



SA UNIONS

**Review of the Impact of the
Workers Rehabilitation and Compensation
(Scheme Review) Amendment Act 2008**

SA UNIONS SUBMISSION

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Unfair, Unbalanced and Unsuccessful

In 2008, the Rann Labor Government justified significant changes to the WorkCover Compensation system on the grounds that the scheme was in financial difficulty. His Government ripped away entitlements to injured workers with a promise to reduce premiums to employers.

Two years on it is clear that the changes have had a significant toll on the lives, income and sanity of those who are injured at work. In reality the very people the system is designed to assist have paid a high price for a reduction in the cost of the scheme for employers.

Our submission outlines evidence that the State Government's reckless social experiment played out on the most vulnerable workers in our community has failed.

- The return to work rate in SA is worse than any other state in Australia.
- Injured workers are treated appallingly by WorkCover's agent which is focussed on closing files rather than getting workers better and back to work.
- The rehabilitation system is broken and urgently needs fixing.
- Unaccountable Medical Panels make unilateral, final binding decisions that determine the future of worker's lives and cut them off from all support.
- Economic stress and threats to their income are used as blunt instruments to deny injured workers the right to dispute decisions and pressure workers to work while they are injured.

This review is an opportunity for the Parliament of South Australia to restore balance into our workers compensation scheme.

It is our view that our recommendations for changes in the law combined with reform of WorkCover policies and practices that treat workers with more compassion, focus on treatment, re-training and keeping people connected to the workplace and employment, will do far more to improve the financial bottom line of the SA Workers Compensation Scheme than continuing to penalise the victims of workplace injury and blame them for the cost of their own rehabilitation.

1.0 Summary and Recommendations

Weekly Payments

The 2008 step-downs of 10% and 20% that cut in at 13 and 26 weeks of incapacity were not justified by any solid evidence but have imposed considerable financial hardship on injured workers. This is especially so in relation to low paid workers, some of whom have had their weekly payments reduced to below the minimum wage.

Recommendations

1. Section 35 of the *Workers Rehabilitation and Compensation Act 1986* ('the Act') should be amended in order to restore weekly payments to their pre-2008 levels.
2. A legislative safety net is required to ensure that weekly payments do not fall below South Australia's minimum wage.

Work Capacity Reviews

The current work capacity review provisions are harsh, unreasonable and can impose severe financial hardship on injured workers with serious ongoing injuries. The work capacity review provisions epitomise the unfairness that now pervades the WorkCover scheme.

Recommendations

1. The Act should be amended to ensure that work capacity reviews are based on assessments of what injured workers have a realistic prospect of obtaining and should only be considered where all reasonably practical efforts have been undertaken to rehabilitate or retrain injured workers.
2. The Act should be amended to clarify that a work capacity review in relation to an injured worker's claim should not commence unless the worker has been in receipt of weekly payments for an aggregated period of 130 weeks.

Common Law

Workers' common law rights in South Australia were extinguished under the WorkCover legislation in exchange for ongoing access to weekly payments for injured workers unable to turn to work. The main purpose of the current work capacity review provisions, however, is to discontinue weekly payments to most of these workers.

Recommendation

1. The Act should be amended to ensure that work capacity reviews are based on assessments of what injured workers have a realistic prospect of obtaining and should only be considered where all reasonably practical efforts have been undertaken to rehabilitate or retrain injured workers.

2. The Act should be amended to clarify that a work capacity review in relation to an injured worker's claim should not commence unless the worker has been in receipt of weekly payments for an aggregated period of 130 weeks.

Non-Economic Loss Payments

The 2008 changes to Non-Economic Loss payments for workers who suffer permanent impairments as a result of their injuries were intended as a cost saving measure. The new provisions have also created anomalies which need to be addressed.

Recommendations

1. Section 43 of the Act should be amended to remove the 5% eligibility threshold.
2. Section 43 should also be amended to ensure that two or more permanent impairment resulting from separate injuries can be aggregated for NEL claims
3. The use of the *AMA Guides to the Evaluation of Permanent Impairment* be reviewed to ensure greater fairness and consistency.

Redemptions

There has been an over reliance by WorkCover on the use of redemptions as a liability reduction measure. This has detracted from a sharper focus on managing the return to work process. However, the current arrangements have resulted in the pendulum swinging too far the other way.

Recommendation

Section 42 of the Act should be amended to provide a greater degree of flexibility in the use of redemptions and to ensure that any applications, made by either a worker or the insuring authority, are referred to the Workers Compensation Tribunal for determination in the event of a dispute.

Discontinuance Provisions during Disputes

The current discontinuance provisions relating to disputes often impose severe hardship on workers who seek to challenge WorkCover claims decisions. In addition, they have increased the incentive for insurers to engage in bad faith claims management behaviour.

Recommendation

The relevant discontinuance provisions in section 36 of the Act should be repealed and replaced by the pre-2008 provisions.

Medical Panels

Medical Panels are becoming a major source of injustice within the WorkCover scheme in that they deny injured workers natural justice. They also lack transparency and accountability. In the event they are retained substantial changes will be needed.

Recommendations

Amendments to the Act are required to:

1. Limit the scope of Medical Panels to questions of whether a worker's disability is permanent and, if so, the level of impairment for the purposes of sections 43 and 43A,
2. Ensure workers are entitled to representation,
3. Provide for appeals against Medical Panel decisions, and that
4. Medical Panels operate under the jurisdiction of the Workers Compensation Tribunal.

WorkCover Ombudsman

The Office of the WorkCover Ombudsman needs to be strengthened in order to enhance its effectiveness.

Recommendations

1. Part 6C of the Act should be amended to give the WorkCover Ombudsman the power to issue enforceable directives where required.
2. Funding for the Office of the WorkCover Ombudsman should be increased to enable public enquiries into systemic abuses affecting injured workers to be conducted.

Code of Workers' Rights

A Code of Workers' Rights has potential to improve insurer and service provider accountability and inculcate a culture of respectfulness in the treatment of injured workers.

Recommendation

A Code of Workers' Rights should be developed in conjunction with the trade union movement and injured workers' organisations for inclusion as a Schedule to the Act.

Employer and WorkCover Behaviour

Behavioural changes since 2008, especially those associated with WorkCover and its agent have created an increasingly adversarial workers' compensation culture in South Australia. This culture is having a detrimental effect on the treatment and wellbeing of injured workers.

Recommendation

It is essential that the culture of mutual respect is created in which injured workers are treated with consideration rather than as 'claims' or numbers.

Retirement Age

Many workers are remaining in employment beyond the traditional 'retirement age' and this is likely to continue. At present, however, workers who do so may continue to be discriminated against in terms of eligibility for workers' compensation in the event of injury.

Recommendation

Section 35 should be amended to ensure that workers are not discriminated against in seeking compensation for work injuries on the basis of their age.

Impact on Employer Premiums

The major beneficiaries of the 2008 legislative changes have been employers as a result of premium reductions in 2010. This occurred, however, without any corresponding contribution to improving the WorkCover scheme's performance.

Recommendation

Any further reduction in employer premium rates should be based on improvements in return to work rates rather than reduced entitlements for injured workers.

Impact on Scheme Funding

There is considerable uncertainty regarding the future of the scheme's funding arising from the 2008 legislative changes. The scope for improvement in the funding position has also been compromised by the premature March 2010 decision to reduce employer premiums. In addition, WorkCover's failure to manage its vocational rehabilitation and return to work responsibilities continues to undermine the scheme's financial performance. Finally, poor decision-making under WorkCover's 'business Board' model, has contributed significantly to the scheme's sub standard return to work performance and its dismal financial performance and remains a matter of concern as far as the scheme's funding is concerned.

Recommendations

1. The Minister responsible for WorkCover should issue a formal direction to the WorkCover Board that any further reduction in employer premiums be put on hold until the scheme's unfunded liability has been eliminated.
2. WorkCover's management of vocational rehabilitation needs to be overhauled and decoupled from the corrosive 'insurance culture' that has chronically compromised the scheme's return to work performance.
3. The availability of retraining for injured workers should be incorporated as a core function within WorkCover's return to work framework.
4. The outsourcing of WorkCover's claims management function should be discontinued at the conclusion of the existing agent contract in 2012.
5. WorkCover should resume responsibility for the administration of section 58B of the Act at the earliest opportunity.

6. The Act should be amended to ensure that injured workers are entitled to select for rehabilitation provider of their choice.
7. Section 5 of the *WorkCover Corporation Act 1994* should be amended to establish a tripartite Board structure comprised of three nominees each from government, employer organisations and the trade union movement.

2.0 Origins of Workers' Compensation in SA

The advent of workers' compensation laws in Australia was one of the most momentous social and economic reforms of the early 20th century. Their emergence was a direct response to the horrific toll of injury, disease and work related death that accompanied the ever increasing mechanisation of production during the latter part of the 19th century.

The new laws provided financial assistance to eligible workers and their families as partial compensation for the loss of earnings that occurred as a result of employment based injuries and fatalities. In economic terms, workers' compensation amounted to the commodification of work related-injury – the price employers were required to pay for the damage to workers' health caused by unsafe working conditions.

It is difficult to overstate the importance of workers' compensation laws. Prior to their enactment, the only recourse to compensation for injured workers and their dependants was through civil actions in the courts. Apart from the often prohibitive cost involved, there were three virtually impenetrable legal defences available to employers which made the chances of obtaining compensation at common law most unlikely.

The first of these 'unholy trinity' defences was the doctrine of common employment which held that an employer could not be held liable for any injury caused by other workers employed by that employer. The second defence was based on the voluntary assumption of risk rule, according to which workers were responsible, as an implicit condition of their employment contract, for all the normal hazards encountered in their work. The third and final defence was provided by the then prevailing view of contributory negligence, whereby a claim for negligence against an employer would not be upheld if the actions of an injured worker contributed in any way to the injury.

