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9 February 2018

The Hon John Mansfield AM QC
GPO Box 464
Adelaide, SA, 5000

via email to RTWreview@sa.gov.au

To The Hon John Mansfield AM QC,

We write in response to your letter dated 17 January 2018 titled 'Invitation to make a written submission'.

Please find below our written submission for the review of the Return to Work Act 2014. Our submission has been organised under each topic of the terms of reference for the review.

1. the extent to which the scheme established by the Act and the dispute resolution processes under the Act and the South Australian Employment Tribunal Act 2014 have achieved a reduction in the number of disputed matters and a decrease in the time taken to resolve disputes (especially when compared to the scheme and processes applying under the repealed Act);

The increased focus under the current Scheme to make sound, evidence based decisions has made a significant contribution to both the reduction of disputed matters and the time taken to resolve disputes. The implementation of the South Australian Employment Tribunal (SAET) Act 2014 and in particular, the focus of Commissioners (formerly Conciliators) to avoid the previous trend of drawn out timeframes at the Conciliation stage has also made a significant contribution to the decrease in the time taken to resolve disputes. Beyond the specific process changes contained in the South Australian Employment Tribunal Act 2014, the adoption of a more even handed approach to Dispute Resolution by both the Commissioners and President/Deputy Presidents has contributed to reducing dispute numbers and resolution timeframes.

While the Scheme has achieved a significant reduction in dispute numbers, the previously stated goal of a reduction of 75% is unlikely to be achievable while the legal cost provisions remain as generous as they currently are. Applications for Review can be lodged with minimal supporting evidence or argument, and with little risk of having a claim for costs denied by the SAET, it is our experience that Injured Workers and their representatives largely continue to take a 'try your luck' approach when considering the merits of lodging an Application for Review.

There are several aspects of the new Act that will remain unclear until there are resolutions to current disputes. These resolutions will have a substantial flow on impact to the benefits Injured Workers will/will not receive.

2. without limiting paragraph (1), whether the jurisdiction of the SAET under the Act should be transferred to the South Australian Civil and Administrative Tribunal;

3. the extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act (especially when compared to the system applying under the repealed Act);

4. the performance of RTWSA in managing claims including RTWSA's outcomes in reducing instances of work injury;

5. the performance of self-insured employers including outcomes in reducing instances of work injury;

6. changes in return to work rates at key milestones outlining factors influencing any improvement or deterioration;

7. factors contributing to non-seriously injured workers failing to achieve a return to work within two years;

In our experience, there are numerous factors that contribute towards long-term claims. In short these factors include:
Psychosocial factors impacting the Injured Worker (e.g. personality/issues/dysfunction, low resilience, victim mindset, persisting pain, low moral obligation to return to work and non-work stressors/barriers)
Employment circumstances (e.g. negative sentiment from the Employer towards the Injured Worker and/or their injury, unwillingness to provide reasonable alternative duties and an unsupportive workplace culture)
Treating Practitioners (e.g. non-work focus in treatment, a negative sentiment from the Treating Practitioner towards the Employer/Insurer/Agent/Scheme and an over-protective and inadvertent disempowerment of the Injured Worker)

Strategies to further improve return to work outcomes for Injured Workers need to not only focus on the Injured Worker, but also on Employers (i.e. encouraging/supporting/ensuring Employers to genuinely fulfil their responsibilities under the Scheme) and Treating Practitioners (i.e. encouraging/supporting/ensuring that treating practitioners have an appropriate Return To Work focus in their treatment of Injured Workers).
There continues to be a high number of Injured Workers who are legally represented from the earliest stages of their claim. A small but not insignificant number of legal firms operating in this jurisdiction seek to actively intervene in the process of trying to return an Injured Worker to paid employment (for example, by revoking the medical authority and/or stating that all correspondence needs to go via them, rather than enabling communication directly with the Injured Worker). The generous dispute cost provisions in this jurisdiction incentivise these firms to actively seek and prolong their involvement in the claims process and to encourage Injured Workers to focus on litigation rather than rehabilitation and returning to work.

