Timber Queensland Submission to the Finance and Administration Committee on the:

Inquiry into the operation of Queensland's workers' compensation scheme

TIMBER QUEENSLAND

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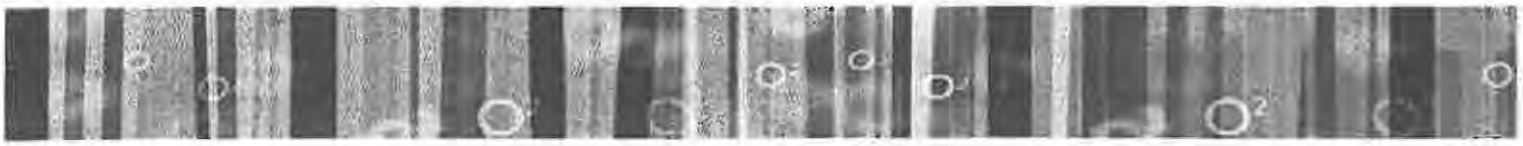
Timber Queensland is the state industry body representing the interests of the full timber value chain; from forest growers, through timber processers, timber treaters and fabricators, to builders and associated building professionals. We welcome the opportunity to comment on Queensland's workers' compensation scheme.

Recommendations

1. *Timber Queensland supports the current workers' compensation arrangements and does not support any move to align these with other states.*
2. *Timber Queensland believes that access to common law for lesser injuries is a major burden of the current workers' compensation scheme and recommends that a whole person impairment (WPI) threshold of 15% be introduced to common law claims.*
3. *Timber Queensland recommends that the applicant should be in full knowledge and support for all claims made on their behalf.*
4. *Timber Queensland believes that the definition of an injury is critical to the function of the workers' compensation system, and recommends that the definition be modified to reflect the workplace as being the major contributing factor to an injury before becoming liable for workers compensation. Timber Queensland also recommends that injuries sustained while travelling to and from work or when away from work on non-work related business should not be eligible for workers' compensation.*
5. *Timber Queensland recommends that workers be required to notify employers of any incident leading to an injury on the day of the incident, or where an injury only becomes evident after the fact, within one working day of the injury becoming evident.*
6. *Timber Queensland recommends that doctors and other specialists should be required to consult with a business when considering / developing a return to work strategy, and reasonable compliance with a rehabilitation and return to work strategy should be mandatory to accessing statutory payments or common law.*
7. *Timber Queensland recommends that workplace initiatives be better recognised when establishing WorkCover premiums, and that common law claims for incidents older than 3 years should not be taken into account.*
8. *In the event that a whole person impairment threshold is not introduced, then Timber Queensland recommends that a permanent impairment assessment automatically occur once the injury is assessed as stationary and stable, and associated damages paid automatically.*



Background

Timber Queensland acknowledges that the objective of Queensland's workers' compensation scheme is to provide benefits for workers (or their dependents) who sustain injury in their employment, and to encourage improved health and safety performance by employers; whilst ensuring that the scheme does not impose too heavy a burden on employers and the community.

All of Queensland's forest and timber industry businesses are reliant on the central WorkCover Scheme, with parts of the industry paying some of the State's highest WorkCover rates. The logging and log sawmilling sectors both have industry rates of around 8%. Although these reflect the high-risk nature of some of these workplaces, the timber industry is committed to reducing workplace injuries, and recently released a workplace health and safety action plan to guide this process. The intention is to reduce the number of injuries and subsequent WorkCover claims, however in addition to reducing workplace injuries, action is required to ensure that the workers' compensation is as fair as possible, and does not provide an undue burden on industry.

Finding the balance between support for injured workers, encouraging reasonable rehabilitation and return to work, and the cost of any scheme to business and the community is always difficult. However Timber Queensland believes that the current scheme fails to deliver on its objectives and modification is required. In particular, the current arrangements favour costly litigation, and inappropriately attribute injuries to the workplace. As a result, the greatest beneficiaries of the current arrangements are often the plaintiff lawyers and fraudulent claimants, with genuinely injured workers and the businesses that finance the scheme missing out.

Queensland's workers' compensation arrangements

The Queensland's workers' compensation arrangements of a 'short tail' system appears to serve both Queensland workers and businesses well. The short tail means that workers receive certainty and due compensation within a reasonable timeframe, and future liabilities under the scheme are minimised. Timber Queensland sees no need to align the Queensland scheme with other jurisdictions.