It was against this background that pressure for change gained momentum. In South Australia the push for reform was championed by the reformist Premier, Charles Cameron Kingston, in the 1890s with the backing of the labour movement. However it was his parliamentary successor, Frederick Holder, who succeeded in enacting Australia's first workers' compensation statute in 1900. Other jurisdictions followed suit and by 1913 all Australian states had workers' compensation laws in place.

The first Australian statutes were based on the British *Workmen's Compensation Act* of 1897. As in Britain, coverage in South Australia was initially limited to workers employed in 'dangerous employment' such as that found in factories, mines, quarries, building and construction work. A further restriction was that eligibility was based on a narrow definition of injury and confined to circumstances in which an injury 'arose out of and in the course of employment'. Compensation payments were low and only payable if a worker was disabled for more than a week. The most an injured worker could receive was 50% of pre-injury earnings for a period of up to three years. In the case of a fatality the same provisions applied if there were any dependents.

Apart from these statutory payments, workers could also seek common law damages. However, it was almost eight decades later, after the 'unholy trinity'

defences had been dismantled and legal representation had become more affordable, before the right to pursue common law damages for negligence became a realistic option for injured workers.

Despite these seemingly inauspicious beginnings the new legislation heralded the transformation of the policy landscape in Australia regarding compensation for work injuries.

In the first instance, it provided a measure of certainty and security in relation to compensation. This in turn served to mitigate the abject financial hardship that almost invariably accompanied a serious work related injury or death.

Second, it established the 'no-fault' principle as the foundation for compensation. In doing so it largely sidelined the traditional legal framework within which compensation was only awarded if negligence could be proven. Under the no-fault principle compensation was payable wherever an injury could be shown to be work related, regardless of whose fault it was.

Third, employer liability for work related injury became the basis for financing workers' compensation. This new financial framework for compensation reflected changes in public opinion which increasingly held that employers should bear much of the cost for the loss of life and limb occasioned by the seemingly relentless progress of modern industry.

The introduction of workers' compensation laws also signalled an emerging shift in the role of the state in dealing with pressing social and economic issues. In the 19th century compensation for work injury was overwhelmingly regarded as a private responsibility to be resolved by individuals in the labour market or the courts. By contrast, the introduction of workers' compensation legislation highlighted the crucial role of government in providing public solutions to social problems. In doing so it, foreshadowed the emergence of the welfare state and the view that government intervention is essential to the wellbeing of its citizens.

2.1 Improvements in Workers' Entitlements

Over the ensuing decades many important changes were made that built on the legislative foundations established in 1900.

In 1911 the Verran Labor government enacted amendments that extended coverage to substantially increase the number of workers eligible for compensation. In addition, explicit provision was made to enable workers to claim compensation for industrial diseases.

This was followed in 1924 by amendments adopted by the Hill Labor government which introduced lump sum payments for workers whose injuries resulted in the loss of body parts and made it compulsory for employers to take out workers' compensation insurance. The waiting period was also reduced from seven to three days, and following a further amendment in 1925 to one day.

During the period from 1933 to 1965 the Liberal Country League held the reins of government and improvements in workers' entitlements came to a virtual standstill. One of the very few exceptions was in 1954 when Sir Thomas Playford's LCL

government restructured the maximum amount of compensation that could be received. Previously there had been a combined upper limit on statutory compensation payments. Thus, any amount obtained by way of lump sum compensation automatically reduced the total amount available for weekly payments – an arrangement that disadvantaged seriously injured workers. The 1954 amendments severed this link and established separate upper limits for weekly payments and lump sum compensation.

Following the return to office of Labor in 1965 the Walsh government succeeded the following year in passing amendments that eased the work relatedness test and broadened eligibility to include journey injuries on the way to and from work.

The 1970s, under Labor's Premier Don Dunstan, was a period of accelerated change that reinforced Labor's credentials as a champion of the rights of injured workers. This was reflected in its overhaul of the existing legislation. In 1971 a new Act was passed that expanded workers' entitlements in several important areas.

Weekly payments were increased to 85% of average weekly earnings, and lump sum payments for work related fatalities and permanent disability were increased by 50% and 25% respectively and the definitions of 'injury' and 'disease' were broadened. In addition, responsibility for the resolution of disputes over workers' payments and employer liability was transferred to the Industrial Court in an effort to reduce the often inordinate delays that had become an ingrained feature of the scheme.

Further changes were initiated during 1973, the most notable of which were the step-up in weekly payments to 100% of a worker's average weekly earnings and another round of substantial increases in lump sum payments.

Another significant change was the decision to retitle the legislation, which since its inception had been couched exclusively in terms of male workers. This reform occurred in 1979 when the *Workmen's Compensation Act* became the *Workers' Compensation Act* and reflected the Labor government's commitment to a more inclusive approach to the treatment of women.

3.0 The Modernisation of the Workers' Compensation System

Despite these improvements it became increasingly apparent in Australia during the latter part of 1970s that workers' compensation schemes were becoming increasingly dysfunctional and expensive. The symptoms of this malaise included protracted disputes over workers' claims, the lack of any linkages between workers' compensation and the prevention of work injuries, the absence of any real efforts to rehabilitate injured workers and the poor performance of private insurance companies, which in South Australia were responsible for the administration and financing the scheme.

Labor's response was to order a comprehensive review of workers' compensation arrangements in South Australia. Established by Deputy Premier Jack Wright in 1978, the Byrne Committee reported back to government in June 1980 with a blueprint for reform (Byrne 1980). By that time, however, Labor had lost office and it was not until its return in 1983 that the Bannon government resumed the task of modernising South Australia's workers' compensation system. With strong support from the trade union movement, legislation for a new Act, the *Workers Rehabilitation and Compensation Act 1986* ('the Act') was subsequently passed three years later in late 1986.

The new WorkCover scheme which came into operation in September 1987 had a number of distinctive scheme design features.

First, the new scheme was publicly owned and operated; and replaced the 55 insurance companies that had previously administered and underwritten workers' compensation in South Australia.

Second, vocational rehabilitation became the centrepiece of the scheme and was regarded as the essential ingredient in getting injured workers back into suitable employment and reducing scheme costs.

Third, the introduction of the WorkCover scheme was accompanied by an overhaul of the state's OHS legislation in a concerted effort to reduce work-related injuries and fatalities.

Fourth, the average premium rate was reduced to 3% of payroll. This provided considerable financial benefits for employers, particularly in light of the rapid escalation in premiums that occurred during the 1970s through to the mid 1980s.

Fifth, entitlements were increased for injured workers. The most significant change was the removal of the artificial limit placed on an injured worker's on going entitlement to weekly payments. Under the new arrangements, payments could continue to retirement age in cases where a worker was unable to return to work as a result of the incapacity caused by their injury.

Sixth, a new dispute resolution based on a specialist Workers Compensation Tribunal was established to provide assistance to workers and employers in resolving claims disputes in an independent, fair and timely manner.

3.1 Mismanaging the WorkCover Scheme

The WorkCover scheme has been a far more complex scheme to manage than its predecessors. This is largely because it is a 'long tail' scheme. In 'short tail' schemes payments are automatically discontinued after a specified period or once a dollar limit has been reached. By contrast, weekly payments in a 'long tail' scheme may continue for an extended period where an injury results in an ongoing incapacity for work.

This difference in scheme dynamics requires a more sophisticated approach to scheme management. The most important component is the need for a thorough understanding of the return to work process, the many barriers involved and strategies for overcoming these difficulties

A deeply ingrained and persistent problem, however, has been the insurance industry mentality that has dominated WorkCover's management culture for most of its existence. This 'insurance culture' can be summarised as a claims management focus on discontinuing entitlements rather than assisting claimants return to work, an often antagonistic attitude towards injured workers and a fixation with process rather than results. While efforts were made to change this antiquated culture during the late 1980s and early 1990s the results were short-lived.

Some of the more obvious aspects of the 'insurance culture' that has underpinned WorkCover's management of the scheme can be described as follows:

- Claims management is essentially office-based and conducted over the phone and by correspondence. There is rarely face to face contact between case managers and injured workers. This lack of personal contact reinforces the system's treatment of workers as little more than 'claims'.
- Claims management tends to be driven by narrowly based legislative and administrative considerations. This frequently creates return to work barriers, while in other cases it results in barriers not being identified or addressed at an early stage.
- Case managers often lack experience and in many cases appear to be poorly trained. This is frequently compounded by a lack of life experience, people skills and maturity in dealing effectively with the complexities involved with claims management.
- A rapid turnover of case managers is a further problem. In 2007 alone there was a staggering turnover rate of almost 40%. High case manager turnover undermines service delivery, creates unnecessary conflict and causes a great deal of anxiety and frustration among injured workers.
- The emphasis on discontinuing workers' entitlements inevitably gives rise to poor decision-making. In doing so, it creates additional delays and hurdles which often frustrate the return to work process for injured workers and employers.

Similar concerns to those raised here have also been expressed by some employers. In its 2007 submission the Self Insurers of South Australia (SISA) emphasised that WorkCover's inability to effectively manage its vocational rehabilitation responsibilities were primarily due to its 'insurance culture' (SISA 2007: 6-8).

The Brown Liberal government's 1995 decision to outsource the WorkCover's claims management responsibilities to private insurance companies has also been a major problem. The outsourcing decision was an ideological response rather than a carefully thought out plan to improve the scheme's performance. At the time, it was claimed that outsourcing would reduce the cost of running the scheme by 10%-15% a year. Instead, administration costs increased. During the period from 1996 to 2008 there was actually an annual 'outsourcing loading' of 11% (Purse 2009: 451). Claims that outsourcing would improve WorkCover's funding position and provide better service to injured workers and employers similarly failed to materialise (Ibid: 452-455).

The outsourcing of claims management also resulted in a loss of control by WorkCover of its core business and its ability to effectively manage the scheme (Ibid: 454-455). This in turn has reinforced the insurance culture within both the management of WorkCover and its claims agents. Increasingly, redemptions were used in an attempt to the scheme's liabilities while programs to assist injured workers return to work took a back seat.

