WORK INJURY EMPLOYMENT LAW PERSONAL INJURY CRIMINAL LAW WILLS & ESTATES

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9 February 2018

The Hon John Mansfield AM QC
Return to Work Act Review
GPO Box 464
ADELAIDE SA 5001

Sent via email: RTWreview@sa.gov.au

Dear Mr Mansfield

Review Pursuant to section 203 of the *Return to Work Act 2014*

Thank you for the opportunity to provide a submission to the *Return to Work Act 2014* ('the RTW Act').

By way of background, WK Lawyers represents exclusively employees with claims under the RTW Act and its predecessors.

In relation to the Terms of Reference, it is our intention to focus on matters that are of primary concern, rather than all issues that have arisen. In response to the Terms of Reference we would say as follows:

1. It is our view that there has been negligible difference in the number of disputes and the time taken to resolve disputes. That said, we note that primary reasons for delay in resolution of matters before the South Australian Employment Tribunal have been questions of law arising under the RTW Act and a backlog of appeals both to the Full Bench and to the Supreme Court of South Australia. We anticipate that the delay in such matters will reduce over time.

2. We strongly disagree with the proposal to transfer the jurisdiction of SAET to SACAT. The specialist nature of the South Australian Employment Tribunal greatly assists parties, both employees and employers, in resolving disputes under the *Return to Work Act 2014*. It is also not uncommon that such matters are connected or overlap into other industrial matters that are heard before SAET under the *Fair Work Act 1994* (SA). These matters are also often of a very technical nature and intrinsically linked to other employment related matters. It is our view that a transfer of such matters to SACAT will delay and complicate matters that are currently being resolved with efficiency in SAET.

3. The RTW Act gives rise to a number of new issues with respect to medical questions:

   Permanent Impairment Assessments

   The first is whether an injury has reached maximum medical improvement ('MMI') and stability in order for a permanent impairment assessment ('PIA') to be undertaken. Whilst this was the same criteria that needed to be established under the previous section 43 of the *Workers' Rehabilitation and Compensation Act 1986*, we raise concerns that the onus for establishing this issue is often falling on a worker who has limited understanding of what may be required in order for a PIA to be undertaken. Claims agents (whether self-insurers or otherwise) are approaching this in an inconsistent manner. On occasions a worker is requested to provide vast quantities of medical documents, others they are asked to sign authorities to summons all medical records and on other occasions a report request regarding stability and MMI is directly requested by the claims agent from the treating doctor. It is our view that this could be undertaken in a much more efficient manner. Two options for this would include (1) that the claims agent is required to request a report from the treating doctor or (2) that the worker complete a form (similar to that under the Commonwealth SRC Act) that indicates they have reached MMI. Where such a form is completed by a treating doctor, that there be provision for the report/medical appointment to be paid for regardless of entitlement period. It would also be our recommendation that the Compensating Authority also pay for an MRI/x-ray imaging and the like requested by the PIA assessor, as on occasion an PIA assessor is unable to make an assessment due to no imaging being available.

   A secondary issue in relation to PIA requests in the request by claims agents for the worker to comment on PIA request drafts. Whilst this is good practice when legal representatives are involved as it reduces potential issues, it is also creating undue concern and/or confusion for workers who do not have representation. We note that there is also, on occasion, significant work involved for legal representatives to check the contents of draft requests, depending on the complexity of injuries sustained by the worker. The legal fees for checking such documents are not covered by the scale and result in workers incurring legal fees in situations where they previously did not. It also creates in equitable process for self-represented workers. It would be our recommendation that there be a scheduled fee payable for checking such request.

   Surgery requests/pre-approval of future medical expenses

   Surgery pre-approval, future medical expenses and medical reports associated are an area where there has been a significant increase in medical questions and report requests. As anticipated, the requirement to obtain pre-approval under section 33(21)(b)(ii) prior to the expiration of medical expense entitlement period has resulted in a significant number of expert reports being obtained. It also raises a large policy concern that workers who are not properly aware of the ability to make such a request are significantly disadvantaged under the current system.

