MinterEllison

9 February 2018

BY EMAIL

The Hon John Mansfield AM QC
GPO Box 464
ADELAIDE SA 5000

Dear Sir

Thank you for the opportunity to make a submission in regard to the review of the *Return to Work Act* 2014 (the Act).

Minter Ellison is currently one of two legal firms representing Return to Work SA and its agents, Employers Mutual Ltd and Gallagher Bassett, in relation to disputes involving workers compensation claims. A third firm, BDK Lawyers, represents RTWSA in relation to recovery matters. Minter Ellison is not directly involved in recovery matters under the *Return to Work Act* except in so far as the recovery provisions may impact current dispute matters.

In addition Minter Ellison represents several self-insured employers and is one of the panel firms engaged by the Crown Solicitors Office to act in relation to workers compensation disputes involving Crown employees.

Our involvement in workers compensation matters is limited to those matters that are in dispute. Dispute matters represent only a very small number of all claims made under the Act in SA in any given year. For that reason, the following submissions are limited to the Act and to SAET processes as they relates to Minter Ellison's involvement in dispute matters.

At present there are approximately 11 matters before the Full Court of the Supreme Court which have either been granted leave or are awaiting leave on issues involving the interpretation of the *Return to Work Act*. There are other matters involving interpretation of the Act which are before the SAET. Examples of the types of matters before the Supreme Court are:

- the proper interpretation of s7 and the meaning of the term 'a significant contributing cause'
- the interaction between s49(2) and s42
- whether impairments arising from iatrogenic injuries (medication induced) arose from the same trauma as the original injury such that the impairments should be combined
- the proper interpretation of s113 of the WRAC Act (which is identical terms to s188 of the Act) in cases where a worker may have held subsequent employment that is not the subject of the Act
- the interpretation of clause 34 of the transitional provisions to the Act
- what constitutes a proper request for approval of future surgery under the Act and regulations
- the proper interpretation of AMA5 and the WorkCover Guidelines (which is in similar terms to the Impairment Assessment Guidelines)

The findings in those matters will significantly impact the Scheme costs and performance moving forward and until such time as those decisions are delivered by the Supreme Court it is impossible to determine whether the implementation of the *Return to Work Act* as drafted has achieved the goal of reducing overall scheme cost and to comment on the legislation in that context would be premature.
In light of this we make the following observations and recommendations in regard to the Scheme:

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The extent to which the scheme established by the Act and SAET Act have achieved a reduction in the number of disputed matters

One of the key objects of the Act is 'to reduce disputation … by reducing adversarial contests to the greatest possible extent'. The *South Australian Employment Tribunal Act* 2015 has, as one of its main objectives, 'to ensure that applications are processed and resolved as quickly as possible while achieving a just outcome, including by resolving disputes through high-quality processes' (s8(c)). Further, the SAET aims 'to keep costs to parties involved in proceedings before the Tribunal to a minimum insofar as is just and appropriate' (s8(d)) and 'to be flexible in the way in which the Tribunal conducts its business and to adjust its procedures to best fit the circumstances of a particular case or a particular jurisdiction'.

Conciliation

The conciliation process has remained largely unchanged from the process applicable under the repealed Act and in the Workers Compensation Tribunal. However there are some key differences:

- Pursuant to s43(7) of the SAET Act, proceedings at conciliation should not extend beyond 6 weeks. In the past it was not uncommon for matters to remain at conciliation for in excess of 6 months and for the most part this '6 week rule' has assisted in the reduction in the duration of disputes.

- The enforcement of the requirement that all parties personally attend conciliation conferences has assisted in the resolution of disputes. There are less adjournments to enable solicitors to seek instructions, and discussions at conciliation are routinely robust and productive.

- The provision of advice and recommendations by the Commissioner at the conclusion of conciliation does assist the parties in clarifying the issues in dispute.

However Minter Ellison submits that there is inconsistent flexibility in the enforcement of the 6 week timeline. There has been a reluctance to apply s43(8) of the SAET Act to extend the time for conciliation.

There are occasions where the extension of the time for conciliation is appropriate and justified. Examples of this include:

- Where the delay is the fault of neither party, for example, due to a delay by a medical specialist or other party in providing a report, and both parties agree that this further information is critical to ongoing negotiations or conduct of the dispute.

- If parties are close to settlement of the dispute but require an additional period of time to finalise instructions, seek financial or similar advice or otherwise make appropriate enquiries, referring the dispute to Hearing and Determination is counterproductive. Having the matter remain at conciliation where the Commissioner has been involved in the matter will be more beneficial than referring the matter to judicial level where a presidential member must familiarise them self with the matter. It would also assist in the minimisation of legal costs.

Whilst Minter Ellison strongly agrees with the concept of prompt and expeditious hearings, the inflexibility at conciliation has led to a bottleneck of matters at hearing and determination before a Presidential Member, and to a concomitant increase in the costs involved.

Minter Ellison submits that the referral of such matters to Hearing and Determination unnecessarily such as in the examples above, causes undue pressure in relation to cost and time for both the Tribunal and the parties involved.

