Submission to the National Workers Compensation and Occupational Health and Safety Frameworks

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This submission argues for, and proposes, a framework for prevention and rehabilitation of injury that can contribute to a viable national workers compensation scheme. In particular it proposes that the Disability Management (DM) approach, which focuses on the continuum of prevention of injury through to rehabilitation, and which is now being adopted in several European countries, should underpin a national workers compensation scheme.

Background

It is fair to say that rehabilitation, in many State workers compensation schemes over the last two decades, has been set up for failure. Time and time again, architects of workers compensation schemes (drawn primarily from business and the legal communities), have proposed workers compensation arrangements where rehabilitation is an 'add-on', rather than the primary focus of the scheme. This is despite the fact that a small investment in rehabilitation has been shown to save millions of dollars in workers compensation costs.

The establishment of workers compensation schemes usually focuses on *levels* of benefits and *entitlements* to benefits with little regard for the impact of these provisions on prevention and rehabilitation. Consequently the systemic features of workers compensation schemes militate against successful rehabilitation. The presence of common law, lack of focus on employer responsibilities to assist injured workers to return to work, and poorly funded rehabilitation services have contributed to this problem.

The development of a national workers compensation scheme is an opportunity to remedy this situation. It is time to develop a scheme that has as one of its central principles an integrated program of prevention and rehabilitation services; ipso facto the design of the scheme ***should be focussed on effective prevention and return to work.*** Benefit levels and structures, premium setting and eligibility criteria should be based on this principle rather than viewing prevention and rehabilitation as an afterthought. This is the only way in which the endless cycle of reviews of poorly performing workers compensation schemes can be brought to a halt.

Changing the focus

Fundamental to the success of a workers compensation scheme is a strong focus on a seamless continuum of prevention and rehabilitation services in the workplace. Establishing a regulatory environment to support this requires the implementation of several key measures. These are outlined below:

Removal of access to common law

There is considerable evidence to show that access to common law is incompatible with a scheme that focuses on rehabilitation. The adversarial nature of common law redress does not facilitate recovery and return to work; in effect the presence of common law is a major disincentive to participate in vocational rehabilitation. For example, a study of 200 workers with back injuries over a three-year period (Thomson, 2000) found that workers who pursued litigation against employers reported significantly higher levels of disability, pain and psychological distress than workers who were not pursuing litigation. A second finding was that a return to satisfying, meaningful employment during the compensation process minimised disability, pain and psychological distress. These results send a strong message that the adversarial process of common law action is psychologically and physically detrimental to injured workers and costs the system millions of dollars in payouts and lawyers fees. Other studies also highlight this problem. For example, Hall's study of the Californian workers compensation scheme found that the presence of legal representation had a significant detrimental impact on the effectiveness of rehabilitation and the post-injury earnings of injured workers (Hall, 1997). Hall suggested that any "policy reform efforts…. should re-evaluate the extent of involvement of litigation in the vocational rehabilitation process" (p. 202).

The arguments of plaintiff lawyers and some unions that removal of common law access will lead to inadequate compensation for injured workers is understandable. However, common law access is not the answer. Well-designed benefit schemes that provide ongoing compensation to injured workers with incentives to participate in rehabilitation, as well as adequate structured settlements for people with catastrophic injuries are alternatives that can work well. Such schemes will also prevent the cost shifting to the Commonwealth from State workers compensation schemes that often occurs by mandating that suitable levels of ongoing compensation be provided.

Early intervention

Early intervention is a key component of a workers compensation scheme. Early intervention includes a range of components: (a) maintaining communication with workers who are absent from the workplace, (b) appropriate medical treatment, (c) immediate contact with the treating doctor to obtain return to work restrictions, and provide information about job demands and the availability of transitional work, and (d) implementation of a clearly defined return to work program that may include modifications.

Provision of rehabilitation services as soon as possible after injury is strongly correlated with early return to work. For example, a study in Victoria (Strautins & Hall, 1989) examined return to work data of 443 injured workers who were referred to an on-site disability management program in a company that had manufacturing plants in the areas of paper, steel, cardboard and plastic products. There were two important findings. First, early referral to rehabilitation was linked to likelihood of return to work. For example, of those referred within a week of injury, 90% returned to work, whereas of those referred within 8-28 days of injury, 77% returned to work. Where workers were referred after a month, only 66% returned to work. Second, the earlier the referral to rehabilitation the shorter the time taken to return to work. Of

those workers who were referred to rehabilitation within seven days of injury, 73% had returned to work within 28 days. However of those workers who were referred for rehabilitation after 29 days, only 42% has returned to work within 28 days.

