Article

WORKERS COMPENSATION & SELF INSURANCE

The Chosen One

One assessment to rule them all, one assessment to find them; one assessment to bring them all and in the darkness bind them.

By Patrick Walsh

Perhaps a little dramatic, but we're only into our third week under the *Return to Work Act 2014 (SA)* and already there's lots of interesting things happening!

Something that is shaping up to be an area of considerable tension is the assessment of whole person impairment. I have already seen a number of requests for impairment assessments and the inevitable requests from worker solicitors to be able to nominate the assessor.

There are a few issues concerning the sustainability of the impairment assessment system in its current form, but for the time being we will need to work within the Impairment Assessment Guidelines that have been published by the Government.

In working out how to properly assess a worker's whole person impairment, I think that it's important to revisit the Government's amendments in this area.

The Return to Work Act makes it clear that a worker is only entitled to one assessment for each work injury. In particular, Section 22(10) of the *Return to Work Act* states that *"…only 1 assessment may be made in respect of the degree of permanent impairment of a worker from 1 or more injuries (including consequential injuries) arising from the same trauma…"*

I consider that this legislative change should be read in such a way that a worker is only entitled to one lump sum payment for economic and non-economic loss for each work injury. This contrasts with the 'old' system; which allowed a worker to seek a further assessment for non-economic loss if their work injury worsened.

This interpretation of Section 22(10) would allow the Compensating Authority to simply obtain an assessment and make a determination. If the worker wishes to dispute the determination, they would be able to obtain their own report and the Tribunal can make a final order.

The Government has gone further than this, however, and Section 22(7) requires the Compensating Authority to comply with the Impairment Assessment Guidelines. These guidelines make it clear that the parties are only to obtain a single report, after the worker nominates which doctor is to perform the assessment.

The principle purpose of this is to avoid "duelling doctors" and reduce the number of disputes. However, this does not necessarily mean that workers should have an unencumbered right to choose their assessor.

In order to address concerns that were raised about this particular issue, the Government has introduced an accreditation scheme for impairment assessors. Ostensibly, this was to ensure the credibility of the new scheme by removing doctors who are perceived to be favourable to one party or another. Impairment Assessment reports prepared for claims agents of Return to Work SA will also be subject to peer review to ensure compliance with the new guidelines.

I won't comment on the individual doctors that have been accredited to provide permanent impairment assessments in this article … but clearly a scheme which simply allows a worker to choose whichever assessor they wish will cause a significant loss of faith and confidence by employers in the Return to Work Scheme as workers will (understandably) select the assessor they feel will provide the most favourable assessment. This would have at least two consequences, being:

1. Assessors will favour workers in their assessments in order to ensure they continue to get requests; or
2. Assessors who are not perceived to favour workers, will essentially be driven out of the scheme by virtue of the fact that they will not receive any report requests.

The reality is that it is impossible to make Impairment Assessments purely objective. An assessor is required to use a substantial amount of subjective opinion whenever they make an assessment and it is in the exercise of their subjective judgement that assessors are generally left open to criticism (and often legal disputes!).

This begs the questions as to how the process should work, at least until the South Australian Employment Tribunal or the Supreme Court rules on this issue.

Importantly the Impairment Assessment Guidelines state that:

Once there is medical evidence (e.g. from the treating doctor(s) or specialist(s)) that the work injury has stabilised/reached MMI and a permanent impairment assessment is required, the worker ***must be given the opportunity to choose the assessor who will assess their whole person impairment*** *caused by their work injury.* ***The worker must undertake the selection process in consultation with the requestor (claims agent, self-insured employer or ReturnToWorkSA, as relevant),*** *considering the following factors:*

The body system to which the injury/ assessment relates – the assessor selected must be accredited for the relevant body system(s)

- Nature and complexity of the injury
- Possible conflicts of interest
- Availability of assessors, and
- Whether multiple assessors are required.

The requestor must ensure the worker is aware of all the assessors that satisfy the above factors.

Until otherwise directed by the South Australian Employment Tribunal, or the Courts, I suggest that self-insured employers either consult with their lawyers after receiving a request from a worker for an assessment, or follow these steps:

1. Identify what body systems are required to be assessed, and whether this creates the need for multiple assessments.
2. Prepare a list of assessors that are accredited for the identified body systems. I suggest erring on the side of using an assessor accredited for all the body systems that you require to be assessed, if possible, for simplicity.
3. Remove assessors who you do not consider appropriate ***having regard to the nature and complexity of the injury, or who have a real (or perceived) conflict of interest.*** In this regard, I note that the Accreditation Scheme document published by ReturnToWorkSA, it states that an assessor ***must not*** accept a request for an assessment in relation to a worker they have treated, or previously provided advice or an assessment to.
4. Remove assessors who are not able to see the worker within 6 weeks of the appointment being requested (assessors are not able to accept a request if they are unable to accommodate an appointment within 6 weeks).

The worker should then be asked to nominate an assessor from those that remain.

Clearly asking a worker to nominate an assessor from a small pool of assessors who are considered to be "employer friendly" will be disputed and will be unlikely to stand up to scrutiny; however, provided that the list of assessors provides a reasonable choice of generally well regarded assessors, I believe that using this process will assist in achieving what the legislature intended, which is to reduce disputes about the level of whole person impairment and the use of doctors within the scheme that are perceived to heavily favour one side or the other.

The alternative is to simply give the worker a list with all the accredited assessors for the relevant body systems and ask them to nominate who they wish. There is the potential for a slew of lopsided reports and the inevitable disputes from unhappy self-insured employers!

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