However the forest and timber industry have had variable experiences with WorkCover as the workers' compensation service provider. Whilst some businesses report a good relationship with WorkCover and effective systems for addressing claims, others report poor performance in terms of validating claims with the employer before they are accepted, pursuing fraudulent claimants, accuracy of their payment calculations, and general communication regarding claims.

1. *Timber Queensland supports the current workers' compensation arrangements and does not support any move to align these with other states.*

Common law claims

The timber industry has no issue with supporting due compensation for workplace injuries, and recognises that where there has truly been serious negligence on behalf of a workplace that workers should have appropriate recourse to the law. However the current unlimited access to common law is seen as an easy target by some workers and many lawyers, driving unwarranted claims and excessive expense to industry.

Common law claims are a particular concern to the timber industry due to the potential for excessive payouts for minor or non-existent injuries, their overall and increasing cost to businesses, and the uncertainty of outcomes which can drag on for many years. The common law process seems to be largely driven by 'no win, no pay' plaintiff laywers seeking to maximise their own benefits at the expense of the system.

The timber industry believes that the statutory claim process should be the first and foremost provider of support to injured workers, and that the incident investigation and injury assessment process should be rigorous. This is the best way to deliver fair and equitable outcomes to injured workers, and reduce uncertainty and cost to business.

Common law claims almost invariably lead to a payout to the claimant. WorkCover has shown a strong reluctance to take common law claims to court, almost universally offering a settlement, regardless of the scant evidence provided by the worker to support their position. A number of timber industry businesses involved in compulsory conferences report that despite a belief that there is no workplace related injury or impairment, settlements are almost always made in the favour of the worker.

Example

A worker sustained an injury to his upper back/shoulder area when he was hit by a piece of falling racking. The worker did not consider the injury to be serious and did not immediately seek medical aid, but did visit a hospital later that day for a check-up after advice from his supervisor. He continued to work with the company for a couple of months with no mention of any injury, before resigning and moving to another employer. Approximately three and a half years after the incident the company received a notice of claim for compensation for the problems arising from the original incident. (Apparently there are provisions for late claims.) Despite no medical evidence of ongoing issues from the incident, the end result was a payout by WorkCover of more than $100,000. The payout recognised the potential for 'future loss' despite the worker being on a considerably higher pay rate than at the time of the incident.

Many businesses believe that workers do not participate in rehabilitation programs or suddenly cannot continue with return to work programs in order to improve their likely outcomes under a common law claim. The worker's lack of participation in work is clearly at the instruction of lawyers, with a view to demonstrating incapacity and improving the chance of a successful common law claim. This is not in the interests of business or the long term recovery and employability of the workers themselves.

Example

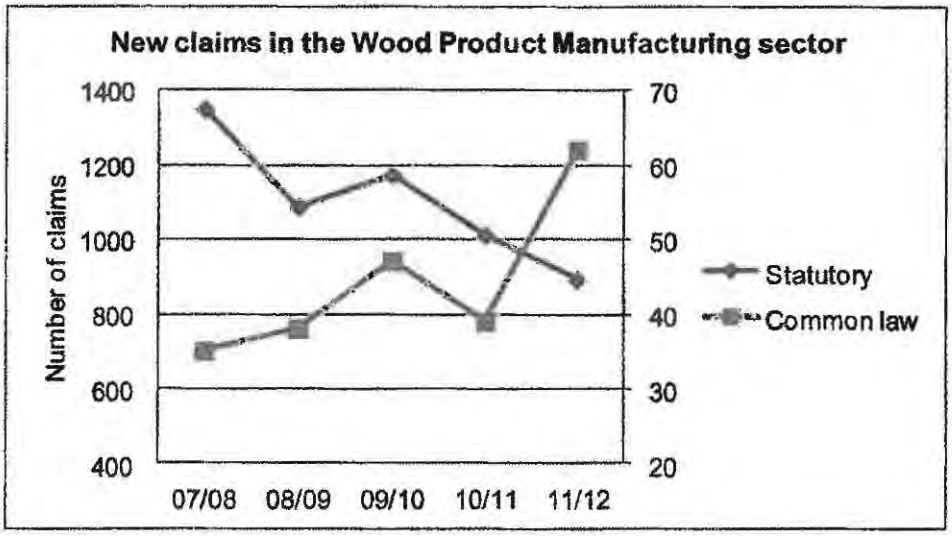
A young worker claimed to hurt his back in a truss and frame plant lifting heavy trusses. He returned to work on suitable duties involving placing nail plates and small pieces of timber during the truss layout process. The worker suddenly couldn't even do the light duties, and this was followed by a common law claim, which included false statements about the weight of trusses that contributed to his original injury. The worker would not cooperate with his doctor, physiotherapist or psychologist once he ceased doing light duties, and ultimately received a generous common law payout.

