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Response to Workers' Compensation Inquiry

Australian Rail, Tram and Bus Union (QLD).

Introduction

The over-arching rationale behind workers' compensation scheme is to get people back into work wherever possible so that they may be able to return to the same, or a similar status in terms of financial abilities prior to their work-related injury occurring. If that cannot be achieved, the affected employee needs to have options available to them to find a way to become an income earner and they need the incentive to do so. The current system provides exactly this and it does so whilst balancing financial expectations of the employer.

Setting aside fatalities (which accounted for a total of 69 claims in the last financial year), if you begin with the premise that employees have an expectation and an entitlement to earn a specified amount of money dependent on their skills, experience and qualifications, all things being equal, that employee should continue on a particular earning trajectory until the day they retire. The ability to earn a wage is a simple human right and it's the way that the majority of society prefers to live.

When that process is interrupted by an injury or illness, other ways must be found to assist the affected employee to maintain (or to very closely maintain) the projected earnings for that person. There are also a number of additional costs associated with injuries and illness that require attention.

The costs associated with that income maintenance and return to health are costs that society has deemed should be covered by insurance, for which employers should be responsible. Those costs for the most part, remain relatively stable in real terms.

Outcomes of any scheme should always be two-pronged.

1. They should be focused on placing an employee in a position where they are able to be self-sufficient once again; and
2. They should be designed to encourage those responsible for safety in the workplace to be vigilant in relation to health and safety matters.

These factors should be considered in light of the financial costs to all involved. As a union we are conscious that if employers' costs blow out in respect of workers' compensation, other rights and entitlements may be threatened. We believe that the current regime is the most cost-effective and produces excellent results.

The way in which the current scheme provides the necessities of the scheme is the exact balance that all states should be aiming to achieve. It promotes fairness by holding employers responsible for negligent actions whilst providing a safety net within the statutory scheme for all employees irrespective of whether negligence was involved in their injury or illness.

There is simply no better way to achieve the desired outcomes of any workers' compensation scheme than that which already exists in Queensland.

The performance of the Scheme in meeting its objectives under section 5 of the Act

Section 5 of the Workers' Compensation and Rehabilitation Act 2003

(1) This Act establishes a worker's compensation scheme for Queensland –

(a) Providing benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death, for persons other than workers, and for other benefits; and

(b) Encouraging improved health and safety performance by employers.

(2) The main provisions of the scheme provide the following for injuries sustained by workers in their employment –

(a) compensation;

(b) regulation of access to damages;

(c) employers' liability for compensation;

(d) employers' obligation to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self-insurer;

(e) management of compensation claims by insurers;

(f) injury management, emphasising rehabilitation of workers particularly for return to work;

(g) procedures for assessment of injuries by appropriately qualified persons or by independent medical assessment tribunals;

(h) rights of review of, and appeal against, decisions made under this Act.

(3) There is some scope for the application of this Act to injuries sustained by persons other than workers, for example –

(a) under arrangements for specified benefits for specified persons or treatment of specified persons in some respects as workers; and

(b) under procedures for assessment of injuries under other Acts by medical assessment tribunals established under this Act.

(4) It is intended that the scheme should –

(a) Maintain a balance between –

(i) providing fair and appropriate benefits for injured workers or dependants and persons other than workers; and

(ii) ensuring reasonable cost levels for employers; and

(b) ensure that injured workers or dependants are treated fairly by insurers; and

(c) provide for the protection of employers' interests in relation to claims for damages for workers' injuries; and

(d) provide for employers and injured workers to participate in effective return to work programs; and

(da) provide for workers or prospective workers not to be prejudiced in employment because they have sustained injury to which this Act or a former Act applies; and

(e) provide for flexible insurance arrangements suited to the particular needs of industry.

(5) Because it is in the State's interests that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.

Recommendation

Currently the scheme provides an excellent balance between all of the intentions under the Act.

