

Submission

Productivity Commission Inquiry into Workers' Compensation and Occupational Health and Safety Frameworks



CHAMBER OF COMMERCE AND INDUSTRY
WESTERN AUSTRALIA

September 2003

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Introduction

CCI welcomes the opportunity to submit to the review of two areas that are of major interest to employers. Some synergies do exist between occupational health and safety (OHS) and workers' compensation, however the guiding principles, and management strategies differ significantly. OHS is a proactive activity. Workers' compensation and injury management is a reaction to workplace injury.

Occupational Health and Safety

Australian OHS requirements are generally detailed, complex and lack practical application in all workplaces the requirements are meant to cover. The legislative and regulatory reforms since the mid eighties have tended towards a general duties approach prescribing outcomes rather than detailed controls.

Whilst the duty of care concept is supported by CCIWA, the more recent proliferation of regulations and support documentation under the framework appears to be creating a significant compliance impost on small and medium enterprises in particular.

The National Occupational Health and Safety Commission (NOHSC) provides an appropriate forum for employers, employees and the jurisdictions to consider OHS matters. The initial development of the seven national standards was a major achievement for NOHSC, however further output slowed until the recent release of the national strategy. The strategy is underpinned by a work plan with a strong focus on national consistency.

NOHSC can establish and maintain nationally consistent programs. Parties to NOHSC have become more open to and accepting of the need for consistent requirements. The national strategy should be supported and work activity to meet its goals encouraged.

Workers Compensation

Reform of workers' compensation is rarely off the political agenda. Its complex nature, vulnerability and volatility create a challenging environment for those financing the system (employers), those supported by the system (employees), those who operate in the system (service providers) and those who control the system (government).

Changes to workers' compensation generally provide short term cost relief that is ultimately eroded by innovative access to a visible workers' compensation pool.

Workers' compensation should be no different from other forms of business insurance other than being compulsory. In particular, it should be negotiable and reflect the claims performance of the insured.

In the past decade, workers' compensation systems have been subject to review at least once by every Australian jurisdiction and the Industry Commission. The framework for an equitable, cost effective structure has remained elusive. The debate is not so much about a national system, as a system framework that produces desirable outcomes without the jurisdictional micro management that currently exists.

This submission will focus more on workers' compensation and injury management than OHS. It explores a number of options for a forward agenda based on national consistency rather than a national scheme.

Background

The task of achieving an optimal long term workers' compensation institutional framework must be based on two outcomes; firstly the provision of fair and efficient arrangements for injury management and return to work and secondly, if common law is pursued, then a balance between liability and damages.

Above all, reform must provide:

- A stable system
- Non volatile premium determinations
- Economic efficiency
- Liability rules and control of risk

These issues will be addressed in more detail under the specific area responses.

System Structure

The history of workers' compensation is an interesting one. Workers' compensation was originally established solely to protect individuals. The protection was to provide adequate but limited income for those that were injured or incapacitated through their work. It was designed to ensure that workers did not have to go through a difficult process of proving that there had been 'fault' on the part of the employer to gain appropriate support following an injury. The basic tenet of 'no-fault' compensation is therefore primarily a protection law. It is not a tort based law.

It is recognised that no-fault arrangements as a source of compensation for injured workers are superior to liability regimes. No-fault arrangements generally provide more targeted, timely and assured compensation and some form of injury management. The lengthy delays associated with legal action are avoided and compensation is by contract rather than dependent on court determinations. However the introduction of compensation by automatic benefit should always remain balanced by institutional arrangements that provide disincentives to pursue common law.

Workers' compensation has been subject to change by almost every state parliament. The goal of change is always improved benefits and greater scheme efficiencies. The goal is rarely achieved and costs escalate to unsustainable levels.

Many factors impact upon the operation of any workers' compensation scheme. The following are of major importance:

- (i) Orientation of the system
- (ii) Institutional structure of the system
- (iii) Premium structure

- (iv) Level and form of benefits
- (v) Cost

Orientation of the system

Orientation of a workers' compensation system refers to the direction in which it is aligned. Two major alignments can be distinguished in Australia. First, the scheme may be directed only toward payment of compensation to injured workers. Second, the scheme may be directed towards accident prevention and injury management. Ideally, the latter must be the focus. However combining OHS and workers' compensation within one system has not been shown to be a highly successful strategy.

Theoretically, occupational health and safety measures should reduce the incidence of workplace accidents and diseases and lower scheme costs by reducing claims. Similarly, a focus on injury management should lead to lowered income support payments from the system because of earlier return to work. In Australia, safety measures have increased significantly in the past decade, injury rates have decreased, injury management is more focussed and yet workers' compensation costs are still high.

A relevant issue therefore, is the costs of undertaking programs of occupational health and safety and injury management relative to the benefits of the programs in terms of reduced claims and early return to work. A preventative and injury management orientation that is externally imposed is not likely to gain workplace ownership and lower system costs. Instead, such an orientation may raise costs by promoting non-cost effective programs, which do not deliver good outcomes.

