

# Office of the WorkCover Ombudsman

## South Australia

**Forum:** Australian Institute of Administrative Law  
(SA Chapter)

**Date:** 14 July 2010

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### **“Promoting peace while the battle rages”**

#### **Introduction: The Battle Scene**

Workers compensation as a scheme for providing benefits and support to those injured at work is fraught with conflict. The principal act covering this scheme, *The Workers Rehabilitation and Compensation Act 1986* came into effect in 1987. When one surveys the history of the legislation and the workers compensation system it oversees, it could be likened to a war that has been waged over 3 decades. It is among the most politicised and polarising pieces of legislation currently in operation having been amended nearly 30 times since it came into operation.

Each time an amendment is proposed it is usually hotly contested both in parliament and in the course of public debate via the media. The amendments usually end up reflecting the intentions of the government of the day but watered down so as to gain broader acceptance in parliament and the community. The result is that many of the provisions of the Act are complicated and convoluted as they seek to incorporate a number of qualifications to their original design. This in turn has produced fertile ground for judicial challenge such that the Workers Compensation Tribunal has been one of the busiest specialist jurisdictions in this State. It handles around 4,500 notices of dispute each year<sup>1</sup>.

In fact, South Australia has the second highest number of new disputes as a proportion of new claims out of all the Australian States and Territories. Our disputation rate is almost twice the national average<sup>2</sup>.

This disputation rate is not only a result of the legislation. It is also a reflection on the way claims are managed and the adversarial approach taken by compensating authorities and employers on the one side and injured workers and their advocates on the other side. I think it is fair to say that there is not a lot of trust between these two sides. Employers and compensating authorities often think injured workers are trying to get more than they should, and injured workers often think that compensating authorities are trying to rip them off. In that sort of environment, decisions will be made by compensating authorities, often at the insistence of the employer, that will seek to escape or minimise

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<sup>1</sup> 2008/09 South Australian Industrial Relations Tribunals Annual Report, p22

<sup>2</sup> Workplace Relations Ministers' Council Comparative Performance Monitoring Report (11<sup>th</sup> Edition), December 2009, p36

their liability and injured workers, often with the encouragement of their advocates, will challenge everything possible. This attitude on both sides adds to the prevalence of formal disputation.

So it is not only the legislation that is contentious; the key players involved in the system also tend to take a combatant stance towards each other. I speak in generalities, but I think you get the picture: the workers compensation system is not for the faint-hearted.

### **Stepping Into the Fray: The WorkCover Ombudsman is Appointed**

In November 2006, the WorkCover Board presented a proposal for yet another round of changes to the legislation. The proposal cited poor return to work rates and a ballooning unfunded liability as the main reasons for the proposal. The government set up a task group to review the proposal and report back. The task group's report, known as The Clayton Walsh Report, was delivered in December 2007 and made 65 recommendations in response to WorkCover's proposal for changing the South Australian workers compensation scheme. Several of these were rather radical. For example, the report supported the introduction of capacity reviews after 130 weeks of weekly payments which would enable compensating authorities to cease payments if the worker had some capacity to work in suitable employment. It recommended the creation of an independent Medical Panel and for a change in the way assessments of permanent impairment are made. It also recommended that when weekly payments are stopped in accordance with the Act, they are not reinstated if the worker disputes the decision in the Tribunal, at least not until the dispute is resolved in the worker's favour.

Finally (but not least), the report recommended that "there be established the Office of South Australia WorkCover Ombudsman as an independent office reporting to the Minister for Industrial Relations" (Recommendation 65). The recommendation was that the Office discharge a complaints investigation role in relation to the operation of the WorkCover scheme and have the capacity to undertake wider analysis of any systemic aspects underlying complaints.

The Report also recommended that the Office have a role in monitoring the nature and quality of decision making in relation to key impact areas within the scheme such as the proposed 130 week review and termination of payments (Recommendation 26).

