141

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3 September 2012

Dear Committee Members

RE: SUBMISSIONS IN RELATION TO THE REVIEW INTO THE QUEENSLAND WORKERS' COMPENSATION SCHEME

I write in relation to your review and inquiry into the operation of the Queensland Workers' Compensation Scheme. I would like this correspondence to be considered when the committee makes their determination into the viability of the current Workers' Compensation Scheme in Queensland.

When the scheme was considered in 2009 there had been a considerable shift, due to case law precedent, in the ability to make common law damages claims. The cases *of Bourk v. Power Serve Pty Ltd & Anor* [2008] QCA 225 and *Parry v Woolworths Limited* [2009] QCA 26, in essence reversed the onus of proof onto the employer in negligence cases against them. The burden being removed from the claimant to the employer had the potential to cause great stress to the WorkCover scheme in Queensland. It meant that frivolous claims could be successful at common law, which meant that for a short period of time the Queensland WorkCover scheme was biased towards the claimant.

In my view this was never the intention of the legislators and these decisions have now been overturned by legislative reforms, which have returned the scheme to its non-biased, fair and equitable position.

In addition to the above decisions and the flow-on effect that was generated by them, the global economic crisis ("GFC") was rearing its ugly head and this effected the investments made by the WorkCover Board of Directors. The GFC had dire effects on many large corporations, seeing many of them fold as a direct consequence. Thankfully, the effect on the Queensland WorkCover Scheme was not as critical. The difficulties caused by such a volatile economic climate as well as the scheme being utilised as it had never been before showed those interested parties what could happen if the scheme wasn't managed appropriately.

Due to the reforms made in relation to the above noted decisions as well as the growing stability of the world's economy – two of the main arguments for reform have dissipated, in my view. However, having said that I also believe that the majority of the reforms that have been made since the 2009 committee have been well founded and have enhanced the scheme as a whole.

The reforms that have been put in place since the last review of the system have most definitely strengthened the current system and, in my view, have made it one of the best insurance schemes in Australia, this is not just in the differing workers' compensation schemes but insurance schemes across the board.

I have recently had to delve into the reformed New South Wales Workers' Compensation scheme and can say that it is a very one sided piece of legislation. It does not provide any great assistance to the injured worker as well as it being a very convoluted and difficult piece of legislation to read and understand. There are virtually no common law rights and the very minimal ones that have remained are so reduced that they are of little benefit to those who manage to meet the threshold requirements. Further to this if a claimant opts to undertake a common law damages claim then they lose any further rights to statutory benefits even though they are unable to claim for medical expenses in their common law damages claim.

On a daily basis I act for people who sustain injuries in the workplace. These injured workers are often devastated by their injuries and inability to function as they once could. Many of them work in the more manual intensive fields which causes considerable additional issues for them when they are attempting to return to work. The QComp initiative, Return to Work Assist, is a fantastic initiative and ought to be expanded and touted so that all injured workers can utilise this option if they choose. In my experience the majority of injured workers simply want to get back to work and will utilise any assistance they are provided.

It would also benefit injured workers if the current statutory scheme were more user friendly for instance I have had a number of clients who have needed additional treatment to assist them to return to work, who have been denied funding by their WorkCover case manager, who has then closed their file and sent them for assessment. The refusal of their request for funding aggravated them and their circumstances and made them more inclined to pursue a common law damages claim in order for them to mainly obtain the money for future treatment. Had they received the treatment requested they may have been able to return to work and they may have opted to forgo their common law damages claim.

In my view, if injured workers were afforded a little more funding / treatment under the statutory system then a number of them would be less inclined to enter the litigation process.

Having said that though, it has been proven that the Queensland Workers' Compensation Scheme is the most financially sound scheme in the country. Its funding ratio is the highest in the country, and over the last 15 years, the premiums in Queensland have been, on average, the lowest in the country. This means that the scheme as a whole is a workable model which allows workers and employers to be mutually benefited from the scheme.

The main reason for the Queensland scheme's financial stability is a short tail no fault statutory scheme, which limits the period and amount of statutory benefits a claimant can receive, this is then balanced with access to common law for meritorious claims. As a lawyer who works predominantly in this area of law I am able to assure the committee that neither my firm nor I (as a practitioner) would consider taking on a claim that is non-meritorious. The reason for this is twofold, the first is that such claims are simply not commercially viable (due to the limitations on legal fees recoverable under the *Legal Profession Act* 2007's 50/50 rule as well as there being no right to recover any legal costs under the current WorkCover scheme – if firms undertook claims that had no merit then they would be in essence "paying for the privilege" as they would receive no payment from same while having to pay for the overheads of running the file while the file was being undertaken) and the second is that undertaking such claims and providing a claimant with false hope regarding the prospects of a successful outcome is simply not fair to them and could mean that the claimant receives no payment through either the statutory lump sum offer or a common law damages claim. This would then mean that the claimant would be worse off than they would have been had they simply finalised their matter at the conclusion of their statutory claim.