In at least some cases, common law claims are initiated by the plaintiff lawyers, without due advice to the claimant about the likely payout and full costs of a 'no win, no pay' action. In some cases, claims have even been made without the knowledge of the injured worker!

Example

A plaintiff lawyer automatically filed for common law before the limitations ran out to no knowledge of the injured worker. It got worse. The lawyer and WorkCover did not know where the worker was (they had moved cities). Doctors' appointments were made but the worker never showed up as they never got the notice. Despite WorkCover having closed the case and the worker not intending to pursue it further, the lawyers action re-opened the case and it is currently in negotiation. The case will invariably result in costs to the business, with most of those costs going to the barrister and solicitor running the case, and little going to the worker.

Despite an apparent reduction in scheme-wide common law claims since 2010, (which is questionable due to the delay of up to three years for making claims), the wood product manufacturing sector has seen a significant increase in the number of common law claims in recent years. There were over 60 common law claims in the wood product manufacturing sector in 2011/12, up from a historic average of below 40 claims per year in 07/08 and 08/09. This appears to be part of an ongoing trend towards increased common law claims in the sector. These increases are occurring at a time when new statutory claims are on the decline, from more than 1300 claims in 07/08 to less than 900 claims in 11/12. (see figure below). Unfortunately, the changes made to the common law process in 2010 have not reduced the incidence of common law claims in the forest an timber industry.



Many common law claims are made for injuries that lead to no long term disability. So despite access to suitable compensation through the statutory claims system, workers with no long term impacts are still able to make further costly claims on employers.

The timber industry believes that the introduction of a threshold for whole person impairment (WPI) of 15% should be introduced to common law claims. Similar thresholds are in place in most other states; reducing the incidence of expensive litigation for lesser injuries.

Introduction of a threshold would ensure that lesser injuries can be settled in a timely and cost-effective manner through the statutory claims process, whilst only more serious injuries are eligible for a broader review and recognition under the common law process. This would deliver a far more cost-effective system, with resources being directed towards injured workers rather than plaintiff lawyers.

2. *Timber Queensland believes that access to common law for lesser injuries is a major burden of the current workers' compensation scheme and recommends that a whole person impairment (WPI) threshold of 15% be introduced to common law claims.*

3. *Timber Queensland recommends that the applicant should be in full knowledge and support for all claims made on their behalf.*

Injury definition

Timber Queensland believes that changes in 1999 to the definition of an injury from being "the significant contributing factor" to "a significant contributing factor" inappropriately expands the opportunity to attribute unrelated injuries to the workplace. There is no test in the Act to define what is deemed to be "significant", and the timber industry believes that for an injury to be attributed to a workplace that it should be the major contributing factor.

The timber industry has many examples of pre-existing injuries, injuries arising from outside of work, and degenerative injuries where the business becomes liable for compensation when no actual injury has occurred at work. Workers are not required to report pre-existing or injuries sustained outside of work, so a business may be completely unaware that allocated duties could aggravate an existing injury, yet still become liable in such an event.

Examples

A worker operating a forklift on smooth concrete complained of a sore back. He is diagnosed with two degenerative discs in his spine which are the main reason for his pain and ongoing back issues. Because the worker felt pain at work then the work is deemed to be "a significant contributing factor". As a result the business will be liable under the workers' compensation scheme for a degenerative spine issue that is unrelated to his work.

A worker reported a sore wrist within 2 weeks of starting with the business. The worker is diagnosed with a carpel tunnel injury (a pre-existing injury and most likely a result of repetitive strain prior to commencing with the business) and as a result the workplace is liable for the cost of carpel tunnel surgery.

The potential implications of aggravating an existing injury is also a significant disincentive to employ injured workers. Despite the recognised benefits of injured workers participating in the workforce, taking on an injured worker can represent a liability due to the risk of further claims that would not be a risk if an alternative worker was employed.

Example

In the spirit of non-discrimination, an employee had been hired despite his having a prosthetic knee joint. The joint developed a serious infection and the employee was off on sick leave for a significant length of time. After about 6 months an application for workers' compensation was submitted on the grounds that over the period of time he had worked at the sawmill he probably would have been subject to a few splinters in his leg and that this could be the cause of the infection.