It was in this context in 2002 that the incoming Rann government set up the Stanley Inquiry, whose brief included a review of key aspects of the scheme's administration. The inquiry was highly critical of WorkCover and its agents in terms of their claims management practices and return to work performance. It recommended a number of changes to improve rehabilitation and that the outsourcing of claims management be discontinued (Stanley et al 2002: 19, 23).

The government, however, ignored the Stanley Inquiry recommendations. Instead, it changed the membership of the WorkCover Board. This was followed by the selection of a new CEO and, in 2006, the appointment of a single claims agent to replace its previous five agents. But in the absence of effective return to work programs and initiatives these moves were an exercise in changing the deckchairs on the Titanic and contributed to the scheme's ballooning unfunded liability, which by 2006 had escalated to \$694 million (WorkCover 2006: 4).

The lack of commitment to revitalising rehabilitation and developing innovative return to work programs has been one of the scheme's most chronic management failures. Between 2000 and 2006 expenditure on rehabilitation increased from \$8.4 million to \$19.3 million (WorkCover 2007: 6). Despite this 230% increase there was no corresponding improvement in WorkCover's return to work rates. This in turn contributed significantly to the scheme's abysmal financial performance.

Part of the problem has been the ineffective targeting of rehabilitation expenditure and a heavy handed bureaucratic monitoring of rehabilitation, combined with a one size fits all approach to the rehabilitation needs of injured workers.

More generally, rehabilitation has been subordinated to the needs of WorkCover's 'insurance culture'. This has been especially evident in WorkCover's use of rehabilitation providers to provide it with the means by which to drastically reduce or terminate weekly payments to injured workers through the two (or more recently, 2 1/2) year review process. In other words, rehabilitation services have been used in attempts by WorkCover and its agents to get injured workers off the books rather than assist them return to work.

In its 2006 review of WorkCover's operations by the WorkCover Board there was no examination of any of the problems attributable to the scheme's claims management philosophy, outsourcing arrangements or rehabilitation performance. In the Board's view the scheme's problems were due to injured workers and the level of their entitlements. This view was largely shared by the business consultants brought in by the government as part of a broader review the following year.

As with the WorkCover Board, the consultants thought the main issue was one of 'incentives' and that the scheme's return to work performance would improve if entitlements to injured workers were cut. There was no consideration given to 'incentives' in relation to other scheme participants, whether WorkCover, its agents or employers. The real issues were papered over and the government enacted the most draconian workers' compensation legislation in South Australia's history.

4.0 The 2008 Legislative Changes to WorkCover

The Rann government's far reaching WorkCover changes were passed in June 2008 and phased in during the following 24 months. The changes of most significance were those which affected compensation payments to workers and restricted their legal rights to challenge claims decisions by WorkCover and its agent.

Other important changes included the introduction of provisional liability and the establishment of a WorkCover Ombudsman.

4.1 Weekly Payments

The most publicised aspect of the 2008 legislation was the changes in weekly payments, which were subjected to new step-downs and more stringent work capacity review provisions.

Prior to 2008, weekly payments were set at 100% of a worker's average weekly earnings for up to 12 months of incapacity before reducing to 80%. Under the new provisions step-downs kick in at 13 weeks of incapacity with weekly payments reducing to 90% and then 80% after 26 weeks.

The burden of these cost cutting measures has fallen predominantly on the most seriously injured workers.

4.2 Work Capacity Reviews

The new work capacity review provisions enable WorkCover to determine whether weekly payments continue beyond 130 weeks of incapacity. In terms of 'cost savings' this was the big ticket item of the 2008 amendments.

A work capacity review operates on the basis that an insurer can 'deem' a worker with a residual capacity for work capable of undertaking suitable employment, irrespective of whether the worker has any reasonable prospect of obtaining such employment. The new arrangements stipulate that entitlement to weekly payments ceases after 130 weeks except where a worker is determined as having "no current work capacity" and "likely to continue indefinitely to have no current work capacity" (SAWRCA 1986: s. 35B). And where a worker with a reduced work capacity and has returned to work on reduced hours for example his or her payments can be reduced or discontinued if the insurer determines that they are working to their maximum capacity (Ibid: s. 35C).

Although presented by the government and WorkCover as a means of improving the scheme's return to work rates, work capacity reviews are all about increasing discontinuance rates not improving return to work outcomes.

4.3 Death Payments

In contrast to other statutory payments, lump sum compensation for work related fatalities was substantially increased, to \$400,000. The provision of counselling services for dependents of workers killed as a result of their employment accompanied this increase. In overall terms the annual cost of these changes is

minimal, but nevertheless of considerable benefit for the small number of families affected by these tragedies.

4.4 Non Economic Loss Payments

These one off lump sum payments have traditionally been paid to workers who suffer a permanent disability as a result of their injury. In 2008 the maximum amount was increased to \$400,000. This was accompanied by the introduction of a 5% threshold. Changes in the method by which lump sum payments are to be assessed were also foreshadowed.

The \$400,000 headline figure was used to create the impression that workers would get a better deal under the new arrangements. It overshadowed the fact, however, that the new NEL provisions were designed as a 'cost saving' measure (WorkCover 2006: 32).

4.5 Redemptions

Redemptions are a one off lump sum payment that enables an insurer to finalise its liability for individual claims.

Redemptions have been a scheme design feature of the WorkCover system since its inception in 1987. The use of redemptions is also an integral part of workers' compensation of legislation elsewhere in Australia, although the conditions under which they are available vary significantly from jurisdiction to jurisdiction.

As a result of the 2008 amendments the use of redemption has become much more limited since July 2010. It should be noted though that the wording of section 42(2)(e) of the Act provides WorkCover with the necessary capability to once again turn on the redemptions tap should it decide to do so.

There is a widespread view that WorkCover's current redemption policy has swung too far from what it was. This position is shared by many employers and legal professionals as well as trade unions.

4.6 Discontinuance Provisions during Disputes

Prior to July 2008 a worker involved in a claims dispute with WorkCover was generally entitled to ongoing weekly payments pending the outcome of the dispute. This procedure was designed to discourage bad faith behaviour in which claims disputes can be manufactured for economic gain by insurers, as opposed to treating workers' claims dealt on their merits.

Bad faith behaviour by insurers was not uncommon under the 1971 Act. Prohibiting this type of bad faith behaviour was one of the significant achievements of the 1986 WorkCover reforms.

The 2008 amendments have overturned this arrangement. Since then, payments are discontinued when disputes occur and only reinstated if the dispute is resolved in the worker's favour. In effect, the new arrangements represent a return to the pre-WorkCover era in which 'starving out the worker' was often standard operational practice.

It is equivalent of a 100% step-down. As the resolution of claims disputes can often take several months, this is a very harsh measure.

4.7 Medical Panels

The introduction of Medical Panels was another scheme design borrowed largely from the Victorian scheme.

The Panels came into operation in July 2009, with each Panel comprised of as many as five medical practitioners. The Panels operate under the aegis of Medical Panels SA.

The role of Medical Panels is supposedly to provide 'opinions' on medical questions. There are 18 categories of medical questions, 17 of which are specific and one which is a catch-all provision. The definition of 'medical questions' is so wide that it encompasses issues that go far beyond what would normally be considered as strictly medical issues. Matters of law and fact also come within the ambit of the Panels, even though their members have no particular training or expertise in these areas.

Workers required to attend a Medical Panel are prohibited from being represented by a lawyer or lay advocate. They are expected to deal with up to 5 doctors on contested aspects of their claims.

Under the WorkCover legislation as it now stands, 'opinions' reached by Medical Panels are supposed to be binding. On this interpretation, injured workers are not entitled to appeal Panel opinions.

4.8 Provisional Liability

Provisional liability arrangements enable weekly payments to be made to injured workers on an interim basis so that full consideration of their compensation claims can be undertaken. In Australia, provisional liability was pioneered in Tasmania and New South Wales.

The South Australian provisions are based on New South Wales legislation and authorise interim payments to be paid for up to 13 weeks. There is also provision for medical expenses to be paid on an interim basis subject to a maximum amount.

Although the administration of the provisional liability arrangements has often been incompetently handled it remains as one of the few beneficial changes to emerge from the 2008 overhaul of the scheme.

4.9 Calculation of Average Weekly Earnings

The 2008 amendments to the calculation of average weekly earnings have also been beneficial.

Once again, the administration of this provision has frequently been poorly handled by WorkCover's claims agent mainly because of failures to obtain accurate details of workers' pre-injury wages.

Nevertheless, the number of disputes over average weekly earnings has declined and thus has reduced an unnecessary source of conflict.

4.10 WorkCover Ombudsman

In principle the Office of the WorkCover Ombudsman is an important structural reform that could contribute to greater accountability within the WorkCover system. All workers' compensation schemes contain possibilities for abuses. Where an Ombudsman has the scope, powers and resources to effectively investigate such abuses this can improve both a scheme's equity and efficiency.

As currently constituted the Office of WorkCover Ombudsman has yet to achieve these objectives. More particularly, it has been largely unable to effectively address many of the complaints and other abuses that confront injured workers under the post 2008 WorkCover regime.

In no small part this has been due to resource constraints and limitations on the Ombudsman's powers

4.11 Retirement Age

The amendment to the Act which enables workers who incur a work-related incapacity "within 2 years of retirement age or above retirement age" (SAWRCA 1986: s. 35) for a period of up to two years is also a step in the right direction. In a limited way it acknowledges the reality that many workers are now working beyond the age of 65.

In light of the demographic changes over the last 30 years which have led to the ageing of the South Australian workforce, the trend whereby more and more workers remain in employment beyond normal retirement age will continue into the foreseeable future.

Workers' compensation laws, however, are failing to keep abreast of these demographic developments, with the result that those workers who choose to work beyond the age of 65 may be denied coverage for workers' compensation in the event of work-related-injury.

5.0 The Impact on Injured Workers

There are a number of difficulties and uncertainties in assessing the full impact of the 2008 amendments on injured workers.

