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Special Report

WORKERS COMPENSATION & SELF INSURANCE

WorkCover: The Big Reform

By John Walsh | May 2015

After Minister Rau famously described the current workers compensation scheme as “buggered”, the Government announced that the WorkCover scheme would be replaced by a Return to Work Scheme effective from 1 July 2015 and that it would be underpinned by the *Return to Work Act 2014*, which passed through the Legislative Council on 30 October 2014.

The new legislation enacts the most significant changes to the scheme in nearly 30 years. The key features include:

- fixed time limits around income maintenance and medical expenses which, except for the most seriously injured, will cease after two and three years respectively;
- reintroduction of common law – but a Clayton’s common law that few will be able to access;
- the introduction of lump sum compensation for economic loss to be paid to those whose whole person impairment is assessed within a range of 5% to 29%;
- the introduction of the category of “seriously injured worker” who has been assessed as having a WPI of 30% or more and who will receive income maintenance to retirement age and who is not expected to participate in rehabilitation initiatives;
- a strengthening of the threshold for compensability such that employment needs to be “a significant contributing cause” of physical injury and “the significant contributing cause of the injury” for psychiatric injuries;
- the reduction of the average premium rate to 2% (with a consequential reduction in the unfunded liability to $100 million or less);
- strengthened mutual obligations in relation to return to work initiatives for both employers and workers.

It appears to me that Minister Rau has achieved what many people would have thought to be impossible in achieving a fair balance between the interests of workers and the State’s employers. Return to Work SA also seems to have pulled off the impossible by turning a deficit of $1.132 billion as at 30/6/14 into a surplus of $20 million as at 31 December 2014!

Certainly the transformation from a “long tail” scheme to one where most income maintenance benefits are capped at two years was always going to reduce the unfunded liability over time. However, this “dramatic reversal” in just 6 months is remarkable and reflective of a much more competent and directive management team.

Previous attempts by the Labor Government to amend the *Workers Rehabilitation & Compensation Act 1986* have been monumental failures. Notably the 2008 amendments introduced by Kevin Foley with great fanfare did nothing but create uncertainty, increase disputation, cost and the unfunded liability.

Inevitably there will be some unintended consequences and, I suspect, increased disputation as workers and their representatives seek to test the boundaries and, in many cases, seek judicial interpretation of the new legislation.

Strengthened thresholds?

One of the key initiatives designed to contain costs is an attempt to restrict compensability and entry into the scheme.

For a physical injury to be compensable, it must arise out of or in the course of employment and the employment must be a **significant** contributing cause of the injury.

In the case of a psychiatric injury, the injury must arise out of or in the course of the employment and the employment must be **the** significant contributing cause of the injury.

The current legislation simply provides that the injury must arise out of or in the course of employment in the case of a physical injury, whilst in the case of a psychiatric injury the worker must also establish that the injury did not arise from some exclusionary features which can broadly be described as reasonable administrative action undertaken by an employer.

There is no definition of what “significant contributing cause” means and we can expect these provisions to lead to considerable disputation. In South Australia the Supreme Court has previously determined that a test which is qualified by the word “significant” has not been very demanding. In essence, it will be found to be significant if it is not “insignificant” or “trivial”.

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Similarly, in situations where a psychiatric injury occurs against a background of a number of factors, we can expect disputation to arise simply because it is so difficult to establish whether or not employment contributed more than any other causal factor to the injury.

Any entitlement to lump sum compensation for permanent impairment is often the subject of disputation, despite attempts to do away with the "duelling doctors" syndrome. The Act seeks to limit and create certainty in relation to the entitlement which flows from an individual trauma by restricting the worker to one assessment only, no matter how many injuries result from the trauma. Specifically, it prevents further assessment (and compensation) for any injury that develops or manifests itself after the assessment has been made. Once again, expect this provision to be tested and particularly in the common scenario where an injury causes another, so called, compensatory injury to manifest itself further down the track.

The ability of a worker to dispute decisions made by a compensating authority in relation to the claim has been restricted to a degree. The current Act provides that, "a decision on a claim for compensation" is reviewable, such that virtually any action taken by a compensating authority in relation to the management of the claim gives rise to a right for an injured worker to dispute the decision, action or failure to act. The new provisions are far more prescriptive and provide less opportunity to challenge claims management actions.

A similar subtle change has been made to the provisions that govern the time within which a decision may be disputed. Traditionally it has been relatively easy for a worker to obtain an extension of time to file an application because the current Act provides a broad discretion for the Tribunal to allow an extension of time. The new Act, however, provides that the Tribunal must only allow an extension of time (beyond the period of one month allowed to file a Notice of Dispute) if the Tribunal is satisfied that:

(a) good reason exists; and

(b) another party will not be unreasonably disadvantaged because of the delay in commencing the proceedings.

Employer's perspective

The overall reduction in average premium rate will be welcomed by the employer community, but there will be a number of employers, who will experience an increase in premium under the new premium reform and some of those will have significant increases due to the fact that claims costs associated with secondary injuries will, in the new scheme, be taken into account in assessing premium.

Employers in high risk industries that have benefitted from the cross-subsidisation which is a feature of the current Act will gain some comfort from the fact that the impact of the removal of the 7.5% cap upon the WorkCover premium for "high risk" industries will be ameliorated by a transition period of five years being allowed for the adjustment to higher rates.

Employers can expect that provisions in the Act which allow for poor performing employers to be charged a surcharge on their premium will be utilised, but on the credit side those excellent performing employers will also qualify for a remission on their premium.

Self-insurance under the new act – any changes?

Self-insurers have traditionally outperformed WorkCover and overall will benefit from the changes brought about by the new Act.

The financial and cultural advantages of self-insurance have long been known and documented. It can reasonably be expected that more corporate employers that fit the criteria to become self-insured will attempt to do so. There are about 15 or more potentially compliant registered employers in the retro-paid loss scheme and it is my understanding that in general they are performing well and, as a consequence, "costing" WorkCover as a result of which the current scheme will see significant change. It would be reasonable to expect many of those employers to seek to transition into self-insurance where they will have complete control over their claims and workforce.

The great unknown

The provisions around the employer's duty to provide work are likely to provide fertile ground for disputation. While the Act attempts to put a boundary around income maintenance payments of 104 weeks, there is no such boundary around an employer's duty to provide work and it introduces the concept of a worker making application to the South Australian Employment Tribunal for an order that an employer provide suitable employment. If the Tribunal orders an employer to provide employment and the employer fails to comply, the worker may apply to the Corporation for financial support which the Corporation may recover, together with interest, as a debt from the defaulting employer.

Self-insured and registered employers both will be affected and those workplaces that are highly unionised, and particularly those affected by militant unions, can expect to be targeted as these new boundaries are tested.

Summary

A fair balance appears to be achieved in this most significant reform, but expect there to be plenty of known unknowns that surface over the next few years as the boundaries are tested and judicial interpretation becomes critical in determining whether the Government achieves its aim in reducing premium to a reasonable and sustainable level for South Australian employers.

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