   It should also be noted that often a medical report is obtained in anticipation of the end of an entitlement period only to have the report indicate that medical expense is of a nature that falls under section 33(21)(b)(i) is needed, and a report was not necessary at the time.

In relation to requests under section 33(17), the question of pre-approval is in some cases increasing the cost of claim management. This is particularly in the case of noise induced hearing loss claims. For example, a request to replace a battery for a hearing aid or have a hearing aid replacement must be made in accordance with the regulations. Prior to the implementation of the RTW Act, the battery replacement (for example) was done on the spot with a small fee at the end. Now, a person must attend an audiometry centre, have it assessed that a battery replacement is required and pre-approval must be applied for, prior to the expense being incurred. This process is often at double the cost. There are two options that could be explored in order to reduce this (1) that there be a scheduled one battery replacement per-year that is pre-approved and one hearing aid per 5 years (or similar) (2) pre-approval requirements could be waived for expenses under $5,000 or similar (as is done in Tasmania).

In relation to future surgery approval requests, there appears to be significant litigation on the question of whether the surgery is reasonably probable at a future date. This aspect of the RTW Act could be avoided if the need for future surgery required simply that the application be made when the surgery was necessary, rather than having to make such an application prior to the expiry of medical expenses.

There is also a practical issue in that sometimes it is recommended that an arthroscopy be performed in order to determine whether a replacement (or similar) is necessary. The arthroscopy falls under s 33(22)(b)(ii) whereas the replacement (assuming there is some form of therapeutic appliance) falls under section 33(22)(b)(i). The public policy reason as to why there is such an artificial divide between what requires an application prior to the expiry of medical expenses and what does not, appears unclear. As such, it would be our recommendation that all future surgery applications be made when and if they are needed.

We also raise a practical issue in that it normally takes at least 12 months post-surgery for an injury to stabilise. This is with considerable further medical treatment and it is not uncommon that subsequent surgery is required, which was not anticipated. This leaves workers who were injured at work in a situation where they are not able to pay for surgery and cannot make a recovery to return to work. It would be our suggestion that a further two years of medical expenses be considered where surgery is undertaken.

4. No comment.

5. No comment.

6. One observation that may be a factor in return to work rates is the cut off of medical expenses, 12 months after the expiry or weekly payments. This is particularly having an impact on physiotherapy and other treatments that assisted workers in continuing in employment and/or increasing their capacity to work, pursuant to a Return to Work Plan. We are now seeing no Return to Work Plan at the end of the entitlement periods and/or Return to Work Plans with no physiotherapy or other treatment. We have had clients who have experienced deterioration in their condition and their ability to return to work as a result of no longer being provided with any treatment, treatment that is often minimal or of little cost. This is both in relation to physical injuries and in relation to psychiatric illness or injuries.

7. See above.

8. No comment.

9. No comment.

10. In addition to the points raised in response to Terms of Reference 3, above, we make the following comments:

    Psychological injuries

    Workers who suffer a psychological injury as a result of work are in a particular worse position, particularly where the suffer a severe injury but fall just shy of a 30% whole person impairment ('WPI'), for example a 29% WPI. These extremely vulnerable workers are not entitled to lump sum compensation for either non-economic loss (s 58) or economic loss (s 56), despite often being completely unable to return to work with their pre-injury employer. They face the situation of having all entitlement to weekly payments cease after 2 years and medical expenses 12 months after that and yet have not made a recovery to return to work.

    It would be our suggestion that medical entitlements continue for a longer period of time, that access to section 56 entitlements be enabled and/or that the common law threshold for these workers be lowered (say to 20% WPI).

    Section 18 cost provisions

    One large hurdle under the RTW Act for workers are the cost provisions under section 18. Section 18 enables a worker to make an application that their pre-injury employer provides suitable duties. Whilst this provision has the potential to increase return to work rates, the cost of potential litigation (post conciliation and the capped costs) acts as a large barrier to workers who wish to return to work with their pre-injury employer.