Apart from the fact that the new provisions have not been fully implemented, there is a lack of publicly available statistical data that could facilitate a more complete assessment of individual components of the 2008 legislative package. In addition, the more controversial aspects of package, especially WorkCover's interpretation of the work capacity review and Medical Panel provisions, are only now beginning to be tested by the Full Bench of the Workers Compensation Tribunal and the Supreme Court of South Australia.

Until these issues have been resolved a full assessment is not possible. Evidence is available, however, from a number of other sources which enable a reasonably accurate assessment to be made. The sources include the views of injured workers, union advocates, government Ministers, lawyers specialising in workers' compensation matters, employers and research commissioned from the University of South Australia. In addition, it is also readily apparent that the reasons given for many of the policy positions underpinning the 2008 changes were not evidence based and do not stand up to serious scrutiny.

5.1 General Observations

Both the thrust and general impact of the 2008 amendments are already quite clear. This is hardly surprising given that the 2008 amendment Act is the most draconian workers' compensation statute passed by a South Australian parliament in the state's history.

It doesn't require a lot of imagination, only a modicum of common sense and empathy, to appreciate that a 10% or 20% reduction in a injured worker's income can impose financial hardship on that person and his or her family. In cases of a 100% step-down, such as can happen to injured workers subjected to the current work capacity review provisions, the impact can be devastating, with individuals being condemned to poverty.

The Minister responsible for the introduction of the 2008 changes came close to acknowledging these problems when he indicated that there were measures within the package that were "blunt instruments" and specifically referred to the new step-down and work capacity review amendments as obvious examples (SAPD 2008a: 2824).

Employers were even more forthcoming in recognising the true nature of the 2008 changes. In a poll conducted by the state's largest newspaper, employers were asked if they agreed or disagreed with the proposition that the changes would "provide fair support to injured workers" (Advertiser 2008: 50). A total of 39.8% thought they would not, which was higher than the 37.6% who did (Ibid.). In addition, 44.1% indicated they did not support the government's changes - a slightly higher percentage than the 43.6% that did (Ibid.).

5.2 Weekly Payments

Since their introduction several thousand injured workers have been financially affected by the 2008 step-down arrangements.

WorkCover figures indicate there were 4,556 workers with income maintenance claims in 2008-09 and 6480 in 2009-10 (WorkCover 2009: 32, WorkCover 2010a: 6). These claims were from workers employed by WorkCover registered employers. WorkCover data also suggests that approximately 40.0% of these injured workers are unlikely to have returned to work within 13 weeks and 36.2% within 26 weeks (WorkCover 2009: 54).

On this basis, some 4,414 workers employed by registered employers have been adversely affected by the 10% step-down, over the first two years of its operation; while as many as 3,855 have also been affected by the 20% step-down.

These estimates understate the total number of workers who have been impacted, since they do not include figures for injured workers employed by self insurers. However, even on a conservative basis it is likely that a total of more than 5,000 seriously injured workers have had their weekly payments reduced by 10% and that over 4,000 of them have experienced a 20% reduction as a result of their injuries during the two year period to June 2010.

Workers affected by the step-downs suffer the equivalent of a 10% or 20% wage cut. This makes meeting ends difficult and places great strain on family budgets. It also creates a sense that they are being punished because of their injuries.

Feedback from interviews with trade union advocates and lawyers indicate that the partners of injured workers often try to work additional hours to compensate for the loss of family income caused by step-downs. The financial pressure on injured workers to return to work before the step-downs cut in, or get worse, also means that workers frequently go back to work before they have recovered. In turn, this increases the probability that their return to work will be non durable, and highlights the perverse incentive effects of step-downs.

The impact of step-downs is felt most keenly by low paid workers - especially female workers who are disproportionately represented amongst the low paid - who usually struggle to make ends meet in the first place. In the case, for example, of industrial cleaners and retail industry workers step-downs can also mean that their weekly payments end up lower than the minimum wage.

The prospect of step-downs also actively discourages some workers from lodging claims. Instead, they use accrued sick leave where this is available or their annual leave entitlements rather than exercise their legal right to seek workers' compensation for their injuries. This is another perverse incentive effect and serves to emphasise the unfairness of the current system.

The rationale for step-downs is that if weekly payments are too 'generous' they will undermine the motivation of injured workers to return to work.

Although it forms part of the conventional wisdom in workers' compensation circles, this claim has not been proven and remains as a highly contested and controversial

issue. The matter is compounded further because none of the Australian schemes effectively measure return to work rates!

The only data currently available are short term snapshots of injured workers interviewed after having been in receipt of weekly payments for between seven and nine months. What the figures clearly show though is that there is no clear correlation between weekly payments and return to work rates. Schemes with high weekly payments can have better return to work rates than those which do not and vice versa.

In WorkCover's 2008 campaign to cut weekly payments in South Australia it implied the Victorian scheme's return to work rate was better than that of South Australia because of Victoria's tougher step-down regime. To this effect it cited figures from 2005-06 which apparently indicated that Victoria had a return to work rate of 85% compared to 77% in South Australia (WorkCover 2006: 9).

This comparison though was inevitably biased because 2005-06 was the year in which WorkCover replaced its five former claims agents with the current agent. The changeover was an understandably disruptive period in which the outgoing agents were de-motivated as a result of losing their contracts while the new agent was struggling to get up to speed.

When comparisons are made over a longer period a dramatically different picture emerges. In the five year period prior to 2005-06, the South Australian annual return to work rate was either identical to, or only marginally lower than, the Victorian rate (Campbell 2001-2005: 1). This was despite the fact that in Victoria weekly payments commenced with an immediate step-down to 95% of a worker's average weekly earnings followed by a further step-down to 75% at 26 weeks of incapacity whereas in South Australia, at the time, weekly payments remained at 100% throughout the survey period.

Since the introduction of the new step-downs, the South Australian return to work rate has not exceeded 80%. This not only remains lower than the national average of 85% (Campbell 2010: 4) but, more significantly, the 82% return to work rate which prevailed in South Australia during the first part of the decade when weekly payments were substantially higher than what they are now (Campbell 2001-2005: 1).

Also highly relevant is the stance adopted by SISA, particularly as its members employ about 36% of South Australia's workers. In its submission to the WorkCover Review it summarised its position as follows:

In our view, the changed income maintenance step-downs would in some cases be having an overall negative impact on workers and return to work performance without doing much to improve the scheme. We take the view that relatively few workers actually need the prodding effect of step-downs – in our experience, the majority of workers return to work without much interaction with the scheme. (SISA 2011: 6).

Interestingly, SISA also makes the point that some self insurers don't actually bother with applying the step-down provisions, as they are not viewed as either necessary or desirable other than in exceptional circumstances (Ibid.).

More generally, self insurers were well able to manage their return to this is work obligations workers' compensation liabilities under the pre-2008 weekly payment arrangements. This reinforces our view that the current step-down provisions were neither desirable nor necessary. It also suggests that there are some valuable lessons that WorkCover could learn from the best performing self insurers.

In relation to academic research, most of the literature draws on US studies based on econometric techniques underpinned by the notion of 'moral hazard'. Moral hazard is often described as 'the effect of insurance on incentives' (Arrow 1963: 961) and in workers' compensation circles is generally subscribed to as a matter of faith by insurers and many other scheme participants.

The doctrine holds that an increase in the level of weekly payments is likely to have undesirable incentive effects. In particular, it is argued that higher payments may result in workers taking less care of their own safety, induce them to lodge fraudulent claims or resort to malingering in order to avoid returning to work (Durbin 1997: 20-21, Hirsch 1997: 35, Myer, Viscusi and Durbin 1995:, Ruser 1998: 102, Krueger 1990: 74, Moore and Viscusi 1990: 123, Smith 1990: 126, Moore and Viscusi 1989: 500, Wooden 1989: 230, and Chelius 1982: 236).

The empirical basis for these assertions rest on statistical findings that indicate higher payments are associated with an increase in claims numbers and their duration. The moral hazard interpretation of these findings, however, is open to criticism on several grounds.

For example, at any point in time, many workers in both Australia and the United States do not seek compensation for work related injuries (ABS 2006: 22, Biddle and Roberts 2003: 776). For various reasons they soldier on. An increase in payments, however, may encourage some to lodge a claim. This is a far more plausible explanation than otherwise unsubstantiated claims that higher payments lead to worker inattention to safety and fraudulent behaviour. Contrary to the moral hazard doctrine, too few rather than too many workers claim compensation for their injuries.

Similarly, claims of systemic fraud (Smith 1990: 126) have been rebutted by more sophisticated research (Card and McCall 1996: 704). More recently, following an extensive investigation, a 2003 parliamentary committee reached the conclusion that the incidence of worker fraud in Australia was "minimal" (HRSCEWR 2003: xxix).

Allegations that higher payments result in malingering are also less than compelling. Such claims are inferred rather than based on robust supporting evidence. Although statistically significant, the duration effects of higher payments are quite limited. Most estimates suggest that a 10% increase in payments would result in a claims duration increase of between 2% to 5% (Butler 1994: 385, Schmid 2009: 30). In other words, claims duration may not be as sensitive to payment increases as is commonly thought. More critical research, employing more sophisticated econometric techniques challenges some of the key assumptions underpinning mainstream studies, goes further and suggests that the duration effect may be in the order of only 1% (Campolieti 1999: 516).

Thus, while there may be an 'incentive' effect its magnitude is small. This is far from sufficient to substantiate charges of widespread malingering and claims that the

solution to this 'problem' is reductions in worker's entitlements. These contentions simply do not stack up against the evidence.

A more plausible explanation is that although higher payments may increase claims duration they may also assist the healing process and enhance the probability of a durable return to work. Indeed, even some moral hazard proponents have admitted that this interpretation of the evidence needs to be given proper consideration (Meyer et al 1995: 338).

Further support for this view is provided by a Canadian study that examined the return to work durability of 3,398 Ontario workers with permanent partial impairments. 85% succeeded in making an initial return to work, but by the end of the study period the number had fallen to less than 50%. The authors noted that workers with higher compensation levels "were less likely to experience multiple absences from work" (Butler et al 1995: 464), as the longer initial absences contributed to a more effective recovery from injury.