Occupational health and safety regimes differ between jurisdictions, in some cases quite significantly. In the early eighties, the jurisdictions began to introduce changes based on the Roben's philosophy of self regulation. The way in which the jurisdictions introduced the changes differed from a complete overhaul of the system to introducing duty of care in tandem with the existing prescriptive and detailed legislative and regulatory approach.

Following the early commitment to a general duties approach the jurisdictions have adopted a proliferation of regulations, standards, codes of practice and other guidance material. This has resulted paradoxically in Australia having a far more prescriptive and detailed approach than existed in the mid eighties.

Whilst much of this work has been beneficial in guiding employers and employees in meeting their duties and improving workplace accident prevention, it has provided fuel for enforcement agencies to request the establishment of generic prevention programs that are costly and have not proved to be highly successful. The external imposition of such requirements ignores the fact that to be successful, workplace initiatives must be fully embraced by workplace parties and internalised.

Employers struggle to understand and in many cases implement the proliferation of workplace requirements in all jurisdictions. National employers find the inconsistencies increasingly difficult. The need is not for uniform legislation and regulations that can become unworkable locally but rather consistent principles adopted by all jurisdictions underpinned by concise, simple and practically orientated guidance material.

The interrelationship of workers compensation and OHS frameworks will be pursued in more detail later in the submission.

Institutional structure of the system

Institutional structure of the workers' compensation system refers to whether the system:

- (i) Is adversarial or administrative when determining eligibility and payments
- (ii) Retains access to common law damages
- (iii) Limits the number of licensed insurers
- (iv) Emphasises investment performance

An adversarial system is often claimed to be more expensive than an administrative one because of the necessary involvement of formally prepared (and expensive) counsel. Moreover, it can be argued that the process of identifying the right to compensation from an accident is pointless in the face of an injured and needy party. However, it is claimed that an advantage of the adversarial system is that it can ensure that payments are made only to those who have entitlement.

As well, an adversarial system ensures that the appropriate signals to be more careful are given to the parties directly involved in the workplace.

The availability of common law damages in addition to workers' compensation statutory benefits contributes to workers' compensation system costs. Limitation of this right significantly reduces costs. CCIWA prefers a structured payments model for severe injury rather than common law. If common law is allowed, then entry must be restricted. This issue will be further explored later in the submission.

On the other hand, an administrative system is argued to be cheaper because of the reduced formality. However, it is claimed by some to give rise to more arbitrary decisions because it does not adequately handle the complex legal and medical questions involved.

Ideally the system should provide a balance between administrative arrangements for small claims and retention of the adversarial system for claims for significant injury. The threshold for entry into the adversarial system should be one of physical impairment.

A source of premium reduction lies in the emphasis placed on investment performance of insurance companies or jurisdictional managers. A large tail to workers' compensation claims and the withholding of good performance payouts, means a large portion of premiums could be held for long periods. Increased investment earnings have the potential to significantly lower premiums.

Premium structure

Both the value of the premiums set and the procedures by which premiums are set and administered are crucial to the efficiency of the workers' compensation system.

The full extent of the costs of injuries may not be anticipated in the year for which the premium is set. This can occur when the cost of claims, treatment costs or claim settlements rise above expectations. Also, there is an Incurred But Not Reported (IBNR) injury claims component when setting premiums for each year. Where claims costs exceed the predicted level for the year, the additional costs are either borne by the insurer or recovered through higher premiums in later years. The system is extremely sensitive to legislative change within or external to the workers' compensation system. Other factors include court decisions on damages and ATO rulings on financial benefits such as lump sum payments. Subsequently, court awards are adjusted to reduce the adverse impact of change.

Where premium levels are set according to historical claims experience in each industry, then the timeliness and accuracy of data is very important. Delays in data provision penalise those industries with improved claims records while providing a bonus to those industries with deteriorating claims performance. Clearly, such information must also be accurate if correct premium rates are to be set without cross subsidisation occurring.

Timely and relevant data collection and analysis appears to be an issue for most jurisdictions and national data release is considerably delayed. Any move to a national scheme may result in slower reporting of claims and even less timely data than is currently the case.

Another important factor in premium setting and system management is the extent to which the administration of the system fails to discourage evasion, avoidance, and minimisation of premiums or fraudulent claims. The ease with which claimants enter the system can in itself encourage fraudulent behaviour. Effective policing of all areas of the system is required.

Level and Form of Benefits/Cost

These issues will be addressed later in the submission.

The following comments relate to matters raised specifically under the Terms of Reference for the review.

Consistent Definitions

Consistency in any area of workers' compensation should enhance innovation and efficient performance and administration, not obstruct it.

