Workers Compensation Scheme
Local Government Association
of South Australia

Supplementary Submission to the Return to Work Act Review

10 April 2018

Executive Summary

The Local Government Association Workers Compensation Scheme (LGAWCS) provides this further submission in response to the supplementary submission made by ReturnToWorkSA on 23 March 2018.

In the main, the LGAWCS joins with ReturnToWorkSA in the identification of the various issues raised by the latter organisation surrounding questions of whether the Scheme is providing the appropriate balance in relation to compensation, and giving certainty and clarity to the implementation of areas of the Scheme.

In providing this further Submission, the LGAWCS is taking the opportunity to either supplement the matters put forward by ReturnToWorkSA, or where appropriate, identify where the views of our respective organisations diverge, and why.

As some of the issues identified by ReturnToWorkSA cut across more than the one principal area their submission addressed, the LGAWCS will provide its submission under discrete topics that arise in the legislation, as set out in the following pages.

We trust the following is self-explanatory, however should you have any particular question please do not hesitate to contact me on 8235 6408 or Jeanette Hullick, LGA Authorised Officer on 8235 6474 to discuss, or alternatively we would be delighted if the opportunity arose to meet so we can further outline our submissions accordingly.

Yours faithfully,

Tony Gray
General Manager

Whole Person Impairment & Seriously Injured Assessment

In the LGAWCS's submission, the whole concept of assessing permanent impairment has gotten away from what should be the focus on the original/substantive injury suffered by the worker, and its immediate extent. With the need to now consider "sequelae" type conditions, the effects of operative treatment, the effects of other medical treatment (particularly prescription medication) and having to consider what are the "consequences" of an original injury, has led to confusion as to what injuries ought to be combined for either whole person impairment assessment purposes or seriously injured worker certification, and in many cases leads to artificial delineation.

In the submission of the LGAWCS, consideration ought to be given to a revised system of permanent impairment assessment which incorporates the following principles:

1. The assessment of compensation should primarily be focused on the original injury, and perhaps any operative consequences arising, which would reduce the incidence of "doctor shopping", fishing for connections between original injuries and whatever other medical problems a worker might experience in the period thereafter, and the consequential litigation that inevitably arises in such cases (and of which many examples have no doubt been provided to the Review);

2. A clearer definition of what is meant by a "pre-existing condition" and the means by which it ought to be taken into account in any assessment of impairment, as the current approach of the South Australian Employment Tribunal (SAET) is to effectively require a compensating authority to produce evidence of what would amount to an impairment assessment for any pre-existing condition, before its effect and consequences can be deducted from any consequential assessment of permanent impairment for a compensable injury;

3. A more transparent process by which assessment of permanent impairment is originated and facilitated bears consideration, incorporating a shifting of the decision-making responsibility on to the compensating authority to assess the appropriate time which permanent impairment ought to be assessed (and based on medical clarification), being no earlier than 6 months post the date of injury, or from the date of the last anticipated operative treatment – but with a fall-back position that an injured worker can apply for permanent assessment from a date 3 months from the end of the notional 104 week period of entitlement to weekly payments, in the event steps are not taken to assess the particular worker concerned already, and in anticipation of possible seriously injured certification;

4. The decision as to whom the worker will be referred to for permanent impairment assessment should be undertaken in accordance with principles including referral to an accredited examiner with a speciality in the area of management and treatment of the injured worker's primary injury, and in accordance with a "cab rank" approach. Only in the event of disagreement as to the identity of the chosen examiner, for conflict or other justifiable reason, might there be a right by the injured worker to seek a review of the referral;

5. The entire referral process might become the subject of oversight by either a division of ReturnToWorkSA (so as to be at arm's-length from the claims agents), or by way of an Application to a Commissioner of the SAET, with a review conducted "on the papers";

6. Insofar as ReturnToWorkSA's submission raises the issue of anomaly of impairment assessments within the Impairment Assessment Guidelines (and further back to the AMA Guidelines, 5th Edition), the LGAWCS notes ReturnToWorkSA's own confirmation that the Impairment Assessment Guidelines can be reviewed, and there is therefore no need for particular legislative attention to a number of the issues that have been

identified. In saying that, it is the submission of the LGAWCS that consideration ought to be given to a possible additional test over and above the 30% whole person impairment threshold, when considering seriously injured worker certification. Further to the support for a narrative test put forward by the LGAWCS in its initial submission, a focus on the effect on working capacity an injury has caused an individual worker might be a valid consideration, particularly in cases where assessment of 30% whole person impairment can be arrived at without there being a particularly significant impact on an injured worker's capacity for work, e.g. an office worker compared to a manual worker; someone suffering from dermatitis compared to a disabling condition of the cervical spine, the combining of bilateral knee injuries creating an assessment of whole person impairment of in excess of 30%, and again for a sedentary/office worker.

Causation

Many submissions have identified the issue of the "a significant contributing cause" test being too low a threshold to make any meaningful difference to access to compensation for physical injuries, which had to be the rationale for amendment to this area of the legislation in 2015.

The LGAWCS queries whether some codified form of the "but for" test might be a better first threshold by which compensation entitlements are established, and fits more easily with the evidentiary onus, under the legislation, on an injured worker to establish on the balance of probabilities that their condition is work related.

