Review into the operation and administration of the Return to Work Act 2014

Supplementary submission of SA Unions

Introduction

1. By letter dated 8 May 2018, the Review has invited SA Unions to comment on a memorandum regarding the potential liability impacts of medication-related top-ups for whole person impairment assessments prepared by Finity Consulting Pty Ltd, and in particular the assumptions contained therein.

2. The memorandum relates to assertions made by Return to Work SA regarding the impacts of the decision of the full bench of the South Australian Employment Tribunal in *Return to Work SA v Mitchell*. As we set out in SA Unions submission to the Review, the decision in *Mitchell* involves the application of entirely orthodox principles of causation. It does not involve any novel legal principle. SA Unions remains surprised that RTWSA continues to assert that the result in *Mitchell* was unanticipated, and that it has led to unanticipated impacts upon the scheme.

3. SA Unions notes that in respect of the memorandum, the Law Society of South Australia has provided a submission to the review containing a number of cogent criticisms of the memorandum. SA Unions endorses those criticisms and joins the Law Society in opposing other submissions of RTWSA that propose:

    - the reintroduction of medical panels;
    - further restricting when sequalae injuries are compensable;
    - further restricting when psychiatric injuries are compensable;
    - reducing availability of lump sums when injured workers are killed (which RTWSA claims is a "drafting issue");
    - further tightening limits on medical expense compensability;
    - major changes to dispute resolution which, it appears, would leave workers unrepresented at some stages.

4. Given the Law Society submission, SA Unions submission will confine itself to criticism of 3 assumptions apparently made by Finity in the analysis disclosed by the memorandum:
   4.1. the assumed cohort of claimants with potential add-on claims;
   4.2. the assumed incidence of add-ons within that cohort;
   4.3. the assumed quantum of those add-ons.

The analysis

5. Finity sets out its analysis and assumptions from pages 4 to 9 of the memorandum.

6. In identifying the cohort of claimants per year with potential add-ons, the analysis identifies that approximately 2500 new claims per year involve the use of opioid medication. The analysis then suggests that 750 of those claims resulted in a permanent impairment lump-sum. It then suggests that 550 of those 750 claims have evidence of legal involvement. The combination of these "filters" produces a cohort of 525 claims per year with potential add-on claims.

7. The analysis separates that cohort of 525 claims per year into 3 subgroups corresponding to bands of whole person impairment percentages (5-10%, 11-20%, 21-29%). It then applies 3 scenarios - low, medium and high - in respect of each of the 3 subgroups to provide estimates of the number of claims which would receive higher WPI assessments if *Mitchell* were to be applied to them. In the low scenario 19% of claims would receive a WPI increase; in the medium scenario 36% of claims would receive a WPI increase; in the high scenario 55% of claims would receive a WPI increase.

8. The analysis then breaks those increases in WPI assessments into those increases which would yield a higher lump-sum only, and those increases which would mean the claimant becomes a seriously injured worker.

9. SA Unions asserts that each of the parts of the analysis identified in paragraphs 6 to 8 above involves error.

The first error

10. In identifying the cohort of claimants with potential add-on claims, before applying the "legal involvement" filter, the analysis includes within its scope all 750 claims resulting in lump sums that involve *any use of opioid medication at all*, regardless of the duration

of that use. This cannot be an assumption that bears any resemblance to reality. There is no evidence to suggest that the short-term use of opioid medication will lead to any permanent impairment save in the very exceptional case. To suggest that a person who is prescribed opioid medication for a few days or a week is at any serious risk of developing permanent impairment from that prescription is absurd. The risk of permanent impairment from opioid medication use largely arises in respect of the long-term use of such medication.

11. Presumably in recognition of this, at page 5 of the analysis, reference is made to the 300-350 claims per year still receiving opioid medication in the third development year. The analysis identifies this group as the proxy for those with ongoing opioid use.

12. SA Unions submits that this is the group at risk of permanent impairment associated with opioid medication. The failure to base its assumptions upon this group of 300 to 350 claims, as opposed to the 750 claims used by the analysis, means that the analysis is likely to exaggerate the number of potential add-on claims by a factor of 2.[1]

The second error

13. Having identified the cohort of claimants with potential add-on claims, the analysis then applies its 3 scenarios to that cohort. The rationale underpinning those scenarios is opaque; the reasoning process identifying the percentage increases of claims within each of those scenarios is simply not disclosed.

14. Nevertheless, the increases suggested by the scenarios cannot be right. The medium and high scenarios suggest that 36% or 55%, respectively, of persons within the cohort (i.e. those who have had *any* opioid medication who have a lump sum entitlement) will suffer a permanent impairment as a result of opioid medication. This, again, is absurd. There is simply no medical evidence suggesting that the risk of permanent impairment from opioid medication is anything in that order. Even the 19% suggested by the low scenario is likely to be significantly higher than anything suggested by the medical evidence.

15. This highlights a significant flaw in the analysis. There is nothing in the analysis which suggests that any attempt has been made to identify any scientific or medical evidence relating to the risks of impairment arising from opioid medication use. Any reliable

[1] Even allowing for an assumption that a greater percentage of these 300-350 claims will have "legal involvement" than the 70% assumed in respect of the 750 claims.

assessment regarding the risks to the return to work scheme of the use of opioid medication should at least make some attempt to consider the scientific and medical evidence of the incidence of opioid medication permanent impairment.

The third error

16. Having identified the likely numbers of claims with increased WPI assessments, the analysis then broadly quantifies those assessments, by dividing them into assessments which yield an increase to lump-sum only, and assessments which result in a claimant becoming a seriously injured worker.

17. In undertaking that quantification, the analysis relies on its understanding that in *Mitchell*, the increase attributable to opioid medication use is 44%. This understanding is wrong. It includes impairments in no way attributable to opioid medication use. The increase actually attributable to opioid medication use is 22%.

18. While again the reasoning process of the analysis in arriving at its quantification is opaque, the fact that its starting point exaggerates the relevant increase in WPI assessment in *Mitchell* by a factor of 2 must mean that the product of that analysis is significantly exaggerated.

Summary

19. SA Unions remains unconvinced that those responsible for the development of the return to work scheme did not anticipate the application of the orthodox causation principles made in *Mitchell*, and remains unconvinced that there is in fact any unanticipated impact upon the scheme from that decision.

20. Assuming, however, that there is some unanticipated impact, the Finity memorandum does not provide a reliable basis for assessing the potential impact to the scheme from the decision.

21. The analysis contained in the memorandum exaggerates the cohort of persons potentially at risk of permanent impairment from opioid medication use by a factor of 2. It then makes assumptions of the incidence of permanent impairment within that cohort which are wildly exaggerated and which take no account of scientific or medical evidence regarding that incidence. It then exaggerates the percentage increase in WPI assessment attributable to opioid medication in *Mitchell* itself by a factor of 2.

22. That is, the analysis exaggerates both the number of claims likely to be affected by *Mitchell* (and does so very significantly), and the quantum of any relevant increase in WPI assessment.

23. We urge the Review to pay it little regard.