Consistency across Australia of a number of definitions will assist in the general understanding and management of claims particularly for those employers trading in more than one jurisdiction. Consistent definitions have the potential to clearly define the workers' compensation boundaries particularly in regard to employment relationships and cross border issues.

However any change must be undertaken with extreme caution.

Definitions impact significantly on the way in which premiums are determined and compensation is paid. The most minor change can have a real or perceived impact on costs that will be viewed as either unnecessary or politically unacceptable. The number of consistent definitions should be the minimum required to underpin consistent statutory benefits, address cross border issues and bring efficiencies to claims determination and management.

Recommendations

CCIWA recommends identification of definitions required to support a nationally consistent benefit structure and address cross border issues.

Consistent Benefits

The benefit structure is the most influential determinant of any workers' compensation system. It drives employer and employee behaviour, premium setting, services to the injured and the administration of the system.

If it is not appropriate in respect to intent or unbalanced in respect to convenience, services and recovery requirements, system stability and reliability will remain uncertain.

Clearly the level of benefits provided by workers' compensation schemes is the fundamental element in total system costs. The higher the benefits, the higher the premium.

The method of paying benefits and the form of benefits are most significant to system costs. For example, making the employer pay directly for a part of each claim has an impact on total costs as well as the distribution of the cost. With this institutional arrangement a greater proportion of the costs are transferred from the insurer to the employer. This may provide an incentive for employers to take action that reduces the incidence of "small" accidents. In this case, the correct pricing signals are given to the person who exerts control over workplace conditions. It does, however undermine the employers desire to fully insure, it discourages the reporting of claims and may result in some cost shifting to the federal medical system.

Another factor influencing total system cost is whether the state sets a limit on the ultimate liability of the insurer. The higher the limit, the higher premiums must be to provide insurance cover.

An influence on the distribution of system costs is the procedure for categorisation of injuries and benefit schedules. If the categories are too broad those severely injured will likely be under-compensated while those slightly injured will be over-compensated. Adoption of an impairment threshold for benefit calculation will provide a more transparent and objective measure of benefit calculation.

The possibility of converting periodic payments to lump sums (i.e. redemption) also has an effect on the costs of the workers' compensation system. It can be argued that the possibility of redemption biases the system against return to work and this has an unfavourable effect on system costs. However, the opposite can also be argued. Once a final lump sum payment is made, there is a strong incentive for the individual to seek appropriate services that assist in a return to work. Should lump sum payments be taxed, the effect will be higher awards and redemption payments to compensate.

The availability of lump sums may also shift some of the burden of workers' compensation onto the general taxpayer. The social security system is likely to be used for subsequent income support if return to work is not pursued and the worker does not utilise the payment for future costs and maintenance associated with the injury.

Cost shifting within the system is not limited to employees accessing social security payments. Consideration must be given to the burden placed on employers for compensation of non-work related injuries. As the *Back on the Job, June 2003 Report* identified, the lack of competence, efficiency and accountability in workers' compensation systems are the causes of perceived fraud. The review was not able to quantify the level of employee fraud but held the view that the adversarial system is damaging to injured workers and the workers may undertake fraudulent activities in response to a lack of support and direction.

Employee fraud is a concern for employers and a greater emphasis on evidenced based claim determination, clear and transparent procedures for all activities and processes within the system and greater emphasis on injury management rather than lump sum payments will assist in reducing both the incidence and perception of claims fraud.

With respect to benefit levels, the following is a combination of quotes from the CCIWA response to the Industry Commission Report, August 1994 and the CCIWA submission to the WA Review of Workers' Compensation in 1999:

The nature and level of benefits has been shown to significantly influence the cost of a workers' compensation claim. Thus, any changes to the system that are designed to reduce overall costs (as the Industry Commission Recommendations are ostensibly attempting to achieve) must firstly address the issue of benefit levels and the nature of benefits, and secondly alleviate the problem of long duration of claims. These two objectives are closely related.

Costs derived from benefit levels may be categorised as employer costs and employee costs. The latter stem from the fact that most workers forgo a portion of wages (ie their risk premium) in the current period to 'purchase' workers' compensation insurance for the future. Premiums are usually related in some manner to benefit levels (although the mechanisms used to achieve this linkage differ between systems), so the higher the benefit level, the higher the premium. Some authors (Dockery and Stromback 1994, 6) (McEwin 1988, 47) (Worrall and Butler 1983, 60) have claimed that when benefit levels are high, workers' welfare will be reduced due to the fact that they are over-insured and are forgoing more income in the current period for income in future periods than they actually need to. In addition, McEwin (1988, 47) contends that the utility derived from income following incapacity is much less than that derived from income when the employee is healthy.

Thus, in terms of utility (or level of satisfaction), the opportunity cost of forgoing income when healthy in order to gain insurance cover in the event of incapacity is increased. This problem further exacerbates the reduction in welfare brought about by over-insurance. However, a purely economic analysis of insurance arrangements ignores many of the social implications of work related injury, as well as the more institutionalised aspects of the system (as market forces, in pure economics, are usually presumed to dominate). Therefore, the economic perspective should not be taken in isolation.