Dispute Resolution

ReturnToWorkSA have identified an issue with injured workers challenging what are in effect "information letters", but the LGAWCS considers this is not a matter that requires legislative consideration and rectification. ReturnToWorkSA's concerns with the increase in litigation generated by workers over the receipt of 104 week warning letters would not have occurred if ReturnToWorkSA had complied with the legislation itself, and issued formal determinations pursuant to section 48 of the Return to Work Act in each case – which is in accordance with the longstanding expectation of how the compensation scheme should be managed.

A Revised Dispute Resolution Process

ReturnToWorkSA's promotion of a revised dispute resolution process is not supported by the LGAWCS, primarily for the reasons identified in our initial submission.

Additionally, the LGAWCS notes that overall disputation levels peaked during a period of the phasing in of some of the new and substantive legislative provisions of the Return to Work Act, particularly around the 104 week point post the implementation of the legislation in mid to late 2017, and have decreased since that time.

It is self-evident that were there to now be a further change to the dispute resolution process, it would carry with it the need for some form of transitional provisions, and consequential litigation. The same can equally be said for any substantive legislative change that occurs at any time within a workers compensation scheme. The handing down of a number of potentially significant determinations on the law by the Full Supreme Court during the 2018 calendar year should also see a substantive impact on the existing disputed matters within the South Australian Employment Tribunal.

ReturnToWorkSA's promotion of the alternative dispute resolution process for dealing with aspects of disputes between the parties also requires further consideration in light of past history. The emphasis on internal review of decisions by compensating authorities has varied over time, but what has remained a constant is that there are little ramifications arising from the reconsideration process imposed by the legislation. The LGAWCS undertakes a thorough and considered review of any disputed decision, and does not adopt a simple rubberstamping process, which could well be at the root of substantive numbers of matters which reach the conciliation stage, but are thereafter quite quickly resolved.
If there is to be some form of alternative path by which disputes can be directed, and which might involve a truncated review process "on the papers", then there should be some form of cost ramification for a worker who then choses to pursue the matter further at the South Australian Employment Tribunal, and then fails, having elected to pursue what becomes a two-part dispute resolution process.

Medical Questions to be Determined by an Alternative Process

The ability to have medical questions determined by other than the direct dispute resolution process at the South Australian Employment Tribunal has historically been fraught with problems, with the South Australian Employment Tribunal and its predecessors, and the legal profession, resistant to change in this regard, having enforced a degree of technicality/legality on the overall process, with its eventual outcomes watered down in their effect at the time of judicial decision-making. There has also been an evident lack of commitment to the process by the medical profession.

Therefore, insofar as ReturnToWorkSA would propose a change to the way in which medical questions are dealt with, then any changes in this regard self-evidently need to be "water tight" as far as process, procedure and the adoption of findings is concerned, and supported by sufficient numbers of the medical profession, across a broad range of expertise, to be of use.

In the meantime, the use of independent medical advisors by the South Australian Employment Tribunal has only more recently begun to be adopted more frequently, and in the submission of the LGAWCS, this situation should be allowed to play itself out over a further period of time before any significant change is contemplated.

Other Drafting Issues Identified by ReturnToWorkSA

Many of the drafting issues identified by ReturnToWorkSA are generally supported by the LGAWCS, or at least not objected to insofar as they are of no consequence to the operations of the LGAWCS. However, the LGAWCS does specifically address the following:

1. The suggestion that Expiation Notices be utilised to enforce employer compliance with their obligations under section 18 of the Return to Work Act is not supported. Injured workers have the right to have ReturnToWorkSA investigate an employer as it is, for any possible breach of the employer of their obligation to provide suitable employment. This right of investigation is thereafter supplemented by the ability of an injured worker to refer issues in this regard to the South Australian Employment Tribunal. The lack of decided decisions by the South Australian Employment Tribunal, and their preparedness to require the parties in dispute to conciliate their differences in this regard, suggests that this area of legislative compliance by employers is not a major issue.

2. In the view of the LGAWCS, section 10 of the Return to Work Act, dealing with the territorial stepdown criteria, does not require amendment, as the effective deeming of the employer's principal place of business as a last backstop to assessing territorial coverage of an injured worker's claim, is an effective, if blunt, instrument to avoid litigation.

3. For consistency's sake, the deeming of a date of injury for noise induced hearing loss claims requires some consistency (and this is not a misnomer). In the submission of the LGAWCS there is no particularly adequate rationale for fixing a date of injury in the alternative, and depending on an injured worker's circumstances. As it currently stands a deemed date of injury can be when an injured worker last worked, and was exposed to noise, or when they actually have given notice of their injury.

In the latter case, the worker can nominate an employer from many years ago, as the responsible employer, and then have the benefit of a much later (in calendar terms) applicable prescribed sum applied for compensation purposes, even though the injured worker concerned may in fact still be working elsewhere. In any case, the relevant date ought to be the date on which a worker last considers that they were working, and exposed to noise, or the last date they were employed with that particular employer.

As to who carries the evidentiary onus in this regard can then fall back to the question of the time passing since that employment ceased (if that is in fact the case) and whether the employment ceased by virtue of age or ill-health. This would avoid the situation where a worker might frequently nominate their last employer as the subject of their compensation claim in this regard, irrespective of their qualitative exposure to noise, leaving it open to the relevant employer/compensating authority to sort the matter out. A good deal of unnecessary litigation arises in this area where workers simply choose their last employer as the responsible entity for their hearing loss, rather than having some form of obligation to more accurately and reasonably identify the actual responsible employer.

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