The flipside of this assessment is that lower compensation payments may undermine durable return to work outcomes. Ironically, this can result in longer claim durations and increased scheme costs.

More generally, the focus on the level of weekly payments as the major determinant of return to work is simplistic and diverts attention from other factors that shape the return to work process. This includes employer attitudes towards accommodating injured workers, the role of insurers in managing - or often mismanaging - claims and the crucial importance of effective rehabilitation. In terms of return to work outcomes, it would be far more productive to address the obstacles associated with these factors than the punitive and one-dimensional response of cutting weekly payments to injured workers.

In summary, the 2008 step-downs of 10% and 20% that cut in at 13 and 26 weeks of incapacity were not justified by any solid evidence but have imposed considerable financial hardship on injured workers. This is especially so in relation to low paid workers, some of whom have had their weekly payments reduced to below the minimum wage.

Recommendations

1. Section 35 of the Act should be amended in order to restore weekly payments to their pre-2008 levels.
2. A legislative safety net is required to ensure that weekly payments for injured workers do not fall below South Australia's minimum wage.

5.3 Work Capacity Reviews

The WorkCover legislation now presumes that seriously injured workers with *any* residual capacity for work can obtain suitable employment, and on this basis that their weekly payments can be terminated. Moreover, even where a worker had no work capacity at the time of a review, it is always possible for the insurer to concoct a case that they might have some capacity in the future and, on this basis, discontinue the worker's weekly payments.

However, the full impact of the new work capacity review provisions remains unclear and will probably remain so for some time. This is particularly so in light of challenges in the Workers Compensation Tribunal and the Supreme Court concerning WorkCover's interpretation of these provisions and the role of Medical Panels in the determination of suitable employment.

It is also apparent that administration of these provisions is being poorly managed by WorkCover and its agent. By way of illustration, discontinuance of weekly payments via work capacity reviews has been occurring where workers have not been in receipt of weekly payments for an aggregated a period of 130 weeks as required by the legislation. This has been compounded in some cases by the agent including time off work associated with a new injury to that of a prior injury! This incompetence has resulted in their entitlements being terminated and in substantial hardship for the workers involved.

More generally, the 2008 work capacity review provisions represent an unrealistic and profoundly unfair approach in that they:

- Fail to take into account that an incapacity arising from a serious injury often exceeds the extent of any residual capacity for work.
- Overlook the obvious fact that the return to work process is not exclusively the responsibility of injured workers but rather a joint responsibility of employers, workers, scheme administrators and service providers.
- Ignore the widespread discrimination that exists in the labour market against employing workers who have been WorkCover claimants, and especially those who have had serious injuries.
- Have encouraged abuses by WorkCover and claims agents through, for example, threats to injured workers of work capacity reviews as a means of pressuring them into accepting redemptions.
- Create a perverse systems effect which reduces the incentive to rehabilitate and retrain injured workers back into employment because of the expectation that most can be removed administratively from the scheme after 2 ½ years.

The harshness of the work capacity reviews provisions has understandably resulted in an increasing number of challenges to their validity being tested in the Workers Compensation Tribunal and the Supreme Court. This can be expected to continue for some considerable time into the future and in the process is likely to result in a growing backlog of cases and uncertainty regarding the scheme's direction and financial position.

A related observation is that if WorkCover was managing the return to work process properly it should be able to return virtually all injured workers capable of returning to work within a period of 130 weeks, and in the process dispense with much unnecessary litigation.

It is also important to recall that when WorkCover legislation was passed in 1986 and amended in 1992, workers' common law rights were extinguished in exchange for

ongoing access to weekly payments for injured workers unable to turn to-work. Since the main purpose of the current work capacity review provisions is to remove most of these injured workers from the scheme; there is now a strong, arguably compelling, case for the reintroduction of common law.

All other Australian states enable injured workers to pursue common law damages. Even the Victoria scheme, which provided much of the inspiration for the 2008 South Australian changes, enables seriously injured workers to seek common law damages from negligent employers.

Apart from compensation for their injuries, availability of common law damages also provides workers with a sense of 'closure' which is sadly missing under the current WorkCover arrangements.

In summary, the current work capacity review provisions are harsh, unreasonable and can impose severe financial hardship on injured workers with serious ongoing injuries. The work capacity review provisions epitomise the unfairness that now pervades the WorkCover scheme.

Recommendations

1. The Act should be amended to ensure that work capacity reviews are based on assessments of what injured workers have a realistic prospect of obtaining and should only be considered where all reasonably practical efforts have been undertaken to rehabilitate or retrain injured workers.
2. The Act should be amended to clarify that a work capacity review in relation to an injured worker's claim should not commence unless the worker has been in receipt of weekly payments for an aggregated period of 130 weeks.

5.4 Non Economic Loss Payments

As indicated earlier, 'cost savings' at the expense of injured workers' entitlements was at the heart of the 2008 NEL changes. It is intended that savings will be achieved in part through the use of new assessment guidelines based on the *AMA Guides to the Evaluation of Permanent Impairment*. Despite the aura of objectivity surrounding their use, the *Guides* have been widely criticised as lacking 'a comprehensive, valid, reliable, unbiased, and evidence based system for rating impairments' (Speiler et al 2000: 519). A related criticism is that the rating methodology used results in many impairments being rated at 'inappropriately low levels' (Ibid: 521). The combined effect of these shortcomings is that they enable workers' compensation schemes to under compensate injured workers on the basis of pseudoscientific impairment ratings.

The other main avenue by which savings are expected is the 5% eligibility threshold that now applies to NEL payments. At face value a 5% threshold may not sound like a major hurdle. But in practice it means that NEL payments will no longer be available to approximately 25% of injured workers with permanent impairments (WorkCover 2006: 30).

The new NEL provisions have also resulted in anomalies that have disadvantaged injured workers. To date, NEL claims involving the aggregation of two or more

impairments which arise from injuries in different years have been rejected by WorkCover. By way of example:

Cyril (not his real name) suffered a serious injury to his left hip in 2006. The claim was accepted for medical expenses and weekly payments. In 2008 he experienced difficulties with his right hip. A claim was lodged for the right hip and was accepted for medical and weekly payments however he only received 80% of the rate set in 2006 as the right hip injury was deemed to be a sequel to the original left hip injury. In 2009 an operation was carried out on his left hip. For section 43 purposes he was assessed by a specialist doctor and that assessment stated said that he had in total a 38% WPI. He was then assessed by another specialist as having a 16% WPI (right hip) and for the left hip he was assessed as having a 22%. As the original injury resulted in an extended period of work, the second injury was subject to the 20% step-down. That is, it was treated as an extension of the original injury. Cyril subsequently applied for a 38% WPI NEL payment based on the combined WPI values of the two injuries. His claim, however, was accepted on the basis of two separate payments of 16% and 22% respectively. Due to the scaling affects associated with WPI assessments he received \$43,000 less than a worker with the same level of impairment arising out of a single injury or two related injuries which occurred during the same year. In effect, Cyril's two injuries were treated as one injury as far as weekly payments and step-down were concerned but as separate injuries for NEL purposes.

This anomaly needs to be resolved and this can best be achieved by amending section 43 of the Act to ensure that two or more permanent impairment resulting from separate injuries can be aggregated for NEL claims.

The overall result of the 2008 changes is that approximately 0.5% to 1% of injured workers per annum with a permanent impairment may receive the maximum payment of \$400,000 while thousands of others will no longer be eligible for NEL compensation and many of those who are eligible will be short-changed (Ibid., WorkCover 2007: 7).

In summary, the 2008 changes to Non-Economic Loss payments for workers who suffer permanent impairments as a result of their injuries were intended as a cost saving measure. The new provisions have also created anomalies which need to be addressed.

Recommendations

1. Section 43 of the Act should be amended to remove the 5% eligibility threshold.
2. Section 43 should also be amended to ensure that two or more permanent impairment resulting from separate injuries can be aggregated for NEL claims
3. The use of the *AMA Guides to the Evaluation of Permanent Impairment* be reviewed to ensure greater fairness and consistency.

5.5 Redemptions

Redemptions are often used by insurers and scheme administrators as a liability management tool to reduce scheme costs. An over reliance on redemptions, however indicates a failure to manage the return to work process. The best that can be said is that they provide a stop-gap measure, at least in relation to long tail schemes.

It is also important to note that when redemption campaigns run out of steam, it is injured workers who end up paying the price for the lack of focus on return to work programs. Workers are also implicitly or otherwise blamed, along with their legal representatives, for the 'lump sum culture' set in train by insurers and scheme administrators, as is testified to by the New South Wales experience of the mid 1990s (Grellman 1997: 26) and the more recent South Australian experience (SAPD 2008b: 2313).

Since 2009 WorkCover has swung from an excessive reliance on redemptions to a situation in which they are rarely available at all. From a policy perspective, there has clearly been a longstanding need to place a greater emphasis on assisting injured workers return to work.

Nevertheless, there does need to be a greater degree of flexibility regarding the use of redemptions than is currently the case. Individual circumstances need to be taken into account. This is more obviously the case where rehabilitation efforts have been exhausted without achieving a return to work result, or where warranted by other relevant personal considerations.

In summary, there has been an over reliance by WorkCover on the use of redemptions as a liability reduction measure. This has detracted from a sharper focus on managing the return-to-work process. However, the current arrangements have resulted in the pendulum swinging too far the other way.

Recommendation

Section 42 of the Act should be amended to provide a greater degree of flexibility in the use of redemptions and to ensure that any applications, made by either a worker or the insuring authority, are referred to the Workers Compensation Tribunal for determination in the event of a dispute.

5.6 Discontinuance Provisions during Disputes

As acknowledged in the Clayton-Walsh report the introduction of this measure was expected to result in "a very substantial economic shock to the worker and their family" (BCSPWC 2007: 141). The report also noted that its introduction "may provide an opportunity for unmeritorious claims determination decisions and practices" (Ibid.).

This is now unquestionably the case. The new discontinuance provisions have dramatically increased the disparity in the power relationship between WorkCover and injured workers.