Please do not hesitate to contact us if you have any questions or queries in relation to the above or any other matter arising under the *Return to Work Act 2014.*

Yours faithfully

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Dear Mr Mansfield

Review Pursuant to section 203 of the Return to Work Act 2014

Further to our previous submissions we write to note some addendum issues not raised by our firm previously. We are aware at the time of writing that the date for submissions has closed, and we express our apologies for the late submission of this addendum, but hope that you will pay it mind when performing the review.

As noted in our previous submission WK Lawyers represents exclusively employees with claims under the RTW Act and its predecessors.

In response to point 3 of the Terms of Reference we raise the following issues of concern with the current legislation and its practical implementation:

Permanent Impairment Assessments

An issue that has arisen in relation to permanent impairment assessments derives from workers being dependant upon compensating authorities to arrange such assessments. We are not advocating removing the control of the compensating authority, or self-insured employer, over the administration of that process but, rather, propose amendments to the way that aspect of the scheme operates in practice.

Issues arise in circumstances where workers claim a lump sum entitlement that is dependant upon the claim being quantified by way of permanent impairment assessment (either as part, or the entirety, of their claim for compensation) and the relevant compensating authority does not perform the assessment of same but issues a rejection over the matter. This has resulted in an increasing amount of matters being brought before the Tribunal where the core question of law has been one of jurisdiction: whether the rejection by the compensating authority of such a claim is a "reviewable decision" for the purposes of section 97 of the Act such that review rights attach to same in the absence of a compliant permanent impairment assessment pursuant to section 22 and the Impairment Assessment Guidelines having been performed (even though workers, in submitting their claims, have sought same). We understand a lack of settled law on this point to date.

Such a niche point of law is confusing and frustrating for both unrepresented and represented workers, who simply wish for the substantive elements of

their claims (i.e. whether they have a work-related injury and a permanent impairment and, if so, the quantification of its extent and the entitlements that flow from same) to be able to be advanced in the Tribunal. We note anecdotally that we have been privy to Presidential Members of the Tribunal bemoaning what has been perceived as a current trend of ancillary matters being brought before the Tribunal, such as jurisdictional points, that avoid the more substantive matters in dispute regarding the status of work injuries and this is creating additional delays in the resolution of matters as well as additional costs for both workers, compensating authorities/self-insured employers, and the Tribunal itself and handling such matters.

Similar issues have arisen where workers have alleged undue delay in the making of a determination of such claims and whether or not such matters are reviewable decisions under section 97 of the Act (in the absence of an assessment having been performed) are crucial to determining whether the Special Jurisdiction under Part 7 of the Act to seek expedited determination of the matter has been enlivened.

We believe these jurisdictional questions that have been the source of such delays and expense for all sides could be easily remedied by instituting greater clarity under section 97 in relation to Permanent Impairment matters. For example, subsection 97(e), states the following type of decision to be reviewable:

> "a decision on a claim under section 31 (and, if a claim is accepted, will include the calculation of average weekly earnings under section 5 and the amount of any payment under Part 4)"

A claim under section 31 is a claim for any financial benefit under Part 4 of the Return to Work Act and so seemingly encompasses claims for medical expenses, income maintenance, and both types of lump sum compensation.

We believe that either of the following amendments would remedy the disputed jurisdictional issues described above:

> "a decision on a claim under section 31 (and, if a claim is accepted, will include the calculation of average weekly earnings under section 5 and the amount of any payment under Part 4 <u>regardless of whether or not a compliant Permanent Impairment Assessment pursuant to section 22 of this Act has been prepared in relation to the claimed injury</u>)"; or

> "a decision on a claim under section 31 (and, if a claim is accepted, will include the calculation of average weekly earnings under section 5 and the amount of any payment under Part 4<u>, the latter only being reviewable if a compliant Permanent Impairment Assessment pursuant to section 22 of this Act has been prepared in relation to the claimed injury</u>)"

We would advocate for the former, as the latter would allow a worker to make a claim for compensation including a lump sum component and such claim could be rejected without a permanent impairment assessment occurring (as has occurred on many of our current and previous files) and then the worker having no jurisdiction to file an Application for Review under Part 6 of the Return to Work Act in regard to the determination of the matter (nor would

they have jurisdiction under Part 7 to apply to the Tribunal to expedite such a determination).

