

HOUSE OF REPRESENTATIVES

**EMPLOYMENT AND WORKPLACE RELATIONS
COMMITTEE**

**INQUIRY INTO ASPECTS OF WORKERS
COMPENSATION**

SUMMISSION BY

**ANDREW HEMMING
PRINCIPAL
HEMSEM**

Preface

I have been involved in workers compensation issues for 13 years, having been a Chief Commissioner of the Tasmanian Workers Rehabilitation and Compensation Tribunal. I have for the last 4 years been actively involved in training, consultancy and publications on workers compensation, rehabilitation and injury management.

I train all parties in workers compensation and injury management issues. I run the Workcover Tasmania Board's Rehabilitation Coordinators Course. I publish the Hemsem Workers Rehabilitation and Compensation Handbook for Tasmania, the Easy Guide to Workers Compensation in Tasmania and the Hemsem Injury Management Newsletter in Tasmania. I am a director of Getyes Solutions t/as Arbitration Australia which, amongst other things, provides ADR in the injury management process.

I am in regular contact with employers, unions, doctors, service providers, workers, insurers and scheme regulators in Tasmania.

Even given the differences between schemes in Australia there is very little reason to doubt that some of the experiences suffered in all States, Comcare and the Territories are shared experiences. Therefore what happens in Tasmania may have relevance to other schemes. Given also that human nature is universal then all experiences driven by human nature have relevance. Workplace Injury Management and Compensation (a title I prefer to Workers Rehabilitation and Compensation) is grounded in the understanding that human nature drives the system, that schemes react to that, and many different identities derive income from it.

This therefore is the background that I would like to build my comments on in relation to the specific matters raised by the Committee's inquiry. I will address each of those in turn as follows:-

“The incidence and costs of fraudulent claims and fraudulent conduct by employees and employers and any structural factors that may encourage such behaviour”

The incidence of workers compensation claims that are fraudulent in Tasmania is low. In the time that I was Chief Commissioner of the Tribunal I can only recall a couple of times in 8 years where I was concerned about the claim from that aspect. What is more common is the incidence of fraudulent conduct or behaviour. Very few claimants set out to actually cheat or defraud the system. Quite a few get into bad habits and bad behaviour because of the way the system is structured.

To understand and appreciate the issues it is worth noting that where the settlement process is foremost used as a way of eliminating fraudulent claims and behaviour the scheme has failed to react meaningfully to the developing problem. This problem is the hard to resolve, hard to pin down condition which will not respond adequately to treatment, to rehabilitation, or to redeployment or retraining. This is usually a sign or message that is being given. It gives rise to a chronic condition that is fuelled by advice, by learned behaviour and by monetary gain. Thus settlement is used to overcome this behaviour. The behaviour in itself is fraudulent because it is a conscious decision to stick with the system playing the same game for monetary reward. The likelihood of recovery once settlement has taken place is often seen as a sign that the behaviour was fraudulent. Yet there are those who say that recovery will be more likely when the pressure of the claim process is removed. What tends to happen is that insurers see damage control better achieved by settlement rather than by any other means. There is common knowledge amongst workers that if you continue along a certain path of behaviour the result will eventually be monetary gain.

So there is certainly some incidence of workers using the scheme benefits as an incentive to exaggerate or mislead as to ongoing symptoms and extent of disability. What we have tended to do over the last few years is put resource into training supervisors and managers to change and improve the culture in the workplace. A focused and productive, happy and valued work force are less likely to make fraudulent claims and indulge in fraudulent behaviour. The schemes must do their bit as well. It needs to give out strong messages by the use of statutory gate keeping of claims. This means sitting hard on claims and using medical panels and medical advice in relation to allowing workers through the process. This also means constant reviewing and more medical training in certification issuing.

As to employers I confess that I have seen employers attempting to stop workers from making claims on the grounds both of duress and of concern for future premium levels. This appears not to be as common as it was. Factors that lead to this are usually those concerned with the presence of an excess under the relevant Act for which the employer is liable. With smaller claims this leads to persuasion not to make claims as the employer has to meet their cost anyway. This is gradually dying out with employers seeing the benefits of pro-active claim management.

I have only seen one incidence of workers not being paid compensation by an employer on an accepted claim and that was a cash flow problem, so that area is very limited. As to collusion in making a fraudulent claim by a worker supported by an employer, I have never seen one. Most employers are worried about the premium they pay. They do not want claims to be any higher than they already are.

I think any workers compensation scheme that provides a lack of direction in the claim process where insurers are left to their own devices will leave fraudulent behaviour as a distinct possibility. To remove this requires the scheme to provide barriers to such behaviour. This then would be tighter review and assessment of claims. But it must also be coupled with that change in workplace culture that I mentioned.

