Civil Contractors Federation
Queensland Branch

SUBMISSION REGARDING THE OPERATION OF QUEENSLAND'S WORKERS' COMPENSATION SCHEME

3 September 2012

Introduction

CCF QLD is the leading industry body for the Queensland civil construction industry and represents the interests of around 200 civil contracting organisations across the state. Our members range from small family-owned businesses to large multinationals. However, the focus is on small-medium sized enterprises with around half our members being small businesses with an annual turnover less than $3 million.

CCF QLD is supportive of a workers' compensation scheme that provides appropriate levels of compensation to people who have a genuine injury or illness that resulted from work and supports the continuation of the system. We also believe that the Queensland workers' compensation system often works well. For instance, the system is very good for short, routine statutory claims processing. However, there are areas where the system is in serious need of improvement.

There are some specific issues that impact those in the construction industry and make the current system difficult to comply with. There are also aspects of the system that are becoming costly to maintain, including the growth in the number and cost of "stress" claims and the increase in common law claims.

On behalf of our members we therefore wish to offer the following recommendations to the inquiry in relation to the performance of the scheme in meeting its objective under section 5 of the *Workers Compensation and Rehabilitation Act 2003*:

1. Change to the definition of worker

We have had numerous requests for advice from members who are confused about who to include when they are submitting their annual WorkCover return, upon which their premium calculation is based. There is a high level of anxiety around the definition of worker which has changed over the years and now focuses on whether a contract is "substantially labour only".

As an example, we have a member who hires trucks with drivers within the civil industry. They do not own their own truck fleet or employ their own drivers. They have a related company that does employ truck drivers and who are covered by that company's workers' compensation premium. They also utilise contractor companies who employ their own drivers. Most of these have a company structure (a small percentage are sole traders or partnerships). The employees of these contractor companies are therefore covered by their insurance policies but the directors are not since a person is not a worker of a corporation of which they are a director. Our member therefore always checks to ensure the companies have public liability insurance cover. However, they are aware of a similar business to their business that is currently under investigation by WorkCover and in this case WorkCover have indicated that contractor should be included in their wages calculation, even

though this would mean they are insured twice. Also, it is estimated by our member that 70 per cent of the rate charged to clients is for the use of the truck and 30 per cent is for labour. It is unknown as to whether this meets the definition of "substantial labour costs" as there is no clear definition of what is substantial.

The definition of worker in the workers' compensation area is also vastly different from that used by governments for other purposes, creating further complexity for small businesses that do not employ Return to Work Co-ordinators or others who are specialists in this area. For instance, the definitions under Q Leave, the Work Health and Safety Act, the Fair Work Act and the Australian Taxation Office all differ in their definition of worker.

CCF QLD recommends that the definition of worker be reviewed to align more with Federal legislation that governs industrial relations and taxation. When a business engages another business to do work and charges that business GST, they do not expect the business to be deemed a worker for any purpose. The business is not a worker under the Fair Work Act or for GST reasons and so it is confusing that they should then become workers under state workers' compensation legislation.

2. Change to the definition of injury

Currently work must be a significant contributing factor for an injury to be compensable. However, this definition is vague and open to interpretation. Like the use of "substantial" in the definition of worker, the use of "significant" in relation to injury does not provide a clear interpretation of the magnitude required.

With an ageing population comes an increasing problem of degenerative and pre-existing conditions for which employers are increasingly becoming liable. This is a concern to our members whose premiums are being affected by high cost claims such as knee reconstructive surgery where the injury was at least partly attributable to age or activities outside of work.

CCF QLD understands the complexity of some claims and the multi-causal nature of some injuries. However, despite the system being a "no-blame" system 100 per cent of the claim costs then affect the employer's premium which is unfair if work was only one of many contributors.

CCF QLD recommends that the definition of injury be changed so that the workplace must be THE major contributing factor for a claim for compensation.

3. Abolishment of "stress" as a psychological illness

A previous review of the workers' compensation legislation removed the requirement for psychological claims to have a clear diagnosis under the Diagnostic and Statistical Manual of Mental Disorders, fourth edition (known as DSM IV). As a result, statutory psychological/psychiatric illness claims have grown continuously over the last four years with an increase of 11.9 per cent per annum.[1]

Most people would admit to feeling stressed at work from time to time. Stress occurs when "the resources of the individual are not sufficient to cope with the demands and pressures of the situation. Thus stress is more likely in some situations than others and in some individuals than others."[2] There is no doubt that work can result in people feeling stressed and we believe that employers should monitor workloads, provide clear job roles and generally manage their human resources so as to minimise stress within their workers.

However, most jobs contain some elements that can cause stress to some people at some time. For instance, some jobs involve public speaking, performance managing others, tight timeframes, managing emergency situations, dealing with customer complaints and other tasks that may cause perceptions of stress. We argue that stress is a normal human emotion that everyone feels at some time and should not be a compensable illness under the workers' compensation legislation. However, where work is the major contributing factor in illnesses such as depression or post-traumatic stress disorder then individuals should be provided with support and compensation to maximise their chances of returning to work.

CCF QLD recommends that compensable psychological or psychiatric illnesses be restricted to those with a clear DSM IV diagnosed condition from a psychiatrist or psychologist, not a vague diagnosis of "stress". When combined with recommendation 2, that work should be the major contributing factor, this will ensure that claims are restricted to actual illnesses caused by work.