While workers still have the right to challenge claims decisions the cost of exercising that right can be exorbitant. On the other hand, WorkCover and its agent can manufacture disputes for economic reasons without due regard to the merits of workers' claims. A not uncommon example involves WorkCover discontinuing payments on the basis of a report from an independent medical examiner despite consistent reports from the treating doctor regarding the ongoing compensability of a worker's claim and the fact that the Workers Compensation Tribunal has generally been reluctant to overturn the treating doctor's assessment (OWOSA 2009: 8).

The result is that bargaining strength rather than the merit of the case has become an increasingly important determinant of a dispute's outcome. In a system that now enshrines perverse incentives, fairness has increasingly been replaced by capricious claims management decision making.

In terms of their financial impact, the new discontinuance provisions impose a 100% step-down for the duration of a dispute. Trade union advocates and lawyers indicate that these provisions are the source of increasing and, often severe, hardship for injured workers. Needless to say, they can give rise to much emotional distress and place great strain on a worker's budget; and especially so when the case drags on for several months as can be appreciated from the following example:

Peter (not his real name), a truck driver in his late forties suffered a debilitating lower back injury. He received compensation but because of the seriousness of the injury had to seek alternative employment. He eventually secured a job as a security officer but sometime later had a relapse and again sought and obtained compensation for the injury. Subsequently, WorkCover challenged his ongoing entitlement to compensation despite supporting evidence from his treating doctor. He appealed the decision but five months later it still had not been determined and he now expects to be evicted from his accommodation as he can no longer afford to pay the rent.

The iniquity of these discontinuance provisions has now been recognised by the government, when in late 2010 it foreshadowed amendments to this section of the WorkCover legislation. While its proposals to remedy the situation are clearly inadequate, this does not alter the fact that it has acknowledged that there is a serious problem that needs to be tackled addressed.

In summary, the current discontinuance provisions relating to disputes have often imposed severe hardships on workers who seek to challenge WorkCover claims decisions. In addition, they have increased the incentive for insurers to engage in bad faith claims management behaviour.

Recommendation

The relevant discontinuance provisions in section 36 of the Act should be repealed and replaced by the pre-2008 provisions.

5.7 Medical Panels

Although the other state schemes make provision for Medical Panels, or related bodies, their functions and powers differ substantially from those of South Australia and Victoria. In Queensland, for example, workers are entitled to representation and the definition of medical matters is more restricted (QWRACA 2003: ss. 511 and 500). A more restrictive approach to medical questions is also reflected in the Western Australian legislation (WAWCIMA 1981: s. 145A). In New South Wales medical determinations are not necessarily binding (NSWWIMWCA 1998: s. 121). And as in Tasmania (TWRACA 1988: s. 50) and the other two states, medical dispute resolution bodies in New South Wales are subject to greater scrutiny from the mainstream workers' compensation tribunal, rather than a virtual law unto themselves (NSWWIMWCA 1998: s.120). None of the specialist interstate bodies that deal with medical questions appears to be as harsh in their curtailment of the rights of injured workers as is the case in Victoria and now South Australia.

The justification offered by WorkCover in support of its preferred version of Medical Panels was that they "provide fast decision-making and remove the adversarial nature of the dispute where there is a disagreement between the worker, claims manager and employer" (WorkCover 2006: 41). This claim was repeated word for word by Clayton and Walsh in their 2007 report (BCSPWC 2007: 134).

While perhaps superficially attractive, this line of reasoning is disingenuous. Medical Panels do not remove the adversarial nature of contested claims; rather they shift the goalposts in relation to how claims may be contested, and do so in a manner that disadvantages one of the parties contesting a disputed claim. Nor do they necessarily provide 'fast decision-making'. As indicated in section 98H of the Act, Medical Panels have up to 60 days, or longer, to form an opinion on any medical issue referred to it. Compounding this is the fact that injured workers face the prospect of having their weekly payments suspended for the duration of this supposedly non adversarial dispute resolution process.

And with the number of matters referred to the Panels increasing so too is the backlog of cases to be heard. This has raised concerns that there will be even longer delays before opinions are handed down.

Attendance at Medical Panels can also be an intimidating experience for injured workers, as is illustrated by the following case study.

Fatima (not her real name) is a 35 year old woman, with a major knee injury and psychological overlay problems, who was referred by WorkCover's agent to a Medical Panel for an opinion because she disputed the agent's assessment that her psychological problems were largely attributable to her injury. The discontinuance of her weekly payments added to her distress. She was very anxious when she appeared before the Panel and experienced a panic attack when it commenced, which delayed proceedings. During the resumed proceedings, two of the panellists spent considerable time arguing about the psychological component of her claim, while the third appeared to be asleep. Most of the rest of the time was spent asking her questions regarding the history of her injury. Fatima described the process as humiliating, extremely stressful and demeaning. She felt alone and scared. It took another seven weeks before the opinion was provided, which was

another seven weeks during which she did not receive her weekly payments. As it turned out, the opinion was in her favour but she indicated the entire experience had been extremely traumatic for her.

Other concerns that have been raised in relation to the operation of Medical Panels include:

- The occasional Panel doctor conducting themselves as if they were interrogating a criminal rather than an injured worker.
- Complaints of further injuries sustained during Medical Panel examinations, or having existing symptoms aggravated.
- Medical Panel examinations where it appeared some members did not take any notes or speak at all during the examination and seemed to be there just to "make up the numbers".
- Documents being provided to workers at the last minute which meant they were afforded no real opportunity to obtain advice, review the material provided or gather further evidence in support of their case.
- Workers being contacted by Medical Panels and asked to attend an examination two days later and well before any documents had been provided.
- Panels often take material provided by the insurer on faith.

A more fundamental problem with Medical Panels though is that they do not afford natural justice to injured workers. Workers required to attend Medical Panels are not entitled to representation by lawyers or trade union advocates. Nor are they entitled to pursue an appeal in the Workers Compensation Tribunal in the event they disagree with a decision by the Panel. More generally, in the event of a miscarriage of justice there is no means of redress available.

It must also be noted that apart from a lack of accountability, there is no transparency in relation to the operation of Medical Panels. Medical Panels SA is not required to make its opinions available for public inspection. In addition, there is no obligation whatsoever for it to report on what it does. As currently constituted, Medical Panels are free to conduct their business behind a cloak of secrecy. There is not even a requirement to provide an Annual Report on its activities to either the government or the parliament.

Injured workers, like all Australian citizens, should be entitled to have their claims for compensation determined on a level playing field. But with the introduction of Medical Panels the axis of the playing field has been decisively tilted in favour of the insurer. This has had the effect of undermining the basic judicial principle that all parties should be given a reasonable opportunity to be heard on a disputed issue that directly affects them.

Medical Panels lack legitimacy and support in much of the South Australian workers' compensation community because they deny injured workers a basic human right - due process. In their current form, they are widely viewed as an extension of

WorkCover's claims management system, and in this capacity have become the source of much injustice.

If Medical Panels are to remain as part of the WorkCover scheme they need to be reformed.

The definition of medical questions needs to be confined to strictly medical issues. At present it is too broadly defined. For example, in one recent case the issue at stake before one of the Panels was the case law question of whether or not the worker's injury was work related or not. The interpretation of 'suitable employment' is another obvious area of concern. Consideration of this issue is not strictly a medical question either, as it also requires an assessment of various other matters including labour market issues such as a worker's education, work experience, skills, previous employment as well as the rehabilitation programs provided for the worker (SAWRCA 1986: s. 3). In another recent case:

WorkCover's agent maintained that Ken (not his real name) could obtain suitable employment as a Radio Dispatcher, Clerical Officer, Bar Attendant or Sales Assistant. The Panel decided that none of these positions constituted suitable employment. It then proceeded to pull a couple of rabbits out of a hat. The Panel opined that Ken could find suitable employment as a Video Surveillance Officer or a Union Delegate. This latter suggestion was bizarre and lacked even a rudimentary understanding of what constitutes a contract of employment. The Union Delegate role is an honorary, elected position determined by the majority of workers in a particular workplace - not an injured worker, let alone a Medical Panel - and is incidental to a paid job. As for the Video Surveillance Officer position, no explanation was offered by the Panel which indicated Ken had the skills, training or aptitude to carry out the duties involved.

In both these examples the questions under consideration were much broader than simply medical issues.

The rights to representation and appeal are also necessary reforms that are required. These rights are absolutely essential to ensure that justice is both done and is seen to be done. The legitimacy of the Panels also requires that they should no longer act as stand alone bodies but rather on the basis of referrals from the Workers Compensation Tribunal – a reform that would dramatically improve both their accountability and transparency.

In summary, Medical Panels are becoming a major source of injustice within the WorkCover scheme in that they deny injured workers natural justice. They also lack transparency and accountability. In the event they are retained substantial changes will be needed:

Recommendations

Amendments to the Act are required to:

- Limit the scope of Medical Panels to questions of whether a worker's disability is permanent and, if so, the level of impairment for the purposes of sections 43 and 43A,

- Ensure workers are entitled to representation,
- Provide for appeals against Medical Panel decisions, and that
- Medical Panels operate under the jurisdiction of the Workers Compensation Tribunal.

5.8 WorkCover Ombudsman

The Office of the WorkCover Ombudsman has a complement of four staff and in 20009-2010 had a budget of \$625,000.

At present the WorkCover Ombudsman deals primarily with complaints on an individual basis. Often this can result in the resolution of issues raised by complainants as a result of recommendations made by the Ombudsman. However, these recommendations have no legal force. Consequently, they can be and, on occasion are, ignored by WorkCover or its agent. This serves to undermine the effectiveness of the Ombudsman's role.

The powers of the WorkCover Ombudsman need to be strengthened in order to deal with this problem. This can best be achieved by ensuring that the Ombudsman has the authority to issue enforceable directives rather than recommendations when required.

While the WorkCover Ombudsman's role in dealing with individual complaints is important there is also scope for conducting public inquiries on issues of concern. To date, however, this has not occurred; no doubt in part at least because of resource limitations.