It is interesting to note that one of the reasons the Review gave for this recommendation is that it recognised that removing the reinstatement of weekly payments while a decision to stop payments was being disputed in the Tribunal required a strong accountability measure. It believed that an Ombudsman would be one of those accountability measures that would provide "a significant countervailing force to the prospect that such a change may provide an opportunity for unmeritorious claims determination ... and practices" on the part of the compensating authority<sup>3</sup>. So it can be said that the genesis of my Office can be traced back to the distrust that surrounds the compensating authority's approach to decision making.

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<sup>3</sup> Review of the South Australian Workers Compensation System Report, December 2007, p141

The Government accepted the majority of these recommendations including the establishment of the WorkCover Ombudsman's Office. While unions were vehemently opposed to most of the changes, they were supportive of having an Ombudsman specific to the scheme. Indeed, they demanded it as a way of reassuring the work injured that the proposed changes to the scheme would be implemented fairly and under the scrutiny of an independent officer. The 2008 amendments were the subject of heated debate both inside and outside of Parliament for the first part of the year, but were passed in the Upper House after an all night session on 17 June 2008 and promptly came into effect from 1 July 2008.

With surprising alacrity, the Minister for Industrial Relations appointed me as the acting WorkCover Ombudsman effective from 1 July 2008.

After a year in the job, I was appointed for 5 years from 1 July 2009. Currently, the Office consists of 3 staff in addition to me. Our office is located at Level 6, Chesser House 91-97 Grenfell Street, Adelaide.

Prior to my appointment, I enjoyed a legal career that spanned 25 years. In that time, I worked predominantly in the workers compensation field and appeared in the Tribunal in hundreds of cases. I had no illusions about what I was stepping into by taking on the WorkCover Ombudsman position. Even so, while the system is fraught with conflict, I have relished the opportunity that the position gives me to promote peace.

### **Promoting Peace: The WorkCover Ombudsman's Functions and Powers**

So how do I promote peace while the battle rages? The Act gives me some clearly described functions to perform and these give me an entrée to reducing conflict. Underlying them all is that I act independently, impartially and in the public interest. This allows me to act for the greater good rather than for one side or the other and with an eye on how to improve the scheme so that it operates in a fair and effective way.

Pursuant to Section 99D of the Act, I am empowered to:

- review the operation of the *Workers Rehabilitation and Compensation Act 1986* and recommend improvements;
- investigate complaints from workers, employers and other interested parties about administrative acts under the Act and seek to resolve those complaints;
- assist WorkCover SA and employers to establish their own processes for handling complaints.

In addition, I have the role of reviewing decisions to cease weekly payments under section 36(15) of the Act.

### Reviewing the Act and recommending improvements

At various times, I have been able to raise issues with the Minister for Industrial Relations, WorkCoverSA, their claims agent Employers Mutual and with self-insured employers and suggest improvements to certain processes.

One example of this relates to the procedure for deciding whether an employer has a continuing obligation to provide suitable employment to an injured employee. The procedure that was in place when I began the job lacked transparency and procedural fairness. Quite often the decision would be made without the worker's knowledge. Sometimes not even the employer would know either. They would simply receive a letter saying that it had been decided that the pre-injury employer could no longer provide suitable work and the worker's rehabilitation goal was now redefined as seeking employment with another employer.

At my insistence the procedure has been revised and now includes the case manager having a face to face meeting with both the worker and the employer and inviting information from them before a decision is made. The letter that notifies the worker and employer of the decision will also outline the investigations undertaken and the reasons for the decision. There is also a review process if either party challenges the decision. The procedure has been approved by the WorkCover Board and is soon to be implemented. I will be monitoring this.

By ensuring that processes like this follow the principles of procedural fairness and actually engage the people that are affected by the outcome of the process, the potential for confusion and dissatisfaction is reduced.

#### Investigation of Complaints

The office has received 100 formal complaints in each of the last 2 financial years. Around 90% of these are lodged by or on behalf of injured workers.

As a complaint investigation agency, my office is acting as a kind of release valve: reducing the pressure building up between 2 sides at logger heads. Injured workers are grateful that there is someone independent of the compensating authority that can look into a situation and help break a stalemate. The compensating authority is also supportive of my role. I can cast an objective eye over what they have done and either validate it or identify problems that they can address. Either way, my involvement usually eases the tension between the parties.

