

# Submission

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## *Inquiry into Aspects of Workers' Compensation*

*Workplace Relations Committee  
House of Representatives*



CHAMBER OF COMMERCE AND INDUSTRY

WESTERN AUSTRALIA

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## **Introduction**

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CCI is pleased to provide the following submission to the Review.

CCI provides a range of workers' compensation services from telephone advice to comprehensive injury and claims management programs to over 5000 members of all sizes across all industries. As well, CCI administers self insurance for a number of large clients.

CCI is represented on the WA Workers' Compensation and Rehabilitation Commission, the Premium Rates Committee, the National Occupational Health and Safety Commission (representing the Australian Chamber of Commerce and Industry) and the WorkSafe Western Australian Commission. Our policy and practical involvement in workers' compensation and occupational health and safety exceeds 25 years

Workers' compensation reform is rarely off the political agenda and strategies implemented to contain costs or particular behaviours frequently disadvantage those genuinely supporting the system or claiming against it.

## **Terms of Reference**

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- 1. Inquire into the incidence and costs of fraudulent claims and fraudulent conduct by employees and employers and any structural factors that may encourage such behaviour*

### **Fraudulent Claims and Fraudulent Conduct by Employees**

Fraud is an additional and unwanted problem within all workers' workers compensation systems. The extent of the fraud by any party to the system including employers, employees and service providers is difficult to accurately measure. Generally it is often difficult to identify and the relevant authorities appear reluctant to pursue it other than in the most blatant cases.

CCI is not able to provide data on the incident of fraud, however consideration should also be given to the factors that drive fraudulent behaviour and strategies to eliminate or reduce the impact of the drivers.

The major drivers are:

- a) the ease with which workers' compensation claim are made and accepted
- b) the high cost of exposing fraud
- c) benefit structures that encourage fraudulent conduct.
- d) lack of strategies within any Australian workers' compensation systems to identify and punish fraudulent behaviour in regard to claims
- e) the lack of control by employers over insurance premiums and the management of claims.

Under the no fault systems operating within Australia, a worker has the right to make a workers' compensation claim for any workplace injury. The process involves obtaining medical certification and lodgement of documentation including the certificate with the employer.

Of most concern is issuance of the first medical certificate formally indicates in the opinion of the medical practitioner, the existence of a work related injury or disease. The medical practitioner is not required to fully investigate the work relatedness of the injury or disease. Even if required to do so, the medical practitioner may not be able to conclusively determine whether an injury is the work related.

Frequently the medical practitioners do not have any knowledge of the injured workers' work environment, systems, processes and demands. Many appear to rely solely on the account of the worker. It is highly unusual for a medical practitioner to actively seek information from employers on causal factors relating to an injury.

Medical practitioners frequently perceive their role to be advocates of their patients rather than providers of information particularly if that information may be adverse to their patient's immediate interests.

Once a claim is submitted, employers (through their insurers) are obliged to disprove the relationship or accept the claim. In challenging a claim, the cost and any other action required to disprove the claim rests with the employer. The direct and indirect costs associated with mounting a challenge are generally prohibitive for low cost claims. As well, the employer bears a cost through increased premiums

Where a claim is denied, the claimant suffers no penalty for the lodgement of what could be perceived to be a fraudulent claim.

Another issue of great importance is that of behaviour. We need to determine accurately the extent to which the nature of the workers' compensation and rehabilitation system effects the behaviour of those caught up in it. The statistics available in this regard are totally inadequate due mainly to the lack of a cohesive national examination of the issue.

A question that frequently arises is *do the levels of benefit/compensation or the type of benefit (ie lump sum vs pension-type approaches) influence recovery time?* There is some evidence that suggests that this is indeed the case, although the veracity of such claims needs to be established.

Dockery and Stromback (1994:15) note that '...the incentive to make fraudulent claims increases directly with the level of income support benefit paid under workers' compensation'.

It has been shown that higher benefits are associated with higher claims frequencies. Wooden (1989:230) estimates that the benefit level/frequency rate elasticity is of a magnitude of 1.8. Thus, every 10% increase in the level of benefit entitlements will lead to an 18% increase in the number of claims being made. Another important issue lies in the exaggeration of symptoms. With high benefit levels, individuals find that they are pressured to justify their absence and begin to exaggerate the extent of their injuries or illness. This process can have deep psychological implications, in that individuals often come to believe their own exaggerations, thus perpetuating the duration of absence and underpinning the potential for effective recovery. This process has been termed 'functional overlay' and its destructive effects are well documented.

### **Fraudulent Conduct by Employers**

All Australian employers are required to procure insurance to underwrite workers' compensation claims except for employers who gain an exemption under a self insured arrangement.