The value of public enquiries is that they provide an opportunity to uncover systemic abuses and develop proposals for their abatement. The use of public inquiries can be viewed as a means of improving both the efficiency and fairness of the WorkCover scheme.

Accordingly, public inquiries need to be used as an integral part of the WorkCover Ombudsman's operations.

In summary, the Office of the WorkCover Ombudsman needs to be strengthened in order to enhance its effectiveness.

Recommendations

1. Part 6C of the Act should be amended to give the WorkCover Ombudsman the power to issue enforceable directives where required.
2. Funding for the Office of the WorkCover Ombudsman should be increased to enable public enquiries into systemic abuses affecting injured workers to be conducted.

5.9 Code of Workers' Rights

Although not part of the 2008 legislative package, this issue was canvassed in the Clayton-Walsh report. Much of the discussion centred on the experience of New Zealand's Accident Compensation Commission which has had a Code in place for several years.

The New Zealand Code contains "an elaboration of certain rights ... as well as a process for dealing with alleged breaches of these espoused rights (BCSPWC 2007: 188). The Clayton-Walsh report recommended that a Code of Workers' Rights similar to the New Zealand Code be developed for South Australia and included as a Schedule to the Act (Ibid: viii).

The main value of such a Code is that it could set out the obligations of the insurer and other service providers to injured workers along with a protocol for resolving complaints. It could dovetail with the operation of the Office of the WorkCover Ombudsman and arguably could be included as part of the Office's remit.

In summary, a Code of Workers' Rights has potential to improve insurer and service provider accountability and inculcate a culture of respectfulness in the treatment of injured workers.

Recommendation

A Code of Workers' Rights should be developed in conjunction with the trade union movement and injured workers' organisations for inclusion as a Schedule to the Act.

5.10 Employer and WorkCover Behaviour

Reports from trade union advocates is that there has been a mixed response from employers following the 2008 changes, although on balance it appears that many have adopted a harder line. This has been reflected in registered employers seeking greater use of Medical Panels.

More generally, the 2008 changes have contributed to a culture less concerned with helping injured workers and more focused on keeping a 'clean' workplace safety record and getting people off the WorkCover scheme.

As against this, there have also been examples of employers being frustrated in assisting injured workers return to work by the actions of WorkCover's agent. By way of illustration:

Ben, (not his real name) a mechanic in his 50's was back at work for three days a week following an injury. His employer was happy with this agreement and wanted to keep him on. WorkCover, however, took the view that Ben was not working to his maximum capacity. A WorkCover appointed rehabilitation provider asked him about his previous work experience. Ben indicated he had been a mechanic all his adult life, but had briefly worked in a clothes shop when he was 17. On this basis, he was deemed capable of working as a suit salesman in David Jones and subsequently had his weekly payments cut. At the time, Ben asked the rehab provider whether he actually

thought that David Jones would take him on. The rehab provider replied that this was improbable, but he 'had a job to do'

This is a classic example of both an injured worker and employer working together to secure a good outcome for themselves and the scheme but being frustrated in doing so by the actions of a WorkCover system more concerned with discontinuance than return to work. As a postscript, this case is currently before the Workers Compensation Tribunal and it is likely the employer will be called as a witness in support of the worker's appeal.

Most criticisms of changed behaviour since 2008 concern that of WorkCover and its agent. Advocates regard the behaviour of the agent as unnecessarily adversarial. While this has been the case for many years they are generally of the view that the adversarial climate has increased since 2008. As one advocate put it, some case managers "are bullies, and intimidate workers. They are authoritarian, think they know everything and think they can do anything".

By contrast, self insured employers are regarded more positively and seen as better to work with than WorkCover and the agent. Matters are usually resolved faster and in a more satisfactory manner with self insurers.

The effect of these behavioural changes in WorkCover and its agent has been overwhelmingly negative. The scheme is increasingly seen now as unfair, even hostile. Many injured workers feel disempowered and there has been an increase in the reporting of suicidal ideation. Unless this adversarial culture is changed there are genuine concerns that more injured workers will end up resorting to suicide as a solution to their WorkCover problems.

In summary, behavioural changes since 2008, especially those associated with WorkCover and its agent have created an increasingly adversarial workers' compensation culture in South Australia. This culture is having a detrimental effect on the treatment and wellbeing of injured workers.

Recommendation

It is essential that the culture of mutual respect is created in which injured workers are treated with consideration rather than as 'claims' or numbers.

5.11 Retirement Age

A number of affiliates have advised they have members who are productively employed that are older than 65 and, in some cases, 70 years of age. In view of Australia's labour shortage there will be a growing number of workers who will fall into this category.

There are also mounting pressures from governments and business to keep people at work longer. In the 2009 Federal budget a series of increases in the official retirement age, to take place over the period from 2017 through to 2023, were foreshadowed (Swan 2009: 11). Elsewhere, the Business Council of Australia has suggested that in the longer term a retirement age of 73 may be warranted (BCA 2010: 30).

From these observations it is apparent that the concept of a 'normal retirement age', as traditionally understood, is becoming increasingly outdated. It is also apparent that the application of workers' compensation policy in relation to the treatment of 'older workers' is outdated as well.

At present, any worker covered by the South Australian WorkCover legislation that is 67 or older and suffers a work injury will be denied compensation. This is clearly discriminatory and especially so at a time when workers are being encouraged to stay in the workforce in order to boost the nation's productivity.

In summary, many workers are remaining in employment beyond the traditional 'retirement age' and this is likely to continue. At present, however, workers who do so may continue to be discriminated against in terms of eligibility for workers' compensation in the event of injury.

Recommendation

Section 35 should be amended to ensure that workers are not discriminated against in seeking compensation for work injuries on the basis of their age.

6.0 Impact on Employer Premiums

The main beneficiaries of the 2008 WorkCover changes have been employers, who received a windfall reduction of 8.3% in premiums from 2009 when the average premium rate was reduced from 3.0 to 2.75%.

This reduction was achieved exclusively as a result of legislative change rather than by any contribution from employers to improving the scheme's return to work performance.

Indeed, in the lead up to the 2008 changes, Business SA lobbied extensively to substantially reduce employers' return to work obligations. This included a far reaching proposal to exempt a substantial proportion of the state's employers from their legal obligation to provide injured workers with suitable employment (BSA 2007: 18).

It was the case of course that South Australian employers were paying the highest average premium rate of all the Australian states and territories. This, however, was not simply because other jurisdictions had better return to work rates. While some schemes have certainly been better managed than the South Australian scheme, the fundamental reason interstate rates are lower has been the availability of legislative mechanisms that enable them to artificially offload seriously injured workers after a specified period or once a prescribed amount of weekly payments has been paid.

Interstate differentials in average premium rates have the effect of encouraging employer groups in states with higher than average rates to argue that businesses in their particular jurisdiction are at a 'competitive' disadvantage. This in turn fuels demands for 'competitive premium' rates. These demands are accompanied by claims that there will be a flight of capital to other states unless rates are cut. Invariably, the employer agenda for lowering premium rates is based on cuts in workers' entitlements.

Notwithstanding its widespread currency the 'competitive premiums' mantra lacks empirical support and in any event is conceptually flawed.

By way of illustration, average premium rates in South Australia varied from 2.46% to 3.0% during the 15 year period to 2008. These rates were consistently higher than the national average throughout this period. Despite this no evidence has ever been presented, by employer groups or successive governments, of any WorkCover driven exodus of investment and jobs from South Australia to Victoria, Queensland or anywhere else in Australia.

This lack of evidence was not surprising, as the interstate difference in average premium rates during this period ranged from less than 1% to about 1.5% of payroll. Business relocation decisions are rarely, if ever, based on such small premium differences. In the real world, investment decisions including business relocation are made after considering the total labour and operating costs involved as well as other strategic considerations such as access to markets and suppliers.

The real significance of the 'competitive premiums' doctrine is that it provides a rationalisation for the externalisation of work related-injury costs from employers to injured workers, their families and federal taxpayers.

In its 1994 inquiry into workers' compensation arrangements in Australia the Industry Commission was scathing in its criticism of this type of competition. In doing so, it drew a distinction between 'beneficial' and 'invidious' competition (Industry Commission 1994: xxxi-xxxii). Beneficial competition was characterised in terms of measures taken by employers to reduce injuries in the workplace and improve rehabilitation and return to work outcomes (Ibid: xxxii). By contrast, invidious competition was depicted as a form of cost shifting which results in the creation of "low-benefit, low-cost workers' compensation schemes" (Ibid: xxxi).

The 2009 reduction in average premium rates for South Australian employers provides a textbook case of 'invidious' competition. This form of competition should not be encouraged. 'Invidious' competition creates and maintains a system of perverse incentives.

Accordingly, reductions in employer premium rates should only be supported where they are the product of 'beneficial' competition that contributes to the improvement of the WorkCover scheme.

In summary, the major beneficiaries of the 2008 legislative changes have been employers as a result of premium reductions in 2010. This occurred, however, without any corresponding contribution to improving the WorkCover return to work rates, which are still the worst of all the Australian states.

Recommendation

Any further reduction in employer premium rates should be based on improvements in return to work rates rather than reduced entitlements for injured workers.

7.0 Impact on Scheme Funding

It is too early to determine the impact of the 2008 legislative changes on the WorkCover scheme's funding position with any degree of certainty. Much will depend on the operation of the new work capacity review provisions and whether Medical Panels continue to operate under their current format.

As mentioned earlier, both the work capacity review provisions and Medical Panels have been the subject of legal challenges. There have already been a number of unfavourable decisions handed down by the Workers Compensation Tribunal regarding WorkCover's handling of the work capacity review provisions – eg *Davy v WorkCover Corporation*, *Creek v WorkCover Corporation* - and there are a number of challenges before the Supreme Court regarding the constitutionality of Medical Panels.

These decisions, and other cases under consideration, have the potential to delay or jeopardise the anticipated 'savings' from the 2008 changes. That there were always going to be legal challenges regarding work capacity reviews and Medical Panels can be taken as given in view of their contentious nature and the clumsy drafting of the amending legislation.