It provides adequate benefits for employees who are injured (or their dependants in the event of death).

When an employee is unable to be present at work, it ensures that their level of income is sufficient to ensure that they can support themself and their family (where required) through the statutory framework.

When an employee needs rehabilitation assistance in order to return to work, there is adequate assistance for the costs associated with that through the statutory framework.

Where there is a stable incapacity, and an employee cannot be accommodated in the workplace any longer, the scheme makes it possible through either lump sum statutory payments or common law lump sum payments (or both in limited circumstances). These lump-sum payments are vital. These payments enable the affected worker to retrain or re-establish themselves in the workplace in a new industry.

To do away with this short-tail style of claim finality is to increase costs. The alternative is a long-tail scheme which, as has been witnessed in South Australia and New Zealand, results in a number of bad outcomes, both for employers and the affected employees when measured on a long term scale.

Long tail schemes generally do not involve access to common law. When a permanently impaired employee cannot afford to retrain or set themselves up in a small business, many become compensation dependent.

This is clearly not the best outcome for the affected employee. However, the cost to the insurer (and by extension, the employer) far exceeds the cost of making a one-off lump-sum payment which gives finality and closure to both parties. In this environment the affected employee is placed into a position where they have no choice but to plan for their future. This is the best motivator for returning people to the workforce in one form or another.

In jurisdictions were the affected employee is reliant on a weekly compensatory income for an indefinite period of time it creates a dependence for the employee themselves, but it further sets a poor example for those around the employee.

Under the current scheme, everyone benefits. Employers- from comparatively low premiums and a strong financial incentive to ensure safe working practices, and employees from safer working environments and a self-driven desire to return to the workforce in whatever capacity they are able after a period of time.

Long-tail schemes generally tend to breed paternalism and have high administrative costs.

Evidence of these assertions exists in the statistics. Queensland's Workers' Compensation standard average premiums have been the lowest in the country since 2006. The last financial year was the only year in which

Queensland's excellent record in this regard has been undercut. In this instance it was by Victoria. There is no evidence to suggest that the scheme is costing employers too much.

The common law acts as financial incentive for employers to be diligent when implementing safety measures in the workplace. One alternative to allowing access to common law claims is to increase statutory compensation which, again, increases premiums. This is unlikely to sit well with safety conscious employers who, in that event, would, through no fault of their own, meet with increases in premiums as a result of an under-performer.

In addition to this, currently Queensland's injured workers do not tend to be reliant on compensation as their sole source of income with the statistics reporting that only 2% of those on Worker's Compensation relying solely on compensation as their only form of income. SA has an astounding 16% of workers reliant on insurers as their only source of income. This statistic alone shows that there is a dependence that is borne of a long-tail scheme. The current scheme promotes self-determination.

How the Queensland workers' compensation scheme compares to the scheme arrangements in other Australian jurisdictions

Recommendation

Queensland undoubtedly has the best worker's compensation scheme of all of the states. It has a low premium average of $1.42 (per $100 of wages) and it targets those who are negligent in respect of their safety obligations.

In stark contrast, South Australia has an expensive long-tail scheme which does nothing to promote re-entry into the workplace. Of all of the states, the South Australian model is the least effective. It also does not hold a negligent employer accountable directly to the employee who has suffered as a result of their negligence because there is no access to common law.

Queensland has an excellent return to work percentage which currently sits at 97.1% in the 2011/2012 year. In addition to this, the Q-COMP return to work assist program contributed an additional 1.5% resulting in a return to work rate of 98.6%. This is an excellent RTW rate especially when compared with SA's 2010/2011 RTW rate of a mere 80%.

Further, Queensland has a much lower proportion of injured workers in receipt of workers' compensation payments than any other jurisdiction in the country sitting at just 16%. The Australian National Average is 23%. This is partially a result of the short-tail scheme that Queensland enjoys, but it is also the result of effective rehabilitation after a long-term or career-altering injury or illness.