Whilst CCI condemns fraudulent behaviour by employers it also recognises that frequently such behaviour is encouraged by the structure of the system that seeks to govern it.

### **Insurance**

The current regulatory framework governing the operation of insurance in relation to workers' compensation is unnecessarily complex and convoluted. Statutory intervention in the process of insurance is in CCI's view difficult to justify. Governments should not treat the insurance of workers' compensation liability differently from other forms, apart from requiring it to be compulsory.

The level of statutory intervention in the provision of workers' compensation has stifled competition and the process of determining premiums creates stagnancy and discourages innovation, negotiation and adaptation.

CCI emphasises the need for flexible, efficient and equitable outcomes in the area of workers' compensation and its insurance. There is no argument that workers' compensation insurance should be compulsory and fraud prevented. However, public liability insurance and third party motor vehicle insurance are compulsory, and yet these forms of insurance are nowhere near as over-regulated as workers' compensation insurance. There must be greater recognition of the need for parties to develop provisions and contracts that adequately cater for their needs.

The de-regulation of workers' compensation insurance will provide a more equitable system where employers can insure against their own performance at a relevant and competitive price rather than what many now perceive to be at a premium that subsidises other employers.

## Claims Management

A major concern regarding claims management is the lack of employer involvement resulting in a distinct separation of responsibility, action and outcome. The result of this arrangement is that no party is fully accountable for the efficient administration of claims. Insurers set outcomes based on their past performance regardless of the quality of that performance, employers are powerless in most instances to improve the insurer performance either at the time of claims management or at a later stage through placing business elsewhere.

Ultimately employers will react to nature and structure of the operating environment. If it is perceived to be unfair and inefficient and in particular permits fraud in certain areas without any retribution, adverse behaviour within the system will be difficult to eliminate.

## Recommendations

CCI recommends that medical practitioners be provided with the option of determining work relatedness of an injury or alternately clearly declaring an inability to conclusively determine.

CCI recommends that medical practitioners be held statutorily responsible for their work relatedness determinations.

CCI recommends that employees contribute to the cost of investigation of any claim found not to be work related.

CCI recommends that strategies be established to identify and punish fraudulent behaviour in regard to claims.

CCI recommends that workers' compensation insurance be de-regulated and a healthy environment of competition between insurance firms be fostered.

- 2. *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***

CCI can only comment within the vacuum that costs incurred by both insurers in the denial of claims and by the workers' compensation authority in the dispute of fraudulent claims is not publicly available if indeed it is separately collected.

The West Australian Workers' Compensation and Rehabilitation Act 1981 (the Act) provides for insurers and self insured employers to accept, deny or pend a claim within a set period of time. If a claim is denied or pended, the employee may consider it in dispute and make application to the Conciliation and Review Directorate (the Directorate) to have the dispute heard.

Insurers are encouraged to resolve disputes through internal dispute resolution procedures and formal referrals are assessed as part of the insurer approval process to operate within the workers' compensation system.

The following table shows the number of disputes referred to the Directorate and the performance of the Directorate in regard to the referrals. Whilst disputes cannot be directly linked to fraudulent claims the causes of a dispute is a disagreement between the employer (insurer) and the employee in regard to either entitlements or the level of those entitlements.

1998/1999	1999/2000	WORKLOAD INDICATORS – STATUTORY DISPUTE RESOLUTION PROCEEDINGS	2000/2001
4272 3548 = 83% 724 = 17%	4560 3834 = 84% 726 = 16%	No disputes resolved at conciliation at review	4757 3900 = 82% 857 = 18%
42% 26% 9% 23%	33% 30% 10% 27%	Timeframe: % disputes resolved at conciliation <4 weeks between 4 weeks and 8 weeks between 8 weeks and 12 weeks >12 weeks	29% 32% 10% 28%
18% 29% 12% 41%	12% 27% 19% 42%	Timeframe: % disputes resolved from date of referral <4 weeks between 4 weeks and 8 weeks between 8 weeks and 12 weeks >12 weeks	10% 12% 14% 65%
35% 23% 11% 31%	28% 26% 11% 35%	Timeframe: % disputes resolved from date lodged <4 weeks between 4 weeks and 8 weeks between 8 weeks and 12 weeks >12 weeks	24% 27% 9% 41%
4247  3543 722 5	4744  3834 726 11	Workload:  Referrals for conciliation filed  Number finalised- at conciliation Number finalised- at review Number finalised- by Compensation Magistrate	4284  3900 857 3
		General	
5440 362 831 4 89 35 62	5915 421 841 12 94 34 106	Number of conciliation conferences Number of preliminary reviews Number of reviews Matters referred to Compensation Magistrate Number of appeals to Compensation Magistrate Other matters heard by Compensation Magistrate Matters referred to a Medical Assessment Panel	6220 511 858 6 87 65 95

**Figure 1: WorkCover Western Australia Annual Report 2001**

The Directorate will determine the claim. The recorded cost of the determination is limited to those of the Directorate. The indirect cost on the employer is not recorded by the authority.