***“ The methods used and costs incurred by workers compensation schemes to detect and eliminate:
(a) fraudulent claims; and
(b) the failure of employers to pay the required workers compensation premiums or otherwise fail to comply with their obligations; and “***

The common approach here is to use video surveillance which is still quite widespread in Tasmania. Video footage will often catch inconsistent behaviour but will usually only ever be used to force settlement negotiation rather than to deny claims. Serious and wilful misconduct can be constituted by fraud and be a bar to a claim but the onus is on the employer to show it and even then it does not apply in the case of death or serious impairment. So that defence is not often used in the case of fraud. Video footage will often only show a snap shot and be unreliable.

The insurers are quite happy to pay for medical assessments as well hoping to limit their exposure by finding support for a reduced level of assessed incapacity. The cost of this opinion shopping is borne as a legitimate cost of the claim process which the employer ultimately pays for.

One other way that can be used, but has not been in Tasmania is to use a Medical panel. This has not yet found favour with the parties to the scheme. The Panel process would in theory eliminate fraudulent claims based on complaints of ongoing chronic incapacity. In practice they may just lead to the settlement process.

Prosecution of fraudulent claims on Tasmania is rare. Due to budgetary constraints and prioritising in the DPP's office there are very few prosecutions. It should also be borne in mind that the onus of proof is difficult to discharge except in obvious cases which are rare.

Premiums:-

As to employers failing to pay premiums this is seen as a sign that premiums are expensive and although mandatory for employers will be avoided from time to time by those employers who are suffering cash flow or profit problems. I have seen the Nominal Insurer involved in many cases where the employer took a conscious risk to not obtain insurance and hoped that he never had an injury. He did of course and the end result is difficult for all concerned. However this is a complex problem. High premium levels are a disincentive to business. Especially small business. No matter what your claims history is or is likely to be there are no incentives in Tasmania for these employers. Few if any report a fall in their premium levels.

This can be broadly fixed by:-

- No claim bonuses - Incentive
- Workplace Safety Auditing and Accreditation – Recognition of practice
- Injury Management System Auditing - Recognition of Best Practice.
- Government Subsidy of Premiums for One Year – Incentive
- Statutory Monetary Caps on Claims – Disincentive for monetary gain
- Statutory Review of Premium – Premium Fixing Body
- Statutory Review of Claim Process including Rehabilitation – Gatekeeper.

“ Factors that lead to different safety records and claims profiles from industry to industry, and the adequacy, appropriateness and practicability of rehabilitation programs and their benefits”

This is quite simply the best question to ask. It is also quite simply the easiest to answer yet the hardest to demonstrate. What workers compensation is all about is basic human nature. Some people recover quicker than others for all sorts of reasons, not many of which are due to the injury itself. We all know that an athlete who is motivated to return to the sport he or she loves will do so quicker than a worker with the same injury.

What makes one workplace or industry safer than another has to do with whether there has been an honest risk assessment done of the state of contentment of the work force itself. Yes factors such as inherently unsafe operations are important to identify and fix, but all the risk assessment in the world will not help you overcome a lack of culture in the work place. If employers work hard at improving all aspects of workplace culture then injuries will fall. This means the whole range not just physical types eg, back , but also mental, eg stress. This means training, training and training .It mean starting at CEO level and working down. It means having commitment by the Board and management that injuries are preventable and then if they occur will be dealt with quickly and properly. It means knowing what is the desired outcome and it means sharing that vision with the work force. It means having unions trained to know the outcomes.

Rehabilitation programs that provide meaningful, relevant return to work will go a long way in that regard. Work that has no meaning will defeat the object and lead to the sort of fraudulent behaviour previously discussed. The certification of rehabilitation providers is also necessary to ensure a professional standard but doctors need training in the rehabilitation process as well. This is vital for any scheme. Rehabilitation should be viewed as an opportunity to recover. Instead it is often viewed in the atmosphere of fear and mistrust. If there is plenty of work done at an early stage to encourage the use of the program then success is more likely. This means encouraging employers to embrace rehabilitation where it often seen as a nuisance, an inconvenience or another cost in lost productivity. Schemes could do this by offering incentives to rehabilitate. Some insurers recognise this but the obvious one is in the premium. Any scheme should concentrate on encouraging rehabilitation as the number one priority. It is simply the best chance of cost containment on the claim in the first three months. It is simply the best way on ensuring the right culture stays in place.

In conclusion I have attempted to give an overview of my views rather than excessive detail. I am more than happy to expand on any of the issues raised at the Committee's convenience.

Yours faithfully,

ANDREW HEMMING.