8. any additional recommendations regarding reskilling services to assist return to work outcomes;

9. whether the scheme has yet achieved financial stability and if not when the scheme will be likely to be mature and stable;

10. any other recommendations based on your review of the administration and operation of the Act which you consider appropriate and consistent with the objects of the Act.

Recoveries:
The scope of section 201 could be broadened to give a general recovery provision where an Injured Worker has received in excess of their rightful entitlements. Such a move would reduce Scheme costs.

Disputes:
A strict application of the cost provisions at the Tribunal would discourage disputes where there is little/no merit to the application. It is our experience that some legal representatives are delaying undertaking work on their files until the matter is referred to a Judge for hearing, as they are able to claim greater costs at that level. Potentially giving scope to pay slightly greater costs at conciliation might encourage greater work to be done in the earlier stages of the dispute, and encourage earlier resolution. Alternatively, a more strict approach from the Tribunal in ensuring parties have obtained their evidence and have clarified the issues in dispute whilst at Conciliation would likely result in reduced dispute timeframes.

Claim determination:
On lodgement of a claim, a medical authority should become automatic and mandatory. It is not uncommon for an Injured Worker to withdraw their medical authority, often on advice from their legal representative. This creates a significant barrier to obtaining relevant medical information throughout the claim which can impact claim determination, the rehabilitation progress, whole person impairment timeframes and even simple medical approvals. This can also add

cost as it may mean a Claims Agent needs to resort to an Independent Medical Examination rather than obtaining information from a treating doctor, and generally means extended timeframes to obtain information required to manage the claim. There is also a risk that the Claims Agent will not be able to obtain appropriate and relevant information in order to assess entitlements on a claim (such as whole person impairment entitlements). If an Injured Worker revokes their medical authority, it would be useful to have an ability to immediately suspend/discontinue payments as revocation of a medical authority can halt progress and place barriers in the way of a return to work.

Whilst it appeared that the test of compensability changed with the RTW Act, the practical application of this has not been so. For example, any injuries that have occurred at home, but which can somehow be linked to the compensable injury are being accepted as compensable (a fall caused by an injured knee giving way, an injured shoulder from using a crutch as a result of a compensable injury). The definition of 'employment' appears to have broadened beyond the initial intent. We thought we would have seen a reduction in which claims could be accepted. We note there are several matters on appeal to the Full Court of the Supreme Court which deal with this issue, so it may be that the appropriate avenue is to await those decisions.

In regard to re-determination provisions, we feel it would be appropriate to have an ability to re-determine when an error is identified, with no restrictions. For example, if Average Weekly Earnings (AWE) is determined with no reference to a prior redemption and the fact that a prior redemption exists is identified subsequent to the determination, there does not appear to be a mechanism to correct this unless one of the specific re-determination provisions applies. This means that an overpayment could continue without the Claims Agent being able to change it at any point.
Often, administrative and other errors are not picked up within 14 days which is the current re-determination timeframe for an administrative error, and then, if none of the other re-determination provisions apply, often the only option available to a party is to lodge an Application for Review in relation to the decision so the decision can be varied at dispute. As an alternative and as referenced above, a general re-determination provision in order to correct an error, oversight etc. would be useful in order to ensure mistakes can be corrected when discovered.

Interim Decisions:
In regard to Interim decisions that an Injured Worker is taken to be Seriously Injured (pursuant to section 21(3) of the Act), we feel this section needs a clause that compels an Injured Worker to actually undertake a Permanent Impairment Assessment (PIA) after an interim decision has been made. Alternatively, scope for Claims Agents to cease entitlements could be introduced if there is some indication that an Injured Worker will no longer likely meet the Serious Injury threshold. Currently there is no incentive for Injured Workers who have received an interim decision to seek a PIA until they are at retirement age and their income support payments have ceased, as there is a risk that they will not reach the 30% WPI threshold, and their entitlements will then cease.