We believe the would introduce the relevant clarity and minimise disputes and Applications before the Tribunal that have this as a central issue, as well as facilitate the ability for disputes concerning permanent impairment to resolve.

Surgery requests/pre-approval of future medical expenses

In relation to requests under section 33(17) of the Act, the question of pre-approval is in some cases increasing the cost of claim management. This is particularly in the case of noise induced hearing loss claims but is also relevant for most injuries that have numerous, relatively low-cost expenses and for which medical practitioners are not the primary treatment providers (but, rather, audiologists, optometrists, physiotherapists, and chiropractors are the main treatment providers).

> For example, a request to replace a battery for a hearing aid or have a hearing aid replacement must be made in accordance with the regulations. Under the current s33(17) and regulation 22 process a person must attend an audiometry clinic, have it assessed that a battery replacement is required and pre-approval must be applied for (which requires a relatively detailed application, compliant fully with Regulation 22 of the *Return to Work Regulations 2015* (SA) including being accompanied by a report from a medical doctor, as opposed to simply a treatment provider or relevant expert), prior to the expense being incurred.

This process is time-consuming and, if legal assistance is required (noting the requirement to conform fully with regulation 22 to have a valid application), potentially much more expensive than the cost of the expense being sought. Options that we believe would reduce these issues, and the disproportionate use of resources required by workers and treatment providers to conform with extensive bureaucracy, are:

1. That there be a scheduled one battery replacement per-year that is pre-approved (possibly for a gazetted maximum cost) and one hearing aid per five years (or similar);
2. The more onerous elements of the pre-approval requirements, such as provision of a medical doctor's report in regard to the claimed expense, could be waived for expenses under $5,000 or similar (as is done in Tasmania); and/or
3. Expansion of the categories of provider under Regulation 22 who can provide evidence in support of the worker's need for a good or service being approved from just medical doctors to a broader category of "Approved Specialists" such as audiologists, physiotherapists, etc (and define such term in the Regulations).

In relation to future surgery approval requests, there appears to be significant litigation on the question as to how such applications are handled and the requirements for same. We understand such matters are currently before the Supreme Court, most notably the appeal of *Rudduck, Karpathakis and Ashfield v Return To Work SA* [2017] SAET 41. This litigation of the RTW Act could be avoided if the need for future surgery (all surgery, not only that requiring the implantation of a device) required simply that the application be made when the surgery was necessary, rather than having to make such

an application prior to the expiry of medical expenses. It has been deeply troubling to many workers to learn that if they require surgery for an injury, but it is not the correct type of surgery (i.e. that requiring the implantation of a therapeutic appliance), that their entitlement to same extinguishes with other medical expense entitlements unless an application under the correct regulations is made within a certain period of time. This is of the greatest disadvantage to unrepresented workers who often do not learn of these issues until after their ability to make such an application has expired. The distinction between these types of procedures is highly arbitrary and ought to be remedied. It seems paradoxically unfair to many workers, as well as their legal representatives, that an injury should necessitate reasonable surgery, but that it not be available to an injured worker under the workers compensation scheme.

There is also a practical issue in that sometimes it is recommended that an arthroscopy be performed in order to determine whether a replacement (or similar) is necessary. The arthroscopy falls under s 33(22)(b)(ii) whereas the replacement (assuming there is some form of therapeutic appliance) falls under section 33(22)(b)(i). The public policy reason as to why there is such an artificial divide between what requires an application prior to the expiry of medical expenses and what does not, appears unclear. As such, it would be our recommendation that all future surgery applications be made when and if they are needed.

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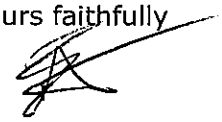
Please do not hesitate to contact us if you have any questions or queries in relation to the above or any other matter arising under the Return to Work Act 2014.

Yours faithfully



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