The Directorate does not determine if the claim is fraudulent. The Act does not provide compensation to the insurer or employer for expenses associated with the successful denial of a claim.

### **Payment of workers' compensation premiums**

In accordance with the Workers' Compensation and Rehabilitation Act 1981 and section 4 of the Employers' Indemnity Policies (Premium Rates) Act 1009, a Premium Rates Committee determines the recommended premium rates in respect of employer indemnity policies. The rates are determined annually and the schedule is gazetted prior to June 30 each year.

The recommended premium rates are applied to the aggregate amount of wages, salaries or other remuneration paid to an employer's workers in accordance with the following definition of 'worker'.

*'Worker' does not include a person whose employment is of a casual nature and is not for the purpose of the employer's trade or business, or except as hereinafter provided in this definition a member of the police force, or except as hereinafter provided in this definition a member of the employer's family dwelling in his house; but save as aforesaid means any person who entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise and whether the contract is expressed or implied, is oral or in writing; the term 'worker', save as hereinbefore provided in this definition, includes a member of the police force, who suffers a disability and dies as a result of that disability and any member of the employer's family dwelling in his house whose name, employment and thereafter from time to time when the insurance is renewed, in writing to the insurer of the employer's liability to pay compensation under this Act;*

*the term 'worker' save as aforesaid, also includes-*

- (a) any person to whose service any industrial award or industrial agreement applies, and*
- (b) any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services,*

*and any reference to a worker who has suffered a disability shall, where the worker is dead, include a reference to his person to whom or for whose benefit compensation is payable.*

The definition is very complex and does not provide clear direction to employers in a number of areas including payments that may or may not be included as part of a worker's remuneration. Also it does not support more contemporary labour market arrangements in that it requires both the direct employer of a contracted employer to obtain workers' compensation insurance cover as well as the employer to whom that worker is contracted.

A structure that supports a double payment by employers to the advantage of insurers creates a considerable disincentive on employers to meet inequitable requirements

Employers should expect a fair and equitable system. A basic principle of that system should be that workers' compensation statutory responsibilities rest with one party namely the direct employer.

## Recommendations

CCI recommends that workers' compensation legislation clearly defines the methodology for premium calculation

CCI recommends that the responsibility for workers' compensation statutory responsibilities rest with the direct employer.

- 3. 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.*

## Claim Profiles

A number of factors influence the safety records and claims profiles from industry to industry. These include the size and nature of the industry, the severity of risks associated with the industry, the ability of employers to practically manage the risks, labour market arrangements including the impact of industrial relations, guidance and other resources available on industry specific risk management, the nature of injuries sustained and the ability to manage injured employees back into the work environment.

The Commission into the Building and Construction Industry has identified a number of factors both beneficial and detrimental to safety performance. Whilst it has heard of intense dissatisfaction with the industry performance, the effectiveness of the existing legislative frameworks and the lack of adequate and appropriate enforcement, it recognises that safety outcomes have improved.

There is emerging evidence to show that particular industries (mining) or particular groups have significantly improved performance by making prevention the major priority for the group. However, one major failing in the encouragement of improved prevention is the inability to conclusively demonstrate the cost benefit.

With the implementation of the comparative performance monitoring (CPM) project by the Workplace Relations Ministers' Council a greater emphasis is on improving not only performance but the way in which that performance is measured. The CPM project has and continues to struggle with the consistent performance across all jurisdictions due to the operation of differing recording system. The depth of the problem is demonstrated in the inability to accurately measure workplace fatalities in Australia.

As well, the establishment of a National Occupational Health and Safety Strategy is expected to drive a far greater emphasis on safety, particularly in the worst performing industries. These industries will be targeted in the implementation of the strategy by the National Occupational Health and Safety Commission (NOHSC) and all of the jurisdictions.

The Strategy commits the jurisdictions and peak employer and employee bodies to national targets for the reduction of fatalities and workplace injuries for the first time ever.

Whilst the measurement of prevention data is being addressed, frequently what is not recognised is that the duration or cost of a claim is not always due to its severity. Indeed an early return to work may be influenced more by the ability of the employer to provide suitable employment, the willingness of the employee to return to work, particularly where a benefit structure is discourages early return. The influence of external parties including service providers should also be considered.

## **Rehabilitation**

In Western Australia the term vocational rehabilitation (being rehabilitation provided by an external approved party) became a legitimate workers' compensation expense under the Workers' Compensation and Rehabilitation Act in 1993. Prior to the amendments to the act the effectiveness of vocational rehabilitation was not separately measured.