A worker injured at another workplace is currently working for a timber business on a return to work program as part of his workers' compensation arrangements. The timber business has a permanent position available and would like to employ the worker. However, there is a risk that the worker's injury will be aggravated, and the timber business held liable for a further workers' compensation claim. The timber business is uninclined to offer the worker full time employment due to the potential risk of a workers' compensation claim in the future.

Timber Queensland also believes that liability for injuries should only be relevant to being at the workplace or actually performing work. As such, injuries occurring while travelling to or from the workplace should not be considered workplace incidents (unless travelling in a work supplied vehicle), and nor should injuries occurring while a worker is temporarily absent from the workplace during an ordinary recess.

Examples

A worker has an long term knee injury from a motor vehicle accident 20 years ago. He steps in a rut on the way home work, causing the injury to flare up. The worker is diagnosed with aggravation of degenerative knee disease (i.e. osteoporosis and osteoarthritis) and is recommended to have a knee replacement in the near future. A claim for the aggravation is made and compensation paid, and after three months the doctor advises that the aggravation has ended. The case is closed by WorkCover. Four months later, the worker seeks advice from another doctor who says the aggravation is still present. The worker appealed to QComp who ordered WorkCover to reopen the claim resulting in back pay from the date the claim was closed. This claim is now ongoing.

A worker alleged to have sustained a back injury when changing a tyre on the way to work. Despite uncertainty about the validity of the injury and no evidence that the injury was sustained on the way to work, the business was ultimately liable for the alleged injury through the workers' compensation claim.

A growing area of concern is the trend to working from home and the responsibility of an employer in the case of an injury. There is a high probability that injuries while working at home are unrelated to work or the employer – e.g. tripping over the dog while working at home. Provided the injury occurred during work hours, then it could end up as a WorkCover claim, irrespective of the control the employer has over the workplace. The employer should only bare responsibility where the workplace (in this case the employment) is deemed to be the major contributing factor to an injury.

4. *Timber Queensland believes that the definition of an injury is critical to the function of the workers' compensation system, and recommends that the definition be modified to reflect the workplace as being the major contributing factor to an injury before becoming liable for workers compensation. Timber Queensland also recommends that injuries sustained while travelling to and from work or when away from work on non-work related business should not be eligible for workers compensation.*

Reporting and proof of injuries

The WorkCover system at present has no statutory requirements for notification of the employer about an alleged incident that led to an injury. As a result, a worker can claim an injury without notifying an employer for many days, weeks or months after the alleged incident. All incidents leading to injuries should be reported immediately they occur to ensure

that they can be properly investigated and managed to minimise the chance of the incident being repeated.

Early reporting of all incidents not only ensures that there can be a proper incident investigation to address any risks of the injury being repeated, it also allows for better verification that the incident actually occurred, and that it occurred at work. The late reporting (or non-reporting) of injuries can lead to spurious claims that are difficult for an employer or WorkCover to verify or deny.

Timber Queensland recognises that there may be circumstances where an injury takes some time to become evident, in which case the injury should be reported as soon as it becomes evident.

Examples:

A worker left the work site without reporting anything. The worker does not show for work for two days and cannot be contacted. On the third day a WorkCover certificate is faxed from the doctor. This is the first the business knows that the worker is claiming injury at work. The worker ended up on workers' compensation but the incident couldn't be properly investigated and no one could verify whether it actually occurred.

An employee makes a WorkCover claim for a knee injury that is alleged to have occurred some months prior. The only proof required by WorkCover that the injury actually occurred at work was: 1. that he was at work on the day of the alleged incident, 2. that he was at the location described, and 3. that the injury could have occurred. Despite serious misgivings of the employer, the claim was accepted by WorkCover.

An employee had a claim accepted by Workcover despite the fact that there is no injury report and he was absent on the specific date he claims to have been injured. There is documentary evidence that the timber he claimed caused the injury was not in production at any time during the week of the claim. The employee brought a civil case against he business for permanent impairment. WorkCover arranged an assessment and the employee was been found to have NO permanent impairment. It is expected that Workcover will pay him a settlement anyway rather than go to court, impacting both the reputation and premiums of the business.