Employer costs associated with workers' compensation are considerably more significant than those faced by employees (especially with the institutionalised workers' compensation systems that exist in Australia). In long term claims especially, the cost tends to spiral upwards drastically to a point far above the level of forgone wages from the employee's perspective. Employers must also meet the cost of retraining and rehabilitation, non-pecuniary loss in cases of permanent disablement, replacing the injured employee, administration costs and the like.

The level of weekly benefits will have a number of effects on workers' compensation costs. However, the greatest influence is on duration. In economic terms the duration effect is explained by way of opportunity cost – the higher the level of benefits, the more potential work hours will be substituted by leisure hours.

As benefit levels rise, the opportunity cost (ie income forgone, fewer chances for social interaction, an end to career advancement, no access to job satisfaction etc) of work absence will fall. Hence, there will be less incentive to return to work. Most studies that have been conducted over the past few years have shown that this is indeed the case. Studies conducted in Britain (Fenn, 1981), the US (Butler and Worrall, 1983), (Johnson, 1983), (Ruser, 1991) and Australia (Wooden, 1989) have all found a significant positive correlation between the level of benefit and the duration of absence.

The elasticities¹ of the estimates of this effect range from 0.018 (Butler and Worrall, 1983) to 3.7 (Wooden, 1989). So, while the magnitudes vary considerably between the studies, all indicate the presence of a positive relationship.

Given that it is largely accepted that higher benefit levels will lead to higher duration rates, what impact will this have on overall costs? A meta-analysis² conducted by Dockery and Stromback (1994) concludes that the overall cost elasticity of an increase in benefit levels is about 1.2. An elasticity value of 1.2 means that a 10% increase in benefit levels will create a 12% increase in overall costs of compensation. This figure, it should be noted, takes into account employer incentives to prevent accidents induced by higher benefit levels. Two conclusions, therefore, can be reached. Firstly, that the net cost effect is positive, and, secondly, that the Industry Commission's obvious adherence to the belief that higher benefit levels will create a preventative pressure and thus ultimately reduce the cost of work related injury is, at least in terms of the bulk of academic evidence, misplaced.

Such a finding has significant implications. In 1991-92, the ABS (1993, 18) estimated the workers' compensation bill in Australia at about three and a half billion dollars. Thus, if Dockery and Stromback's (1994) findings are correct³, a 10% decrease in benefit levels will lead to a saving of nearly half a billion dollars – significant in any terms.

This option has been taken seriously by workers' compensation reformers in the past. Various inquiries have concluded that the level of weekly benefits should be less than full pre-injury earnings. Many of these inquiries have suggested that weekly benefit levels sit at about 80% of pre-injury earnings (currently, most systems utilise a rate of either 95% or 100% of pre-injury earnings for a certain period).

The Sackville inquiry into Law Reform in NSW highlighted two reasons that justified such a reduction in weekly benefits. Firstly, it was argued, "earners have certain work related expenses (such as the cost of travelling to and from work) not incurred by people unable to work", and secondly that "...the payment of compensation covering the total loss of earnings may, at least in some cases, discourage injured people from attempting to rehabilitate themselves". From a purely economic perspective, it has been argued that even 80-85% benefit levels are too high and will discourage rehabilitation and return to work. Braddock et al (1984) conclude that a 70-75% benefit level would be optimal, and in keeping with traditional pension plan arrangements.

¹ Elasticity is an economic concept referring to the rate of change in the dependant variable (in this case duration of absence) caused by a change in the independent variable (in this case the level of benefit). An elasticity of 1.5, for example means that a 10% increase in the level of benefits will lead to a 15% increase in the duration rate.

² Meta-analysis refers to the research technique of combining the results from an array of previous studies to come up with an 'average' effect. This approach has the advantage of assisting in the elimination of statistical error and bias, as it combines a large number of samples and statistical techniques

³ Interestingly, Dockery and Stromback (1994,26) argue that this elasticity, because it takes into account data from US and British Studies, would probably actually be higher in Australia due to the fact that Australian systems under utilise the concept of experience rating in setting premiums, which they argue is considerably more cost-effective than other methods.

Thus it can be seen that weekly benefit levels can have a significant influence on the costs of the claim – both directly and indirectly. This factor interacts with a variety of others in determining the total cost of the claim (such as age, gender, occupation, economic conditions and others). Therefore, in examining the cost implications of any new proposed workers' compensation system, the benefit level is the key issue. Most of the studies conducted in this area have concluded that a weekly benefit level of about 80% is both equitable, economically sustainable, and provides a necessary incentive for the employee to participate actively in rehabilitation.