In 1997, a Review of Rehabilitation by the Workers' Compensation and Rehabilitation Commission found '...the utilisation of vocational rehabilitation as a strategy to assist injured workers return to work was associated with an increase in the return to work rate for closed cases from 59% in 1993/94 to 64% in 1994/95'. It also found that the referral to external vocational rehabilitation increased by 39% in the first two years and the cost in the first three years by 186%. Since 1995 the return to work rate has remained reasonable stable

The Review recognised that the major stakeholders in the system were the employer and the employee. It recommended that employers directly assume more responsibility for injury management as a total concept and work directly with the employee in consultation with the medical practitioner to achieve a return to work.

Injury management is defined as:

*"a workplace managed process incorporating employer and medical management from the time of injury to facilitate where practicable, efficient and cost effective maintenance in or return to suitable employment"*

Rehabilitation is defined as:

*"part of the injury management process and where necessary can include, but is not limited to, the use of physical and vocational services"*.

Whilst the major responsibility now rests with the employer to initiate injury management, the employer's responsibility is not coupled with the legislative power to actively consult on and where appropriate participate in medical interventions without the consent and willingness of the medical practitioner to the employer's involvement.

Employers have experienced difficulties in consulting with medical practitioners. The reasons for the reluctance of many medical practitioners in particular to consult and involve the employer are unclear. Possibly practitioners are concerned regarding patient confidentiality, lack of experience and training in dealing with workplace considerations, a reluctance to become involved in matters outside of specific medical treatment or the perception that to consult with the employer will jeopardise further business from workers or their families. Practitioners not consulting with employers appear to rarely consider the implications of the absence of the worker in the workplace or the value of work to the worker in determining injury management strategies.

Where the parties have been able to work together to return an injured employee to work the results are encouraging as the ownership of the process is directly with the parties most able to influence the process.

Interestingly the return to work rate in Western Australia has remained relatively stable since 1993, however following introduction of the injury management approach in 1998 the cost of vocational rehabilitation has reduced significantly from 4.7% of total claims costs in 1997/98 to 3.8% in 2000/01.

There exists very limited evidence to show that externally provided rehabilitation is cost effective. What is evident in the literature is support for many of the common themes that emerged from the WA review of Rehabilitation. These themes were:

- *Workers were identified as changing providers without reasonable excuse thereby prolonging the vocational process and increasing costs*
- *Workers were often reluctant to commit to vocational rehabilitation programs in fear of demonstrating a capacity for work and having weekly entitlements reduced or ceased*
- *Workers were identified as not being confident and that all parties were acting in their best interests*
  - *There is a need for employers to develop and implement vocational rehabilitation policies and to play a more active role in rehabilitating injured workers*
  - *The need for incentives and more assistance for employers to rehabilitate injured workers*
  - *There is a poor understanding of the compensation and rehabilitation system by medical practitioners and allied health professionals*
  - *Accredited rehabilitation providers need to be more accountable and their performance more closely monitored, assessed and reviewed*
  - *Motivation for provision of vocational rehabilitation services appear to be market/financially driven*
  - *Vocational rehabilitation programs were compromised by goals aimed at reducing cost rather than achieving durable return to work outcomes*
  - *The Act does not provide for appropriate action to be taken in cases where it can be substantiated that an injured workers has not reasonably cooperated in or refused to carry out vocational rehabilitation*
  - *The opinions, vested interests and roles of the stakeholders and other parties in the system creates tension and conflict to the detriment of vocational rehabilitation*
  - *Performance indicators are required to evaluate the effectiveness and efficiency of vocational rehabilitation.*

A subsequent Report of the Review of Medical and Associated Costs identified the need for clearly defined decision points where injury management intervention is considered. The concept of an injury management treatment plan initiated by the treating medical practitioner in consultation with the worker and employer was explored. The plan may or may not include vocational rehabilitation.

The most important factor to emerge from the reviews and the literature is that an return to work intervention will only succeed where it has the full support of the worker and employer.

The ability to measure the effectiveness of injury management is limited as employers are not required to report on internal programs.

Ideally a review of specialised intervention within the injury management process will provide a clearer understanding of the benefit of vocational rehabilitation to the workers' compensation systems and provide a platform for establishing clear performance indicators if the intervention is formally maintained within the systems.

## Recommendations

CCI recommends that the benefits of vocational rehabilitation as a formal process within workers' compensation systems be critically assessed.

CCI recommends that in the case that vocational rehabilitation is not assessed as a beneficial service to workers' compensation, formal requirements for the service be abolished.

CCI recommends the establishment of formal benchmarks for vocational rehabilitation performance if it is to formally continue

CCI recommends that the cost and performance of vocational rehabilitation be measured nationally

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