This makes it all the more remarkable that the WorkCover Board in March 2010 decided to reduce the average premium rate from 3% to 2.75% of payroll. Even more incredible was that this decision was taken at a time when the scheme was grossly underfunded, with an unfunded liability of \$913 million (WorkCover 2010b: 1).

In summary, there is considerable uncertainty regarding the future of the scheme's funding arising from the 2008 legislative changes. In addition, the scope for improvement in the funding position has been compromised by the premature March 2010 decision to reduce employer premiums.

Recommendation

That the Minister responsible for WorkCover should issue a written direction to the WorkCover Board that any further reduction in employer premiums be put on hold until the scheme's unfunded liability has been eliminated.

7.1 Rehabilitation, Retraining and Return to Work

The reliance on work capacity reviews and Medical Panels by WorkCover also throws into sharp relief the lack of emphasis accorded to vocational rehabilitation and the return to work process. This imbalance needs to be redressed as a matter of urgency if WorkCover is to develop a coherent strategy and culture which facilitates the return to work of injured workers. This is all the more so given that "The problems confronting the fund are essentially management issues" (ALA 2007: 57).

As has already been pointed out, vocational rehabilitation has been increasingly subordinated to WorkCover's 'insurance culture' and an excessive focus on claims discontinuance which does more harm than good (Guthrie and Monterosso 2010: 188). By way of example:

David (not his real name) is a 25 year old worker who incurred a severe lower back injury shortly after commencing work in the automotive industry in 2007. His employer acknowledged the injury was caused by the firm's negligence. David underwent lower back surgery, which was unsuccessful, and he now suffers from chronic back pain. His case manager and a rehabilitation provider put together a rehabilitation plan that had as its objective his return to work with his pre-injury employer. This was problematic from the outset as the available jobs entailed a significant degree of manual handling in one form or another. Eventually in September 2009 his employment was terminated. It was only after this occurred that it was decided David should be provided with retraining. It was subsequently agreed he would be able to enrol for a computer administration course at TAFE. His treating doctor and specialists all testified to his return to work commitment. However, in the meantime there had been a change of heart by WorkCover and he was packed off to a Medical Panel and on Christmas Eve David was notified by the agent that his payments were likely to be discontinued as he was deemed by the Panel as having a capacity for work. The matter is now before the Workers Compensation Tribunal, and David is disgusted that instead of assistance to get retrained WorkCover was now simply interested in getting him off the books.

This example also illustrates that retraining is simply not a priority for WorkCover. This is supported further by WorkCover's own figures. In 2009-10, \$760,000 was allocated for retraining. This was down from \$1.28 million in 2007-2008. These figures, in all probability, exaggerate the situation in that they were presented without any definition of what WorkCover actually means by 'retraining'. Nevertheless, they represent a clear downward trend, from a low base, which corresponds with the decreased emphasis placed on rehabilitation since 2008.

It is also clear that retraining is viewed by WorkCover as a last resort rather than as a first or second option in certain circumstances. By way of illustration:

Kaz (not her real name) was working as an industrial cleaner when she suffered a lower back injury. Her employer was initially supportive but subsequently, following a change in the firm's management, maintained her injury was not work related. This was not the case and her claim for compensation was accepted but the combination of medical advice to the effect that she would not be able to return to her occupation and the breakdown in the relationship with the employer resulted in her losing her job. Although a hard worker Kaz is relatively low skilled, so she sought retraining as she was determined to get back to work. Instead her claims manager and rehabilitation provider arranged for her to do unpaid work hardening as an assistant to a florist on a 3 days a week basis. She did this for two months. Throughout this period the business was slow and Kaz became increasingly frustrated as she was not being assisted to acquire new skills that would help her to get a job. She again sought retraining assistance. Eventually she was offered an introductory course on how to use a computer. This was eight months after she first lodged her claim. She is still unsure of what the future holds for as a result of her injury.

The outsourcing of WorkCover's claims management function which as mentioned earlier, has increased the cost of administering the scheme without delivering any

tangible benefits, especially in relation to improved return to work rates remains as a deeply ingrained problem. While the outsourcing of some functions can make sense, it doesn't make any sense at all to outsource an organisation's core functions and this is all the more so in the absence of a strong evidence based case.

It also needs to be remembered that the outsourcing of worker's compensation claims management in Australia "was devised as a matter of political compromise" (Clayton 2002: 41) between employer groups and conservative governments, rather than as the result of well thought through policy considerations.

Similar comments apply to the outsourcing of another key WorkCover function. Section 58B of the Act specifies the responsibility of employers to provide suitable employment for injured workers in so far as this is reasonably practicable. Although this provision is generally regarded as an employment protection measure - which it is - it is also an important liability management tool. Where workers have their employment terminated this invariably makes it more difficult to secure their return to work and inevitably increases scheme costs.

The enforcement of this section of the Act is an important regulatory function for the scheme. Notwithstanding this, primary responsibility for the administration of section 58B was outsourced to the current agent by the WorkCover Board without any evidence based justification. The result has been an abject failure as even the consultant who recommended it in the first place has since recognised (BCS 2009: 26-27).

There is also a need to empower workers. At present, when rehabilitation is required the rehabilitation provider it is almost invariably appointed by the insurer or employer, with the worker having no say in the matter. This reinforces the perception that injured workers are 'claims' and often accentuates their sense of powerlessness. It would be more equitable to place the choice of a rehabilitation provider on the same footing that currently applies to the selection of a worker's treating doctor.

In summary, WorkCover's failure to manage its vocational rehabilitation and return to work responsibilities has worsened since the 2008 legislative changes and continues to undermine the scheme's financial performance.

Recommendations

1. WorkCover's management of vocational rehabilitation needs to be overhauled and decoupled from the corrosive 'insurance culture' that has chronically compromised the scheme's return to work performance.
2. Retraining for injured workers should be incorporated as a core function within WorkCover's return to work framework.
3. The outsourcing of WorkCover's claims' management function should be discontinued at the conclusion of the existing agent contract in 2012.
4. WorkCover should resume responsibility for the administration of section 58B of the Act at the earliest opportunity.

5. The Act should be amended to ensure that injured workers are entitled to select for rehabilitation provider of their choice.

7.2 WorkCover's Governance

The past performance and future prospects of the WorkCover scheme cannot be considered in isolation from its governance arrangements. From 1987 to 1994 WorkCover had a 14 person tripartite Board comprised of six employer and six trade union nominees. The two other members were the Chair and a rehabilitation specialist.

Since 1994 the management of the scheme has been oversighted by a Board structure dominated by business people. Although still nominally a tripartite board, union representation is minimal with only two of the nine member Board being from the trade union movement.

When the 'business Board' model was adopted by the Liberal government in the mid 1990s it was justified on the grounds that it would enable WorkCover to operate "without philosophical divisions over policy" (SAPD 1994: 305). This subsequently had the effect of creating an organisation in which the ethos and values of employers became deeply embedded within WorkCover's management culture. A by-product of this development has been the emergence of what can be described as policy myopia.

One of the earliest examples was the ill fated, ideologically driven decision to outsource WorkCover's core business – its claims management responsibilities – which, as pointed out earlier, resulted in an annualised 11% increase in the scheme's administration expenses without any corresponding improvement in scheme performance. Another graphic example concerns WorkCover's extremely costly persistence with its flagship experience-rating program - the Bonus and Penalty Scheme. Although it was supposed to operate on a revenue neutral basis, it ended up costing the scheme \$50 million a year before it was belatedly mothballed in 2010 (WorkCover 2011: 40).

Finally, there was the 2006 WorkCover Board report which called for substantial reductions in workers entitlements and restrictions on their capacity to challenge WorkCover claims decisions but did not find it necessary to review either WorkCover's own performance or that of employers. This was all the more remarkable in view of the scheme's rapidly deteriorating financial position.

As these examples clearly illustrate, the faith placed in the 'business Board' model is not warranted. It is a model that has failed. It has failed financially and it has failed socially. A more balanced governance arrangement is required.

A return to a genuinely tripartite Board structure comprised of three nominees from government and three each from the two key stakeholders – employers and workers – provides the best way forward. Two of the three government nominees could be persons with expertise in vocational rehabilitation and workplace health and safety while the third would be the Chair. In appointing the two experts care should be taken to ensure that neither had business dealings with WorkCover in order to avoid or minimise any perceptions of conflicts of interest.

This governance model offers a balanced format that encourages genuine and respectful debate over the most appropriate policy settings that should underpin WorkCover's strategic direction and goals. Most importantly, it provides a framework in which win-win outcomes can be achieved, as opposed to the zero-sum mentality that currently prevails, and is better geared to providing a sharp focus on the scheme's return to work performance.

In summary, WorkCover's 'business Board' model of governance has a history of poor decision making on important policy issues and has been largely responsible for the scheme's sub standard return to work performance and its dismal financial performance .

Recommendation

Section 5 of the *WorkCover Corporation Act 1994* should be amended to establish a tripartite Board structure comprised of three nominees each from government, employer organisations and the trade union movement.

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9.0 Appendix - WorkCover Review Terms of Reference

- (1) The Minister must, as soon as practicable after 31 December 2010, appoint an independent person to carry out a review concerning—
 - (a) the impact of this Act on workers who have suffered compensable disabilities and been affected by the operation of this Act; and
 - (b) the impact of this Act on levies paid by employers under Part 5 of the principal Act; and
 - (c) the impact of this Act on the sufficiency of the Compensation Fund to meet the liabilities of the WorkCover Corporation of South Australia under the principal Act; and
 - (d) such other matters as the Minister may determine.
- (2) The person appointed by the Minister under subclause (1) must present to the Minister a report on the outcome of the review no later than 4 months following his or her appointment.
- (3) The Minister must, within 6 sitting days after receiving the report, have copies of the report laid before both Houses of Parliament.
- (4) In this clause, terms used have meanings consistent with the meanings they have in the principal Act.