WorkCover Ombudsman

As a result of performing the functions of complaint investigation and review of section 36 decisions, I have been able to address some systemic issues which I believe has had a beneficial impact on injured workers generally. However, it may be too early to gauge that benefit at this present time.

Firstly, my review of section 36 decisions has highlighted the need for compensating authorities to exercise more quality control over their decisions to cease weekly payments. In particular, Employers Mutual Limited has improved the standard of documentation in support of their decisions. This is reflected in the suspension rate for their decisions decreasing from 42% in the 2008/2009 year to 6.6% in 2009/2010. The number of decisions Employers Mutual Limited set aside once the decisions were referred to me for review halved over the same period, which also indicates that the decisions are more robust and able to withstand external scrutiny. If this improvement applies to all section 36 decisions whether reviewed by me or not, then workers will have benefitted from better decision making.

In the course of investigating a number of complaints about decisions by Employers Mutual Limited to approve a worker's termination of employment by their pre-injury employer, I identified the need for the process to be more transparent and evidence based. Recommendations I made on individual cases have resulted in the whole process being substantially revised so that it includes a meeting of the case manager with both the worker and the employer, a period following the meeting for parties to provide any further information of relevance to the case manager and more detailed correspondence to both the worker and employer setting out the information relied upon and an explanation of how the decision was reached.

Investigation of complaints by injured workers about the way they have been referred to Medical Panels SA has resulted in it becoming apparent that there has been an absence of internal guidelines within self insured employers and Employers Mutual Limited governing the process by which case managers refer workers to Medical Panels. Accordingly, I have alerted compensating authorities via Self Insurers SA, Public Sector Workforce Relations and WorkCoverSA of the need to develop guidelines immediately.

Complaints my Office received about the terms of Rehabilitation and Return to Work Plans indicated to me that inadequate consultation was occurring between rehabilitation consultants and injured workers in the development of their Plans. My

recommendations included amendments to WorkCoverSA's Injury and Case Management Manual that would strengthen the requirement for consultation with workers and their treating doctors in the preparation of a Plan. In addition, I had input into the revision of the standard form Rehabilitation and Return to Work Plan and Rehabilitation Program completed in December 2010. These revised forms and the guidelines attached to them emphasise the requirement of consultation.

I have also made recommendations to WorkCoverSA about their process for exercising investigation powers under section 110 of the Act and publicising convictions for fraud so that the privacy of injured workers is not unnecessarily or inappropriately infringed.

In addition, I have exercised my function of encouraging WorkCoverSA and employers to establish internal complaint handling processes (section 99D(1)(d) of the Act) to review the processes of all 69 private and 12 crown self insured employers. As a result of my review, a number of employers that did not have a process in place now do and several others whose processes were inadequate now have improved ones.

I advise that my Office has been adequately funded and staffed for the work it has needed to undertake so far. Currently, there are 3 full time staff besides myself and for each of the last 2 years we have been dealing with about 2000 approaches for assistance across the full range of my functions. Although, section 99D(2) of the Act allows me to investigate or review an issue arising out of the operation of the Act on my own initiative, I have only been able to do this in an informal, low profile way on a few matters. If my jurisdiction were to expand or if I were to instigate public inquiries into systemic issues relating to the operation of the scheme, the resourcing of the Office would need to be reviewed.

Generally, I am satisfied with the extent of the powers to perform the WorkCover Ombudsman's functions. The level of co-operation I receive from compensating authorities is very good and for the most part my recommendations are accepted and implemented. Sometimes, though, the implementation can take a very long time and my Office has to engage in some persistent follow-up to ensure the implementation occurs. It may be worthwhile amending the Act to empower the WorkCover Ombudsman to give directions concerning the implementation of recommendations made pursuant to the exercise of functions under section 99D of the Act and specifying that the failure to comply with a direction is a breach of the Act.

8. Section 123B – Code of Claimant's Rights

No Code of Claimant's Rights has been issued under this section of the Act. In my view, a Code should be in place to standardise the quality of service injured workers can expect to receive from compensating authorities and to make compensating authorities more accountable to the public. I provided feedback to WorkCoverSA on a draft Code of Claimant's Rights in February 2009, and I understand that the Workers Rehabilitation and Compensation Advisory Committee presented the former Minister with recommendations regarding the Code in late 2009. It appears no progress has been made since then. I do not know the reason for the delay. The Review Team should insist on a Code being issued by the end of 2011.

I welcome any questions the Review Team may have in regard to these submissions and acknowledge that my submissions will be made publicly available at the conclusion of the review.

Wayne Lines
WorkCover Ombudsman
February 2011