WorkCover's current and future financial position and its impact on the Queensland economy, the State's competitiveness and employment growth

Recommendation

Without a robust and fair workers' compensation system, employees will not want to work in Queensland or they will need to find other ways to insure against a possible loss of income.

If an employee does not feel confident that their employer will be held accountable for their negligence in relation to their safety, they will look for work in a jurisdiction that does.

Without a robust Workers' Compensation scheme, employees will be forced to take out their own private insurance for injuries caused at work and will need to be either compensated with higher wages, or simply work in a jurisdiction where they are covered adequately by their employer's compensation.

There is no suggestion that Queensland's national competitiveness is being diminished by the framework of our Workers' Compensation Scheme.

Whether the reforms implemented in 2010 have addressed the growth in common law claims and claims that cost that was evidenced in the scheme from 2007-08

Recommendation

Yes, the 2010 changes have commenced to have effect. It seems that common law claims are in line with the number of people in the Queensland workforce and historically have tracked this way with the exception of the period July 2009-July 2010 when there was not so much an increase in claims, rather a drop in the workforce.

Undoubtedly the *Bourk* decision in 2008 did result in an increase in the ratio of workers to common law claims, but that is not the complete picture. This was set against a backdrop of the GFC which needs to be factored in.

Changes in management behaviours at WorkCover have addressed the issues at that time.

It would seem that the ratio of workers to common law claims has returned to its pre GFC and pre-Bourk status and remains steady.

Whether the current self-insurance arrangements legislated in Queensland continue to be appropriate for the contemporary working environment

Recommendation

Self-insurance is a difficult area. The Queensland Branch of the Rail Tram and Bus Union does not support self-insurance as a concept. We are fundamentally opposed to any employer having access to an employee's intimate medical records.

The only response that has been issued in response to this very real concern is the illusory "Chinese wall".

A Chinese wall has been characterised as a 'firewall' or an information barrier implemented within a firm to separate and isolate persons who make decisions from persons who are privy to undisclosed material information which may influence those decisions. In self-insurance cases, this mythical wall is said to exist between the self-insurance department and the HR department of a self-insuring employer.

The concept of the Chinese wall is simply farcical. The employer is considered to be a single legal identity in all other respects except when it comes to holding very personal and sensitive confidential information.

Although there are strict rules around what information can and cannot be passed between the HR department and the department that deals with workers' compensation matters, we often see a lack of respect for the separation of functions.

We recently had a member who had lodged a workers' compensation claim with his employer, Queensland Rail. Queensland Rail's HR department then proceeded to discipline him for not reporting his injury in accordance with policy.

There are times when the two departments quite legitimately will need to transfer information, but that information needs to be afforded the same protections granted to those who are not working for self-insurers.

An employee should be able to protect the dissemination of information from one department to another in a tangible way. An individual's right to privacy is the most significant casualty in self-insurance schemes and for that reason we are fundamentally opposed to them in any form. We would oppose any relaxation of the regulations which currently restricts a number of employers from becoming self-insurers.

Summary

By all objective measures, the current Workers' Compensation scheme is an excellent scheme. The cost to safety compliant employers is minimal and the distribution of additional costs to negligent employers by way of common law remedies is an effective way of targeting those at fault.

Employers' costs in terms of changing the scheme will either increase or be redistributed by other means, but cannot be lessened without impacting greatly on the Queensland economy.

The current short-tail scheme acts as an incentive for injured employees to retrain or become self-sufficient in other ways, whilst a long-tail scheme, as evidenced in other jurisdictions is more expensive and creates dependency, paternalism and provides little by way of incentive to either the employer to maintain a safe working environment, or the employee to re-enter the workforce.

With the exception of Self-Insurers, the Queensland Branch of the Rail, Tram and Bus Union supports the current Worker's Compensation arrangements and opposes any structural change.

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