Income Support:
Further clarity is required in relation to entitlement to medical expenses in the following situation:

Claim initially accepted for Medical Expenses Only (MEO).
The Injured Worker receives 12 months of medical expense entitlement, then entitlements cease. After the 12 month medical entitlement ceases, the Injured Worker loses time from work and has an entitlement to income support. Because the 12 month medical entitlement has passed, the current position is that the Injured Worker is not entitled to medical expenses. This can be particularly problematic in that it impacts the ability to support the Injured Worker and influence a return to work outcome. The medical component of the claim impacts significantly upon recovery and ability to return to work.
Consider further clarification of this, potentially as follows:
A non-seriously injured Worker has an entitlement to reasonably medical expenses up to a maximum of 3 years, dictated as follows:

If the claim has only been accepted for medical expenses only, the maximum entitlement is 12 months of medical expenses.

If the claim has been accepted for income support and medical expenses, the Injured Worker's entitlement to medical expenses will extend to 12 months after income support ceases (as per current provisions)

If the claim was originally accepted for medical expenses, and the 12 month medical entitlement has expired, then subsequently the Injured Worker has a determined entitlement to income support, the Injured Worker is entitled to medical expenses for up to 12 months post the cessation of income support, so long as that does not extend the total medical entitlements beyond 3 years from the date of injury.

Consider providing a financial incentive to Injured Workers who have achieved a return to work, earning greater than 50% of their Notional Weekly Earnings:
For any period during the second designated period, where an Injured Worker has no current working capacity, the worker is entitled to weekly payments equal to 80% of the workers notional weekly earnings.
For any period during the second designated period where the Injured Worker has a current work capacity, and is earning less than 50% of their Notional Weekly Earnings, the worker is entitled to weekly payments equal to 80% of the difference between the workers notional weekly earnings and workers designated weekly earnings.
For any period during the second designated period where the Injured Worker has a current work capacity and is earning at least 50% of their Notional Weekly Earnings, the worker is entitled to weekly payments equal to the difference between the workers notional weekly earnings and the workers designated weekly earnings.

Currently there is no positive obligation on an Injured Worker to declare earnings from employment. This results in Injured Worker's being in employment and not declaring it to us, therefore being in receipt of both income support and earnings from employment. This can be difficult to discover and can result in significant overpayments to an Injured Worker.
Sick leave no longer be considered a prescribed benefit. Currently an Injured Worker is entitled to both sick leave and income support for the same period (this also applies to annual leave, but section 50(7) can be utilised to suspend payments for the period of annual leave) the effect of which is that an injured worker may receive double income for periods of sick leave.
We believe that the stepdown periods should revert back to a reduction at 26 weeks (rather than keeping it at 52 weeks). Doing this can encourage Injured Workers to return to work earlier because it is a date that the Injured Worker can aim for in their return to work before they are financially disadvantaged.

Waiver:
For an Employer to be entitled to a waiver of liability for the first two weeks of payments, they have an obligation to provide payslips for the 12 months prior to the date of injury within 5 business days of being advised of the claim for compensation.

Supplementary Payments:
In regard to Section 40 supplementary income support payments, the position is that an Injured Worker can receive up to 13 weeks supplementary income support if pre-approved surgery is undertaken outside their medical entitlement period. However, Injured Workers who are still in their medical entitlement period are not entitled to these supplementary payments. This may lead to Injured Workers delaying surgery so it occurs outside their entitlement period, in order to access the additional Income Support.

WPI:
We believe that only primary injuries ought to be considered for a Serious Injury classification. The current Scheme provides an incentive for Injured Workers to claim for any and all symptoms and injuries they are suffering, resulting in

costly investigations and often disputes. The focus appears to be on injuries and symptoms and potential to claim, as opposed to best recovery and return to work. If WPI assessments for consequential claims are combined with primary injury assessments, there is a greater risk of a WPI being over 30% and therefore more Injured Workers will be considered to be Seriously Injured. Whilst appropriate compensation and benefits should always be provided where there is an entitlement to receive them, consequential claim assessments can often only add a few percentage points to the overall assessment. That means multiple consequential claims could increase the overall WPI assessment significantly, resulting in more Injured Workers being considered Seriously Injured.

We appreciate the opportunity to put forward our submission. If you would like clarification on any of the above, please feel free to contact me on (08) 8394 4723 or via email at shaun_meehan@gbtpa.com.au.

Yours faithfully,

Shaun Meehan
General Manager - Worker's Compensation SA
Gallagher Bassett Services Pty Ltd