There are also cases where injuries are misdiagnosed or mishandled by their doctors, leading to significant costs being attributed to the employer. WorkCover is understood to be reluctant to seek costs from doctors in these circumstances. Even when claims are proven to be false, the costs associated with the case are reflected in the employers' premiums.

Examples:

An overweight worker suffered a hernia and required surgery. An internal organ was nicked during surgery, resulting in multiple operations and long term pain for the patient. The business ended up with a common law claim that was settled at $190,000. WorkCover took no action against the surgeon.

A worker presented with a workers' compensation claim for a sore back based on a doctor's initial misdiagnosis. The timber business had to pay for the initial time off work and medical costs, until it was diagnosed as an illness (pancreatitis) rather than a back injury.

5. *Timber Queensland recommends that workers be required to notify employers of any incident leading to an injury on the day of the incident, or where an injury only becomes evident after the fact, within one working day of the injury becoming evident.*

Rehabilitation and return to work

Early return to work is recognised as a major contributor to improved outcomes for workers after injury, and obviously an improved out come for a business. This is commonly cited by WorkCover as the reason for rapid acceptance of claims without detailed investigation of the circumstances. However many businesses experience significant issues with rehabilitation and return to work programs.

Despite there being a requirement under the current arrangements for a worker to comply with any rehabilitation and return to work strategy, there are often difficulties in getting these arrangements in place in the first place, or in getting the worker to participate. Two of the main problems arising when an employer seeks to get a worker back on a return to work program are:

- The doctor won't let the worker back to work (either the worker tells them there are no suitable duties available or the doctor is overly cautious) or
- The worker tells the doctor they can't go back to the workplace (usually because of secondary claim or perceived disagreement with management / other workers)

There are potential penalties for not participating in a return to work program, however these are not being enforced. In some cases, non-compliance with rehabilitation and return to work programs would appear to be based on legal advice to the worker, with a view to maximising the opportunity for a successful common law case.

Example

A worker had an alleged knee injury that required minor surgery, the level of damage was reported as age related. A return to work program was developed for the worker in conjunction with his doctor and the business's occupational therapist. Despite agreement from the employee to attend, he reneged on three occasions. He went on to get a significant common law payout.

Timber Queensland believes that all injured workers should have a clear rehabilitation strategy developed, and where appropriate (i.e. most cases) a return to work strategy. Reasonable compliance with a rehabilitation and return to work strategy should be mandatory to accessing statutory payments or common law.

There is also a significant cost associated with workers that do not show up for medical / specialist appointments as arranged. Workers not showing up for any appointment should have the cost of the appointment deducted from their claim / settlement unless they have cancelled the appointment via their WorkCover case manager.

6. *Timber Queensland recommends that doctors and other specialists should be required to consult with a business when considering / developing a return to work strategy, and reasonable compliance with a rehabilitation and return to work strategy should be mandatory to accessing statutory payments or common law.*

Employer initiatives and WorkCover premiums

Industry regularly raise concerns that employer initiatives are not duly recognised by WorkCover when developing premiums. Despite investing considerably in improved workplace safety, leading businesses are tied to industry rates and their claims history. Better recognition of individual business's WH&S initiatives is required when setting business premiums.

The timber industry also does not support the inclusion of common law actions from 4 or 5 years ago when determining a business's premium. Workplaces are highly responsive to any incidents, generally introducing a range of measures to improve safety in the event of a workplace injury. These improvements generally lead to an immediate improvement in the health and safety outcomes for a business, and as such should be duly recognised in associated premiums.

7. *Timber Queensland recommends that workplace initiatives be better recognised when establishing WorkCover premiums, and that common law claims for incidents older than 3 years should not be taken into account.*

Notice of Permanent Impairment

The issuing of a permanent impairment notice frequently becomes a trigger point for common law proceedings. This is a result of the worker having to request an assessment, and then having to decide on accepting a statutory payout or taking a common law action. In many cases employees appear unaware of the need to request a permanent impairment certificate and do not take advantage of the benefit available.

In the event that a whole person impairment threshold is not introduced, then Timber Queensland recommends that a permanent impairment assessment automatically occur once the injury is assessed as stationary and stable. Associated damages should be a standard part of the system. This would ensure that permanently impaired workers have access to appropriate payment, eliminates uncertainty about the entitlement to benefits and would reduce the propensity for common law action.

8. *In the event that a whole person impairment threshold is not introduced, then Timber Queensland recommends that a permanent impairment assessment automatically occur once the injury is assessed as stationary and stable, and associated damages paid automatically.*