A further issue contributing to the time taken at conciliation relates to the refusal by some claimants to provide the compensating authority with medical authorities and / or details of treating medical practitioners during the investigation stage of the claim. Due to the timeframe for determination provided for in the Act this can result in decisions being made on inadequate evidence. In turn the conciliation process is delayed while that evidence is obtained either by summons or by order of a Commissioner. This extends the time taken at conciliation. If the provision of a medical authority was mandated at the time a claim for compensation is lodged so that relevant medical information could be obtained at the

investigation stage, the decisions made by the compensating authority would be improved, would be more expeditious and ideally would result in less disputation. At the very least, it would reduce the amount of time a matter is at conciliation.

Appeal costs

The number of Appeals being heard in the SAET has increased significantly and it appears that this is in part due to the change in the costs provisions relating to Appeal matters. The present approach whereby claimants receive their costs of Appeal except in exceptional circumstances effectively means that the trial is only the first stage of proceedings. The majority of matters are appealed with limited risk as to costs to the Appellant worker or employer. There was no such cost provision in the repealed Act: Section 95 and the cases decided under that provision meant that costs on appeal follow the cause. The current Act, and the interpretation of the costs provisions, encourage the lodgement and pursuit of appeals to the disadvantage of a successful compensating authority, with adverse orders on appeal only being made following unreasonable frivolous or vexatious behaviour. It is submitted that this is onerous both on the respondent compensating authority and on the SAET, especially in circumstances where a decision is upheld both at trial and on appeal, only to be met with costs orders in favour of a twice unsuccessful worker. The reintroduction of the previous scheme in this regard will mean that appeals with merit will still have costs paid but otherwise the costs risk (in the same nature as moral risk with high-yielding investments) will act as an appropriate disincentive to continue to pursue minor and largely unnecessary claims.

The extent to which there has been an improvement in the determination or resolution of medical questions arising under the Act

Independent Medical Advisers

It is our experience that there has been a general reluctance to utilise Independent Medical Advisers except in relation to s58 matters. The SAET have been unwilling to refer matters to an IMA unless there is agreement by both parties to the referral. One of the impediments to the referral is that parties are unwilling or unable to agree critical facts required for the referral. Even in the case of s58 matters, there is often an initial trial before the referral to the IMA is made or recommended.

The use of IMAs at an earlier stage of proceedings and not just in s58 matters would assist.

Any other recommendations

WPI assessments

As outlined by RTWSA, 6 accredited assessors have provided in excess of 40% of WPI assessments despite there being 157 medical practitioners on the accredited assessor list. Minter Ellison expects that this will have significant repercussions in regard to the time taken for the undertaking of WPI assessments. This will in turn impact the finalisation of s58 entitlements and the determination of serious injury status. There is also a significant risk that if the other assessors are not utilised, they will not maintain their accreditation and new assessors may decide against seeking accreditation.

A way to ensure the sustainability of the system may be to apply a rotational method of selection of assessor (for example, a 'cab-rank' roster). This would remove any suggestion of bias or lack of independence. Ensuring that accredited assessors assess impairments that are within their area of expertise may limit the disparity between assessments that is currently evident in the matters before the Tribunal and as referred to in RTWSA's submission.

30% WPI threshold for serious injury

There has been concern raised about the 30% WPI threshold. Setting an arbitrary threshold will always lead to difficulties. Using a 30% threshold as a guide, a worker who has undergone a spinal fusion and remains significantly incapacitated will not reach the 30% WPI threshold whereas a person who self-reports ongoing symptoms of extreme pain (that are not able to be measured objectively) following a knee replacement will be assessed at 30% WPI. This is despite there being a significant difference in the capacity to work between the two workers.

Further, a worker with a spinal fusion with ongoing radiculopathy and impact on activities of daily living is assessed at 29% WPI whereas based on current authority a person with a 10% WPI for a lower back injury who has not undergone surgery may reach the 30% WPI threshold if there is, say, medication induced impairment of 20% WPI for erectile dysfunction and 10% WPI for impairment of mastication and deglutition, both of which are assessed based on subjective evidence reported by the worker rather than objective medical testing. The impairments of erectile dysfunction and mastication and deglutition will usually have no impact on that worker's ability to work. The worker with the more significant and incapacitating back injury will have his income support cease after 104 weeks whereas the worker with the less significant back injury and greater capacity for work will receive income support until retirement.

This issue could be avoided by ensuring that any impairments assessed under the Act and the Impairment Assessment Guidelines require objective measurement of symptoms. This could be in conjunction with the limiting of assessments of various impairments to assessors who practice in that field and who have appropriate expertise. The issue of combinability of so called 'consequential injuries' is currently before the Supreme Court.

Lump sum payments for deceased worker claims

Section 61 of the Act provides that a lump sum payment following the death of a worker under compensable circumstances is to be made to a spouse or domestic partner and to dependent children. There is no longer any requirement in the legislation that a spouse be cohabitating with the deceased worker. This means that there is the potential for a spouse who was separated from the deceased worker for what may be many years but has yet to finalise divorce proceedings can claim the lump sum. This may occur in circumstances where both parties are in new relationships. Such an outcome can be detrimental as to the entitlement of any dependent children given that the amount of the lump sum is distributed in a greater proportion to the spouse than to dependent children.

Thank you again for the opportunity to make submissions in regard to the review.

Yours sincerely

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