4. More rigorous investigation of psychological illness claims during the determination period

Over the last twelve months the average time taken to determine such claims has decreased from 33.1 to 25.3 days.[3] CCF QLD understands the need to determine claims as quickly as possible in order to be able to process claims and ensure employees are provided with care that is better able to equip them for their return to work. However, it is unlikely that sufficient medical reports can be acquired in these timeframes.

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[1] Q-COMP, 10-11 Statistics Report: United Behind the Values we Share, p.2.
[2] Michie, S., 2002, Causes and Management of Stress at Work, Journal of Occupational and environmental Medicine, Vol. 59, pp.67-72.
[3] Q-COMP, 10-11 Statistics Report: United Behind the Values we Share, p.17.

For the majority of physical injury claims, a medical certificate from a General Practitioner is sufficient to ensure an accurate diagnosis and commencement of any treatment. However, there is a greater need to have claims relating to mental illness objectively assessed and for the determination phase to include an interview with the employer as well as an assessment by a medical specialist who can devise a suitable duties plan as early as possible. A General Practitioner with a long-term association with their patient may be more likely to provide time off work if requested, even if this is not likely to achieve the best return to work outcome.

An interview with the employer will assist WorkCover Qld to assess potential workplace stressors versus reasonable management action and will ensure that both sides are heard and considered during the determination phase.

We have anecdotal evidence from industry that fast claims determinations based on Q-Comp certificates from the employee's General Practitioner leads to poor claims decisions that are then later set aside by Q-Comp. Psychological/psychiatric claims should not be subject to the same determination timeframes as physical injury claims and WorkCover Qld key performance indicators should be based on return work outcomes rather than speedy claims determination.

CCF QLD recommends that psychological/psychiatric claims require a specialist medical report being considered prior to them being either approved or rejected.

5. Introduction of an impairment threshold for common law claims

The number of common law claims has increased by 32.7 per cent since 2006/7 with 4,462 claims lodged during 2010/11.[4] One of the possible reasons for this increase is the ability for employees in Queensland to submit common law claims with zero per cent impairment.

Other jurisdictions apply a minimum impairment threshold below which claims cannot be made. The introduction of a threshold in Queensland would therefore achieve consistency as well as curbing the rise of claims. Any threshold should aim to prevent claims where people are not permanently impaired or where they have returned to a similar job role, or the same workplace. A review is required to determine the appropriate level for such a threshold but CCF QLD would support a threshold of between one and fifteen per cent.

CCF QLD recommends the introduction of a minimum impairment threshold as a sensible approach to ensuring that common law claims are used for their intended purpose – to provide appropriate compensation to those who are permanently injured or ill and where the statutory system is unable to adequately compensate them for their losses.

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[4] Q-COMP, 10-11 Statistics Report: United behind the values we share, p.39.

6. Increased employee responsibility to report all incidents and the need for a substantiated link between mechanism of injury and the diagnosed injury/illness

The is no requirement under either work health and safety or workers' compensation legislation for workers to report injuries sustained in the course of work to their employer. Our members report that sometimes they first become aware of an injury when they discover that a workers' compensation claim has been submitted. This is despite workplace policies stipulating that all incidents must be reported.

When the employer learns of the incident several days after the event, the window of opportunity for investigating the incident has passed. This means that the employer is unable to confirm the time, location and severity of the incident and in some cases whether the incident occurred, particularly if no witnesses are named.

There is also often a weak link between the actual incident, or mechanism of injury, and the diagnosis. Anecdotal reports from our members suggest that minor twisting which could reasonably result in muscular strain can result in several weeks, and sometimes months, off work, which is inconsistent with the original minor twisting incident.

CCF QLD recommends that submission of an incident report be required at the time a claim is lodged so that this can form part of the determination of whether a claim is accepted or rejected. We also recommend that claims be monitored to ensure that the mechanism of injury is consistent with the diagnosis, treatment and progress of a claim.

7. Enforcement of employee participation and contributory negligence requirements

Employees are required to participate in rehabilitation programmes to ensure they continue to receive entitlements under an accepted workers' compensation claim. However, the requirement is rarely enforced. We have heard from members whose employees refuse to perform some tasks for fear of re-injury despite a medical certificate or suitable duties plan that does not exclude the task. We have also heard of workers shortening their working day or scheduling medical and physiotherapy appointments during work times as a matter of routine.

Furthermore, if a claim progresses to common law but is then settled prior to reaching the court system, contributory negligence is not considered. This means that even if an employee has blatantly refused to follow a safety procedure and is injured as a result they can still receive a common law payment. This is negotiated by WorkCover Qld and the employer has no control over the amount negotiated or whether any contributory negligence is considered.

CCF QLD supports enforcement of existing provisions that require employees to take part in their rehabilitation including an early return to work. We also recommend that contributory negligence be considered during common law negotiations.

8. No change to journey claims

Journey claims currently represent 6% of all claims lodged and this rate has remained stable over the last 10 years.[5] Whilst journey claims are such a small percentage of all claims and do not directly affect employer premiums we see no need to change this aspect of the system.

CCF QLD recommends that the journey claims be retained as part of the workers' compensation system.

Conclusion

Whilst the workers' compensation system works well for routine claims for physical injuries there are a number of areas that can be altered to ensure the system better meets its objectives. There are some fundamental changes that we recommend, which will subtly alter the regulation of access to compensation and common law damages and change the way claims are assessed and managed by the insurer. However, we believe these changes will reduce the current burden on employers and on the workers' compensation system whilst still providing support and compensation for those employees with genuine injuries and illnesses.

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[5] Q-COMP, Queensland Workers' Compensation Claims Monitoring, June 2012