Effect of Benefit Levels on Individual Behaviour

The nature and level of benefits strikes at a more fundamental level than the hip-pocket. It affects the very behaviour of those caught-up in the workers' compensation system – both employers and employees.

Benefit levels will affect the cost of a workers' compensation claim both directly and indirectly (via duration effects). However, there are a number of mechanisms by which benefit levels affect behaviour, and often these mechanisms translate into cost impacts.

Once an accident has occurred, the level of benefits will also impact on the behaviour of the parties. It has been shown that higher benefits are associated with higher claims frequencies. That is, when benefits are seen to be generous, claims that would otherwise not be taken up (due to their triviality), and instead worked through the system via sick leave provisions, start to become workers' compensation issues. This has implications for premium levels, and can lead to an ever increasing cost spiral. It also affects the validity of statistics (which are already sadly lacking) as the frequency rates become distorted. 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 then 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 undermining the potential for effective recovery. This process has been termed 'functional overlay', and its destructive effects are well documented.

Fraud, too, becomes an additional and unwanted problem as benefits rise. 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". This outcome will further impact upon costs and statistical validity.

As shown above, the average duration of absence from the workforce will increase directly as benefit levels increase. This is another form of moral hazard, - employees will exaggerate the extent of the injuries or the time needed for recovery in response to the financial incentive provided by increased benefits. In the only relevant Australian study into this effect, Wooden (1989, 226) estimates the magnitude of the effect on duration rates as a result of a change in the level of benefits to be in the region of 3.7.

Additionally, Dockery and Stromback (1994, 14) warn that "...if the benefit level is set high enough, there may be no incentive to return to work even with full recovery".

A second, but related issue, is that of desire to undertake rehabilitation. This higher the level of benefit, the less the incentive to undergo appropriate rehabilitation and therefore the less likely is an effective return to work.

In short, the duration of absence from work will increase directly as benefit levels are increased.

Thus, not only will an increase in benefits add a direct component to cost, it will indirectly affect cost by increasing the duration rate of the injury, and decreasing the probability of a speedy and effective return to the workforce.

Benefit levels have a significant effect on both cost and behaviour, with the implications of these effects being closely inter-related.

The establishment of consistent benefits levels is a major challenge. However, a nationally consistent, minimum benefit structure will provide competitive incentives for jurisdictions to provide efficient and effective workers' compensation.

Additionally, nationally consistent benefits will provide the following:

- a) cross border fairness – regardless of where a workplace injury occurs in Australia the benefit will be the same;
- b) a consistent risk profile for organisations operating in more than one jurisdiction;
- c) the potential for more meaningful and reliable data collection, analysis and utilisation including national and international benchmarking.

The benefit structure should focus on return to work and not be used as a punitive measure against employers.

Recommendations

CCIWA supports the establishment of a consistent benefit structure across Australia.

Common Law

CCIWA previously agreed with the Industry Commission's view that common law is not a cost-effective means by which workers' compensation claims can be settled. The majority of claims are dealt with under statutory systems, however, common law settlements contribute substantially to claim costs.

Open access to common law has proved to be financially and administratively unsustainable. A system of structured payments with appropriate support mechanisms is preferable to common law. It eliminates the adversarial process, significant costs, time delays and uncertainty of outcome associated with common law whilst providing a fair and equitable outcome for all claimants.

Should common law remain, CCIWA proposes restricted common law access based upon physical impairment combined with an election option between statutory benefits and common law for minor claims.

The proposed process recognises the problematic nature of the dual system arrangement that supports the inherently inequitable concept of multiple remedy. The principle of exclusive remedy or entitlement by one remedy should apply for minor injuries.

Thresholds

Western Australia has a threshold entry system where below a certain disability threshold (16%) claimants are not permitted to pursue common law. Between 16% and 30% claimants must, at six months make an election between common law and statutory benefits with the selection of one automatically precluding the other. The election can be delayed in defined circumstances. In this category the damages are capped.

Above 30% claimants are not required to elect and may pursue common law whilst remaining on statutory benefits.

The election option in conjunction with the threshold limits eliminates small and trivial claims from the courts whilst providing an appropriate avenue for seriously and permanently disabled workers to pursue compensation for non-economic loss.

Frequently, statutory benefits for small claims are greater than the net payment from a court award. Remaining on statutory benefits also enhances the chances of workers with minor injuries returning to pre-injury duties and eliminates the trauma associated with pursuing common law action.

The restriction on damages for disability below 30% brings certainty to the system both for the injured employee in regard to assessing the potential payout against statutory benefits, to their employer in terms of injury management outcomes and to insurers in assessing claims costs and calculating claim reserves and appropriate premiums.

However, the use of a *disability threshold* in WA is subjective and has created a high level of disputation due to significantly different medical determinations. At times the difference has been shown to be in excess of 30%.

CCIWA favours the *impairment threshold* as it is based on the objective and transparent measure. The assessment of impairment being in accordance with the American Medical Association guidelines amended as necessary to suit Australian circumstances.

