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Date: 06-08-2002

Weather: Fine

Attn: Julia Morris
Inquiry Secretary
House of Representatives
Standing Committee on Employment & Workplace Relations
Parliament House
Canberra
A.C.T. 2600

Dear Julia Morris

Re: Inquiry Into Aspects of
Australian Workers Compensation

Thanks you for the opportunity now afforded the company to lodge a submission to the above inquiry.

1. TERMS OF REFERENCE

This submission relates specifically to the Term of Reference concerning:

- ◆ the incidence and costs of fraudulent conduct by employees and employers and any structural factors that may encourage such behaviour;

In particular, this submission relates to an incident of fraudulent conduct committed against our company by an employee and the structural factors which led to such conduct being arguably condoned by & indeed rewarded by The Victorian Workers Compensation system.

2. LEGAL ENVIRONMENT

This submission further relates to the effect of Section 82 (7) & (8) of The Victorian Accident Compensation Act 1985 (copy attached) which deals with pre-employment disclosure by an employee to an employer of pre-existing injury or disease.

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3. FACT SITUATION

In February 2000, our company, which might be described as a medium sized manufacturing concern, advertised for a boilermaker. Candidates were interviewed after first completing a printed application form which included a question seeking details of any workcare claims & nature of injury. The position was finally awarded to a 37 year old man who asserted that he had no prior claims history. Five months later this employee complained of a sore neck which was diagnosed by the company's doctor as an aggravation of a pre-existing workplace injury. Upon being interviewed the employee admitted to falsely answering the questionnaire and was dismissed for dishonesty & handed a termination payout. Just prior to his dismissal however, he had lodged a claim for compensation under the Accident Compensation Act 1985. Victorian Workcover Authority ("VWA") subsequently accepted the claim thereby forcing our company to continue paying the employee for the ensuing 39 weeks at the rate of \$574 per week. VWA further demanded that we prepare a "return to work plan", nominate a "return to work co-ordinator" & ultimately re-employ him. VWA was also quick to inform us that penalty for non compliance could run as high as a \$25,000 fine.

4. APPLICATION OF THE LAW

How could this absurd & inequitable situation have arisen?

The VWA when later pursued for an explanation maintained (via the responsible minister) that in accepting the employee's claim it was simply relying upon the employers failure to comply with Section 82 (7) & (8) of the Accident Compensation Act 1985. As the attachment reveals these provisions set out a complicated series of steps which must be followed by an employer if it is to avoid liability for ongoing wage payments (& consequential workcover premium adjustment) in circumstances involving dishonesty such as those outlined in para 3.

5. THE STRUCTURAL PROBLEM

The structural problem which is central to this submission is that rather than impose upon the employee any substantial obligation to make true & proper disclosure (as is ordinarily required for general insurance contracts purposes), the legislation instead places upon the employer a burden of strict compliance with finely tuned legal obligations if the employer is to avoid the sort of liability referred to in para's 3 & 4. In practical terms this means that it is the quality of employer's compliance with these obligations that ultimately determines liability towards the injured employee while dishonesty committed by the employee assumes a somewhat secondary importance and may indeed be irrelevant.

The subordination of "truth" in this way does more than breed employer cynicism & resentment. It suggests a systemic disdain for employer rights which is nurtured by widespread ignorance among employers as to the precise nature of the responsibilities foisted upon them by S.82 (7). In our case the VWA automatically accepted the employee's claim without even bothering to enquire whether the provisions had been complied with and we suspect that other employers have been treated similarly.

6. SUGGESTIONS FOR REFORM

The Victorian legislation does not describe the VWA as an “insurer” although a reasonable analogy can be drawn. It is the exercise of this insurance type role in combination with VWA’s extensive policing powers designed to compel employer compliance with occupational health & safety laws & regulations which is particularly troubling. This submission respectfully suggests that the assignment of this type of dual role to a single organization brings with it important risks that it will perform neither task particularly well. Such is our experience of the performance of VWA. That said, our view is that the “insurance” function should be separated from the enforcement function and two independent statutory bodies be created with respective responsibility for “insurance” & enforcement matters. The manner in which this would be achieved is beyond the scope of this submission however the provisions of the Insurance Contracts Act 1984 (Commonwealth) should ideally apply to any such organization charged with administering the insurance function by permitting it to rely upon Sections 13 & 21 of that Act. These sections impose strict duties upon person seeking insurance coverage to act with utmost good faith towards & make proper disclosure to the insurance provider. By such means the burden of responsibility for honest disclosure of details pertinent to the decision to assume the risk & ultimately provide compensation for workplace injury would lie with the beneficiary of the protection, i.e.: the employee. Matters disclosed, insofar as they relate to the decision to employ, should also be made simultaneously available to the employer.

Finally, we would once again like to express our thanks to the Committee for the opportunity to make a submission & trust that we have made a contribution to its deliberations.

Regards,

A handwritten signature in black ink, appearing to read 'Peter Andriske', with a long horizontal line extending to the right.

Peter Andriske,
Director,
Andys Group.

and permanent disablement.

(6) Where a worker suffers an injury which occurs by way of a gradual process over time and which is due to the nature of employment in which the worker was employed and if employment of that nature was a significant contributing factor at any time before notice of the injury was given, the worker or the worker's dependants shall be entitled to compensation under this Act as if the injury were an injury arising out of or in the course of employment.

- (7) If it is proved that before commencing employment with the employer-
- (a) a worker had a pre-existing injury or disease of which the worker was aware; and
 - (b) the employer in writing-
 - (i) advised the worker as to the nature of the proposed employment; and
 - (ii) requested the worker to disclose all pre-existing injuries and diseases suffered by the worker of which the worker was aware and could reasonably be expected to foresee could be affected by the nature of the proposed employment; and
 - (iii) advised the worker that sub-section (8) will apply to a failure to make such a disclosure or the making of a false or misleading disclosure; and
 - (iv) advised the worker as to the effect of sub-section (8) on the worker's entitlement to compensation; and
 - (c) the worker failed to make such a disclosure or made a false or misleading disclosure-

sub-section (8) applies.

(8) If this sub-section applies, any recurrence, aggravation, acceleration, exacerbation or deterioration of the pre-existing injury or disease arising out of or in the course of or due to the nature of employment with the employer does not entitle the worker to compensation under this Act.

(9) If this section operates to prevent a worker or the worker's dependants recovering compensation in respect of an injury, the worker or the worker's dependants cannot rely on this section to claim to be entitled to take any other action or proceedings in respect of the injury whether under this Act or otherwise.

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