Lengthy claims determination processes do not facilitate early return to work. Those companies that commence rehabilitation prior to the determination of a claim and/or do not distinguish between occupational and non-occupational injuries in terms of providing rehabilitation achieve excellent return to work rates. For example, Steelcase in the US has saved millions of dollars by merging their workers compensation and disability areas, instituted the same one-day reporting system for all medically-related leave and integrated functions such as prevention and rehabilitation for ***non-occupational*** as well as occupational injuries. A national workers compensation scheme should create a regulatory environment that supports early intervention.

Provision of alternative duties and workplace accommodations

Employers must provide suitable duties and workplace accommodations if workers compensation schemes are to be successful (Westmorland, 2000). Furthermore the identification and selection of suitable duties and accommodations should involve injured workers. Not providing these things can lead to considerable dissatisfaction among workers, threatening the return to work program. For example a study in Victorian manufacturing industries asked injured workers to write stories about their experiences of injury and rehabilitation (Calzoni, 1997). Positive experiences workers reported included (a) employers providing graduated return to work programs designed in consultation with them, and (b) employers providing job modifications to make normal duties accessible to them. However workers also reported many negative experiences. These included employers giving them tedious, repetitive work and not consulting them about these duties (this made workers feel at the ‘bottom of the pile’) or allocating them alternative duties that were unsafe and resulted in further injury.

Another study in NSW (Kenny, 1995) confirmed the need for employers to provide structured on-site rehabilitation programs that involve workers and other key parties as soon as possible following injury. In-depth interviews with 12 long-term injured workers about their experiences with key stakeholders in the rehabilitation process revealed quite negative findings in that employers failed to provide suitable duties and workplace accommodations, were unwilling to keep workers jobs open and sometimes provided duties that were demeaning. These actions or lack of action were instrumental in creating adversarial relationships between employers and workers. Clearly the provision of return to work opportunities is going to impact the success of rehabilitation which in turn will influence the economic viability of a workers compensation scheme.

Employers taking responsibility for rehabilitation

Employers must take responsibility for the rehabilitation of injured workers if a national workers compensation scheme is to be viable. Purse (2002) has reported that thousands of injured workers lose their jobs each year despite laws protecting employment security. These workers often become the 'long tail claimants' (Purse, 2002) that cost workers compensation systems so much money. The findings of the

2000/2001 national return to work survey commissioned by the HWSCA (Campbell Research and Consulting, 2001) confirm the relationship between employer involvement and return to work. For example it was found that (a) injured workers who rated their employer as helpful in the rehabilitation process had a substantially higher return to work rate, (b) employers were most likely to be identified as least helpful when there was no return to work and (c) the provision of suitable duties by the employer was positively associated with a durable return to work.

There is considerable other Australian research that supports the need for employers to be actively involved in prevention and rehabilitation. Kenny (1995), for example, reports that negative experiences of workers in NSW included: (a) a lack of contact by the employer, (b) lack of information about rights and responsibilities under workers compensation, (c) dissatisfaction with the role of workplace rehabilitation coordinators, (d) alienation from the workplace and co-workers, and (e) deterioration of the relationship with the employer so that process became adversarial. Similarly, Calzoni (1997), documenting workers stories in the Victorian manufacturing industry found that workers wrote positively about (a) the support of co-workers and health and safety representatives during the return to work process and (b) the provision of training by employers to upgrade skills. However, negative experiences were more the norm and included (a) rehabilitation being given low priority by employers, (b) poorly designed return to work programs being offered workers which indicated a lack of interest by employers, (c) feelings of isolation in the return to work job and (e) verbal abuse from co-workers.

Disability Management as a framework

Disability Management (DM) is a framework for practice that integrates prevention and rehabilitation. Its principles are ideally suited to a national workers compensation scheme that is prepared to tackle the difficult issues raised earlier. This is because the DM approach is: (a) collaborative, not adversarial; (b) supports employers taking responsibility for injury not third parties such as insurers and rehabilitation providers; (c) focussed on the workplace; and (d) mandates early intervention.

DM is a term that originated in the 1980's as a response by self-insured employers in the United States (US) to the rising costs of disability and injury. DM has since been embraced by a number of countries (e.g. Canada, Germany, Netherlands) to control work place disability costs. Recently the International Labour Organisation (ILO) developed a Code of Practice for Managing Disability in the Workplace (ILO, 2002). DM is rapidly becoming viewed on a global basis as a solution to the economic and human costs of injury in the workplace (Westmorland & Buys, 2002). DM is defined as:

> *A workplace prevention and remediation strategy that seeks to prevent disability from occurring or, lacking that, to intervene early following the onset of disability, using coordinated, cost-conscious, quality rehabilitation service that reflects an organizational commitment to continued employment of those experiencing functional work limitations. The remediation goal of disability management is successful job maintenance, or optimum timing for return to work, for persons with a disability.* (Akabas, Gates and Galvin 1992, p. 2)