CCIWA supports a “one gateway” model based upon a minimum twenty five per cent bodily impairment. Time of entry should be subject to defined criteria and once entry has occurred, statutory benefits should cease.

CCIWA does not support an economic impairment threshold. WA introduced such a threshold in 1993 that lead to severe financial pressure on the scheme almost to the point of collapse. CCIWA is not aware of the any scheme that has successfully applied an economic threshold.

Voluntary Risk Assignment

Workers' compensation is unique in that it is a compulsory employment entitlement that is non-negotiable at an individual level. Whilst the principle of compulsory entitlement should remain, the detail of that entitlement could be subject to negotiation between the employer and worker, under certain conditions.

Given that no environment is totally risk free, the potential for workplace accidents will always exist. Workers and employers are the best placed to voluntarily assign and control risk. Such assignment provides for the acceptance of different levels of risk and the value of assuming the risk.

In a model where workers' compensation is not tied to strict external control, employers and employees may have the option to negotiate appropriate benefits in the same way that other workplace entitlements are determined. This model assumes a safety net and appropriate strategies to ensure that neither party suffers undue disadvantage from the initiative.

The model could provide for those who are totally risk adverse remaining in a very safe environment providing defined outcomes. Those accepting a level of risk and generally able to self-control that risk can seek entitlement benefits in other forms.

The concept of workers and employers assigning risk between them provides a number of advantages. It empowers workers to have control of their own entitlements package and a greater interest in their own safety. It has the potential to place greater emphasis on service provision. Those entitled to the benefit will have a greater say in the services provided from those who share the benefit. It can provide an enormous incentive within workplaces for all to focus on prevention.

The voluntary assumption of risk by a worker in respect to workers' compensation does not overcome an employer's legislative obligations.

The voluntary assumption of risk may not be upheld by a Court where the contract results from unjust conduct due to the unequal bargaining position between the employer and employee.

Under this approach, entitlements currently prescribed exclusively by statute would become open for negotiation. In this respect, risk adverse workers may opt for the prescribed entitlements whilst others would build their own package of automatic entitlements.

The negotiated packages can encompass both automatic entitlements and the right to sue at common law or alternately, just one avenue of entitlement. For instance, some workers may opt for better automatic entitlement by contracting out of their right to pursue common law damages, whilst others may choose a common law remedy.

For those workers who choose not to negotiate an entitlement package, a safety net of statutory benefits or common law remedy should apply.

The abolition of statutory benefits has a number of desirable outcomes. It provides a mechanism for workers to control their own benefit structure appropriate to their needs and the level of risk they assume. As well, it provides a tool for workers to negotiate a more attractive employment package. Most importantly for workers, it allows them to manage their injuries in the same way as they do in the private health system.

Workers and their families will be in a position to define and expect real treatment outcomes.

CCIWA believes real reform is about individual choice of flexible entitlement options.

Recommendations

CCIWA recommends that the primary focus of the system be on return to work. Disincentives working against it should be removed.

CCIWA recommends a system of structured payments as an alternative to common law access.

CCIWA recommends that if common law is retained, access be restricted.

CCIWA recommends an impairment threshold entry into common law.

CCIWA recommends an election approach whereby claimants within a specified impairment threshold are required to elect between remaining in the statutory system or pursuing common law damages.

CCIWA recommends consideration of a structure that provides for workplace negotiated workers' compensation packages.

Injury Management

The major orientation of Australian workers' compensation systems is on compensation. Injured workers expect compensation, legal service providers (by their existence) promote it and employers pay for it.

The orientation must be on return to work. The major factors working against return to work are attractive statutory benefits and the ability to pursue substantial common law damages.

A successful system provides a balance between return to work expectations and medical and financial support to achieve the goal. Even the most impaired person may have the potential for productive employment if well managed through all stages of recovery and return to work.

Good injury management is the most effective driver of high workplace morale, cost mitigation, shared responsibility and positive outcomes. Injury management should commence immediately the injury occurs. Jurisdictions and employer management strategies of lost time injuries in particular must not provide the disincentive for the early reporting of claims and immediate injury management by the employer.

The most critical period of any claim is the first 24 to 48 hours. It is during this time that the injured worker requires the most support in a number of areas including personal, moral, medical, financial with a clear understanding of the return to work expectation and assistance. Poor support systems for workplace injury can result in an adversarial relationship developing between the injured worker and the employer and the chances of a successful return to work diminish quickly.

Anecdotal evidence suggests the most successful injury management programs are those implemented and supervised by the employer. The role of case management should always rest with the employer although assistance from the insurer may be required by small to medium employers. External assistance by other service providers should only be sought where specific services are required.

Generally vocational rehabilitation is useful in the treatment of long duration claims to reduce the psycho-social impact of injury and ensure physical capacity for return to work duties. Services are ideally targeted at complex cases with a low probability of a return to work with the original employer.