This function also provides me with an opportunity to provide constructive criticism to WorkCoverSA and self-insured employers. In the last 2 years I have made over 100 recommendations to address specific complaints. All but a couple of these have been adopted; a rather good uptake, I suggest.

My role in receiving and investigating complaints helps to reduce friction between the parties and improve the way services are delivered to the benefit of others.

#### Internal Complaint Handling Processes

I have a role in assisting WorkCover SA and employers to establish their own processes for handling complaints. I have now completed my review of the complaint handling processes of all 81 self-insured employers plus WorkCoverSA and Employers Mutual. They have satisfied me that they have reasonable processes in place. This allows me to encourage complainants to attempt to resolve their complaint internally before escalating it to my office.

Besides making it possible for me to keep my office's workload manageable, a resolution achieved internally is usually quicker and more satisfying to the parties.

A recent survey of 1500 injured workers conducted on behalf of WorkCoverSA revealed that 50% of them wanted to make a complaint about the services they received and around half of these actually proceeded with a complaint<sup>4</sup>. These statistics highlight the level of dissatisfaction with the system and the importance of WorkCoverSA and self-insured employers having effective complaint handling processes. There would be even more frustration and hostility evident if these processes were not in place.

#### Review of Decisions to Cease Payments

I am empowered by Section 36(15) of the Act to review decisions to discontinue weekly payments. I can suspend those decisions while the dispute is proceeding before the Workers Compensation Tribunal where it appears to me that the decision is not "reasonably open". If I suspend a decision, the worker has the benefit of the weekly payments continuing while the dispute is being sorted out in the Tribunal. If the decision is not suspended, the worker misses out.

To avoid suspension, the decision maker only has to satisfy me that the decision is reasonably open. This is not a high threshold. It is really no more than showing that the decision is defensible. In other words, it has to be arguable on the law and the facts. I do not have to be convinced that the Tribunal will agree with it. My review is similar to deciding an application for summary determination of a dispute.

My involvement has had a 2 fold effect.

The first effect relates to the quality of decision making. In the first 12 months of operation I suspended 40% of decisions reviewed (53 out of 137). While I had nothing to compare this to, it seemed too high. It was a rather alarming figure and reference was made to it in the media after my annual report was tabled in Parliament last October. In the 2009/10 financial year I have reviewed 190 decisions and suspended only 28 of them (at a rate of 14%); a much more acceptable rate.

This improvement is largely the result of WorkCover's claims agent, Employers Mutual, responding to my criticisms of their decision making process in the first 12 months. They improved the quality of the evidence they obtained to support their decisions and added a couple of internal quality assurance measures. Hence, my scrutiny of their decisions has led to improved decision making.

Secondly, my involvement has impacted on the outcome of disputes. From feedback received from applicants, it is evident that most of the decisions I have suspended on a review, have been conceded at an early stage in the Tribunal.

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<sup>4</sup> McGregor Tan Research Injured Workers Research Report, May 2010, p17

Improved decision making and reduced disputation in the Tribunal is good for the scheme. The role I have in reviewing decisions is contributing to this.

**Concluding Comments: Can there be Peace in our Time?**

My office exercises an independent scrutiny of the scheme that is having an impact. However, the culture of distrust and disputation is deep seated and I would be deluding myself if I thought that I could change things quickly. Winning the peace will take time and will have to be achieved in small steps.

In my mind's eye I often have this picture of myself standing in the middle of a battle field calling on the parties to cease hostilities and to take up peace talks, but my shouts are being drowned out by gun shots and cannon fire as the battle rages on around me. Nevertheless, there are signs that the warring parties are willing to give peace a chance and I will continue to utilize the functions given to me under the statute to promote that as much as possible.

It would be unrealistic to expect that peace will one day reign supreme where everyone is satisfied, but I dare to hope that the current level of conflict will be reduced and that in the next few years the scheme will operate in a much more satisfactory way for all involved.