There are five major principles of DM. First, DM embraces the notion of ***prevention*** of injury, as well as return to work assistance following injury (Shrey, 1995). Prevention encompasses a range of activities including safety programs, pre-placement screening, ergonomic services, loss prevention programs, health promotion, employee assistance programs and wellness services (Tate, Habeck & Schwartz, 1986). The fact that prevention and rehabilitation are 'viewed as related ends in a comprehensive, conceptual framework' (Galvin, 1986, p.233) separates DM from vocational rehabilitation because the latter focuses primarily on return to work interventions (Shrey, 1996). There is little evidence of *integration* of prevention and rehabilitation activities in workplaces in Australia. O'Donnell (2000) makes this point when she argues that there needs to be an 'integrated design and management of workers compensation, rehabilitation and OHS [occupational health and safety] at the enterprise, industry and government level' (p. 178) and that rehabilitation workers should also focus on prevention. She also states that lack of worker involvement in these areas reduces the potential for prevention and rehabilitation.

Any national workers compensation scheme needs to remove the arbitrary division between prevention and rehabilitation that has been a historical anomaly resulting from separate legal imperatives in OH&S and workers compensation, and a lack of integrated educational programs training professionals with skills in both prevention and rehabilitation. Injury management is a phrase that has gained most popular usage over recent years. However, injury management has a narrower focus than DM. For example, the Australian Heads of Workers Compensation Authorities (HWCA) (1997) states that injury management is 'a coordinated and managed process *from the time of injury,* [italics added] integrating medical and employer management practices with a focus on the workplace and return to safe employment' (p. 72). Although this definition appropriately implies that interventions should workplace-based, it is typical of most definitions of injury management in that it excludes mention of injury prevention.

Second, DM is an ***employer-directed process*** using systems at the organisational level to promote prevention and rehabilitation (Rosenthal & Olsheski, 1999). The philosophical commitment to DM permeates the organisation, and is reflected in the workplace culture, management structure, management attitudes, business approach, communication channels and performance evaluation. It involves a strategic planning approach involving needs assessment, goal setting and development of interventions to ensure its effective implementation at all levels of the organisation (Millington & Strauser, 1998). This approach represents a move away from traditional rehabilitation service delivery where third parties such as insurers, and external providers manage prevention and return to work programs, to an approach where employers take responsibility for these activities.

Third, DM is a ***collaborative*** approach involving joint labour management support to implement programs to reduce the impact of disability on the workplace (Shrey, 1995). Poor labour management relationships can actually contribute to the incidence and longevity of disability claims, whereas the creation of 'occupational bonds' between management and injured workers can maintain the employability of workers and reduce claims costs (Bruyere & Shrey, 1991). The National Institute of Disability Management and Research (NIDMAR) argues that the collaborative approach of DM is operationalised through the creation of joint labour management committees within organisations. This role of these committees is to oversee the development and implementation of all facets of the DM program (NIDMAR, 2000). Such committees

work. For example, Shamhart & Growick (1996) report on the contribution of a DM committee composed of union officials and management to significantly reducing the numbers of absent injured workers in glass picture tube manufacturer.

Fourth, the focus of all DM interventions is the ***workplace*** (Habeck, 1999). Shrey (1996) refers to the normal workplace being the 'therapeutic environment of choice' (p. 409) both in terms of rehabilitation (e.g. job accomodation, worksite modification, transitional work) and prevention activities (e.g. teaching safe work practices, ergonomic changes to prevent injury). Removing environmental barriers and providing employer-based transitional work opportunities optimise the chances that injured employees will return to work as soon as possible.

Finally, ***early intervention*** following injury is critical to the success of DM programs (NIDMAR, 2000). The notion of the importance of early intervention is not new to the business world. However, there has been a tendency in workers compensation to delay the provision of rehabilitation assistance for a range of reasons, including waiting until claims liability has been determined (Industry Commission, 1994). DM practice requires that immediate contact be made with the treating doctor following absence from work through injury to provide information about job demands and the availability of transitional work and to obtain information about return to work restrictions (Shrey, 1996). Employers with DM programs usually do not distinguish between compensable and non-compensable injuries in terms of initiating rehabilitation. These employers understand that there will be significant costs to the company if rehabilitation assistance is delayed, regardless of when and where the injury occurred.

Summary

This submission has argued that the any national workers compensation scheme must include an integrated range of injury prevention and rehabilitation services. For these services to be effective in terms of reducing the burden of injury and illness on workers and employers the scheme must align the benefits structure and regulatory measures with the goals of prevention and return to work. This submission has suggested key areas that need to be addressed in any national scheme including removal of common law access. It also argues that the Disability Management approach, now being adopted in several countries, is a framework for practice that is consistent with the aims of integrating prevention and rehabilitation at the workplace using a collaborative approach between employers and employee representatives.

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