Vocational rehabilitation may also be appropriate in certain cases requiring specialist services such as occupational therapy, speech therapy, and clinical psychology, counselling, retraining, job search and like services.

However, full management of an injured worker by vocational rehabilitation providers has not been shown to have consistently successful outcomes.

The 1997 review of rehabilitation in WA identified a number of factors inhibiting effective rehabilitation. These included the lack of a decision making process and formal chain of responsibility in the management of injured workers, inadequate and inappropriate data on rehabilitation outcomes and a very young, inexperienced industry with a lack of formal training and education programs.

The notable observations of the review were the low case closure and return to work rates. Combined with the long average duration of service provision the real role of vocational rehabilitation may be one of support services.

The more recent approach in WA has been the adoption of the broader injury management approach. It places greater emphasis on employer involvement and management. It recognises the employer and injured worker as the primary players in claims management with responsibility for initiating service provision.

Following adoption of the injury management approach, vocational rehabilitation costs in WA have fallen by around 27% in the period from 1997/1998 to 2001/2002 and now represent 3.9% of the total system costs. Return to work outcomes have not deteriorated.

Employer initiated injury management is not a concept that lends itself easily to legislative requirement. Externally imposed requirements for an injury management co-ordinator or vocational rehabilitation programs have not proven to be successful in jurisdictions where these requirements exist.

Injury management is a concept that requires greater promotion and education by jurisdictional authorities particularly in assisting employers understand firstly the benefits and secondly the skills necessary to integrate the concept into the existing human resource management functions within the workplace.

A major factor in injury management is the involvement of the medical profession. Philosophically, medical practitioners should be aware of the benefits of early return to work, encourage and support the worker in return to pre-injury or alternate duties and consult with the employer to achieve the best outcome.

The rhetoric does not always translate to reality. Where treating medical practitioners understand injury management principles and support the effort of employers to return injured employees to work, the outcomes are generally very positive. However, where the support of the medical practitioner is missing, the potential for a positive outcome is limited at best.

Medical practitioners are generally not accountable to the workers' compensation systems. Beside the worker and employer, the medical practitioner is the third major player in the system. Whilst it is understandable that the major interest of medical practitioners is the physical treatment of the patient, return to work is an important element of physical recovery.

Allied health providers provide further injury treatment and support. These providers respond to the request of the medical practitioner. Lack of a common goal between providers and the employer and employee is not uncommon and the services can have a limited return to work outcome. Some jurisdictions have recognised the high cost of allied services and the need to closely monitor the services to ensure the most appropriate treatment is provided and where that treatment is not effective it is discontinued.

All medical and allied providers choosing to work within the workers' compensation systems must have a direct responsibility to it in terms of service provision and achieving agreed outcomes. The role of providers to the system should be clearly defined and articulated to the providers. Consideration should be given to a licensing arrangement and compulsory education programs.

Direct monitoring against the performance outcomes should occur and providers not responding to the system requirements should be given the opportunity to opt out of providing services to injured workers.

Recommendations

CCIWA recommends that the primary focus of a workers' compensation be on injury management with appropriate financial support.

CCIWA recommends an injury management approach with emphasis on direct employer management.

CCIWA recommends that all medical and allied service providers be made directly accountable to the system through performance outcomes.

CCIWA recommends that the role of medical practitioners and other allied service providers be clearly defined.

CCIWA recommends consideration be given to a licensing arrangement and compulsory education programs for medical and allied service providers.

CCIWA does not support compulsory vocational rehabilitation intervention.

Dispute Management

Complex systems, an adversarial approach to workers' compensation, inappropriate third party management and/or intervention and lack of appropriate employer and employee information frequently lead to unnecessary disputes within workers' compensation systems.

Workers' compensation should be managed in a consultative and supportive manner. A dispute, however minor, commences the breakdown in the consultative approach and a shift towards adversarial management. If the dispute is not addressed quickly, the adversarial nature of the relationship will grow and reconciliation will become extremely difficult, if indeed it is possible.

The first opportunity for dispute is on claim determination. Currently, most systems lack transparent and well defined claim determination processes.

Both employers and workers can feel aggrieved by the lack of a clear and equitable process. In particular, where workers' compensation claim determination is not evidence based, it is viewed by both parties as subjective, open to fraud and difficult to fairly dispute. CCIWA firmly advocates evidence-based claim determination.

The gatekeeper role for claim determination is critical to achieving satisfactory outcomes and reducing the number and intensity of disputation. There is a case for the medical practitioner to be the gatekeeper on work relatedness of an injury where the presenting injury is very clearly work related. Where there is any doubt the medical practitioner should be given the option to investigate sufficiently to provide an objective view, or alternately leave the determination to a default process.