In the past, there have been suggestions made that the ability of an injured person to sue their employer at common law should be restricted by introducing impairment thresholds. As with any other type of eligibility based test there is room for it to be misused. Any move to an impairment threshold would put the financial health of the existing scheme at risk. It would, for the first time, make the Queensland scheme a pension based scheme. That type of scheme has demonstrably failed in other States particularly South Australia and New South Wales.

Further to this, without allowing those claimant's with a meritorious claim to bring it (due to them not meeting a certain injury threshold) has the potential to place considerable strain on the public purse, currently the WorkCover Queensland scheme (both steps) fund themselves. Turning such a viable scheme into one in which some claimant's would be unable to claim their loss from those who negligently caused it, would mean that a greater number of people could end up on Centrelink benefits. Why should the tax payers pay for the negligence of employers?

The committee may consider that my previous statement is inflammatory however when considering that impairment and disability are two very different concepts it lessens the potential inflammatory nature of the statement. In my view this is one of the main considerations with regards to thresholds that needs to be considered. Impairment is measured in the same way for all claimants, by realistically ticking the boxes under the specific heading in the AMA 5 Guidelines, this is without taking into consideration what the injury and the impairment mean to the claimant and the effect that that injury and subsequent impairment are going to have on their ability to work in their chosen field. In other words, when providing someone with an impairment rating does not take into consideration the subsequent disability caused by the injury and its on-going effects on that specific person or their ability to earn a living from their chosen profession.

When considering the difference between impairment and disability please consider the differences in the residual employability and workplace disability and function of those workers who are in such positions as, say, a concert pianist or a surgeon sustaining a hand injury. Then consider someone such as a bank teller or even a lawyer.

The concert pianist may never be able to play to a similar standard again whereas the lawyer would still have a similar earning capacity as they did prior to the injury. Even if a concerti pianist is measured as having a relatively low impairment they may have a considerable disability and their earning capacity could be gravely affected. If a threshold was introduced then they may not be entitled to claim damages even though they are likely to suffer a considerable loss.

This would in essence make a currently fair and equitable system quite biased towards the ones who have caused the injury. This is especially so considering the onus of proof that is currently placed on a claimant to prove that liability for the injury rests with the employer. Without liability, no matter how badly injured a person is, they have no common law damages claim to make. Because of this the current system is a fair and equitable one which is not slanted toward either workers or employers. I stress upon the committee that the common law damages scheme is one with its basis in the tort of negligence, as such without a negligent action or omission, no matter how badly injured a person is, they have no right of action.

Therefore, those who are seeking to make the scheme one with thresholds and other provisions are simply asking the committee to allow those employers with unsafe working practices to be able to shirk their obligation to pay damages to those who have been injured as a result of their actions, omissions, systems or lack thereof in their workplace.

The existing common law scheme in Queensland weeds out most unmeritorious claims through:-

- Restrictions on damages and legal costs which mean that only financially viable claims where an injured person has suffered loss of income are likely to be pursued;

- Tough liability provisions bringing a common-sense approach to assessments of liability;

- Tough fraud provisions in the WorkCover legislation.

This collection of measures has delivered financial stability while ensuring that injuries which have had a significant financial impact on a person are able to be pursued and compensated. An

impairment threshold would inevitably operate unfairly. Impairment, as described under AMA Guidelines, is not a reflection of the ability of the person to work or the financial impact on that person. It is a technical medical assessment of limited scope.

In relation to limiting, reducing or stopping journey claims, I submit that this would place workers at a distinct disadvantage, especially considering the majority of workers travel to and from work, with their only reason for the travel as work. Both regional and metropolitan workers travel vast distances in order to earn a living. If journey claims were abolished or even reduced then a considerable number of workers would be unable to access the care they require in order to recover enough to return to work. If, the committee was mindful to try and reduce journey claims or their effect on the scheme generally, then I would suggest that WorkCover cease funding medical and rehabilitation expenses once a compulsory third party insurer becomes involved in the claim process. Therefore, if the claimant has lodged a damages claim against the other driver, in a motor vehicle collision, and this claim has been accepted by the compulsory third party insurer then it is their obligation to fund the claimant's reasonable and necessary medical and rehabilitation expenses under the *Motor Accident Insurance Act (Qld) 1994*. Even though a successful claimant, under their compulsory third party claim, is required to refund WorkCover any monies outlaid on their behalf It would seem more beneficial to the WorkCover scheme to simply have the third party insurer fund the medical and rehabilitation expenses from the outset. I concede that WorkCover would then still be liable to fund any time lost claims however it would be a far less onerous responsibility than funding the entirety of the claim when another party ought to be liable for same.

I ask that the Committee consider my submission and thank them for taking the time to do so.

Yours faithfully

GOULDSON LEGAL