Medical practitioners choosing to determine the work relatedness of an injury should be responsible to the system for their determination. Penalties in the form of investigation costs should apply where the practitioner can be shown to be negligent in a statutory duty to provide evidenced based claim determination.

The default process for claim determination should be clearly evidence based and subject to determination protocols and procedures. Both injured workers and employers must be involved in all stages of the determination process.

The more transparent and objective claim determination process will reduce the potential for disputes. Other dispute prevention strategies should include encouraging employers to establish workplace dispute resolution processes as part of their injury management programs. Statutorily imposed dispute resolution procedures on employers at the workplace are unlikely to have a major effect.

Insurers can also reduce disputes through good claims management including internal dispute management procedures and processes. Ideally it should form part of their licensing requirements.

Independent mediation can be an effective and economical tool particularly in minor disputes where expedient resolution is possible and highly desirable. It should be an option available to employers and workers through their insurers prior to referral to the more formal dispute resolution process.

Formal dispute resolution is an expensive and resource intensive process. In jurisdictions where restrictions do not apply on submission of evidence, a proliferation of medical and associated reports may result. Generally medico-legal reports cost between 1000 per cent and 2000 per cent more than a regular treatment cost. 'Doctor shopping' under all circumstances results in a significant cost on the system and should be restricted.

Dispute resolution must be expedient, transparent and subject to practice rules. It should provide the opportunity for an informal process of conciliation and, where appropriate mediation before proceeding to a more formal environment subject to strict legal rigour. Legal representation should only be permitted in the formal process.

This submission does not seek to address procedural matters associated with the dispute resolution process.

Recommendations

CCIWA recommends the establishment of clear and transparent guidelines for evidence based claim determination.

CCIWA recommends that medical practitioners can exercise an option on determination of work related injury.

CCIWA recommends that statutory penalties apply where claim determination by a medical practitioner is not evidence based.

CCIWA recommends that employers be encouraged to and supported in establishing workplace dispute resolution procedures.

CCIWA recommends that insurers establish dispute resolution procedures that may include the services of an independent mediator.

CCIWA recommends that a two-tier level of formal dispute resolution be available with a focus on expedient dispute resolution.

CCIWA recommends that dispute resolution be subject to strict practice rules.

CCIWA recommends strict control on the submission of medical and associated evidence.

CCIWA recommends that legal representation be restricted to the second tier hearings.

Premium Setting

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

Governments should require compulsory workers' compensation insurance. However governments should not treat workers' compensation insurance differently from other forms of insurance and in particular liability insurance.

Intervention in the premium setting process is both restrictive and uncondusive to competition. Whilst risk rating can and does occur for some employers, it is unlikely that small employers will receive rates substantially different from the recommended rate.

Incentive schemes are frequently proposed and are available in some jurisdictions. Structured incentives are underpinned by procedural requirements on participating employers that frequently cost as much and in some cases more than the premium reduction or return. In such cases, employers are often reluctant to make or continue the investment.

The only measure required for either a discount or rebate should be good performance in both claims reduction and injury management. The performance outcome should be measured against annual claims costs.

How an employer achieves the performance should be the prerogative of the employer and not externally imposed through structured requirements. Every workplace is different and good management strategies will vary, if not in principle, in implementation. Employer established programs will have greater workplace ownership and are more likely to be embraced at the coalface.

The values of the premiums set and the procedures by which premiums are set and administered are crucial to the efficiency of the workers' compensation system and the maintenance of an adequate premium pool.

Two factors lead to a rate of growth of premiums that is higher than it would have been if premiums had been correctly set for each year. As mentioned previously, these are the ability to anticipate the full cost of claims and establishing the appropriate level of IBNR claims.

In one sense the basic idea behind workers' compensation insurance rate setting is quite simple. Premiums have to be in excess of the sum of pay-outs plus the costs of running the insurance business. When setting rates, the rate for the next period should, as far as possible, reflect all information about current and future claims available in this period as well as information about the costs and expected costs of running the insurance business.

The total premium income at the recommended rate is not paid out in claims costs in the year that the premium is supposed to have been paid. The premium income must cover claims carried forward, claims that are incurred but not reported (IBNR) and expenses of the insurance companies for the duration of a claim.

The premium setting process is based on the estimated premium pool for the following year and the performance of the individual rating sectors. It does not take into account nor can it, individual performance. The rate for individual sectors is subject to volatility particularly where the sector is small and a large claim is experienced. Accordingly, the premium rating process should take into account appropriate and adequate adjustments to spread the risk in exceptional circumstances.

The manner in which premiums are struck and applied does not encourage employers to make an investment in programs that would reduce the overall cost of workers' compensation. For large employers, unless they are self insurers, often their safety performance has little to do with their premium and much to do with the size of the premium and the cash flow implications for the insurer.

In WA insurers are able to load premiums by 100 per cent of the recommended premium rate before reporting their action to WorkCover. Discounting also occurs. While the level of discounting will depend on the overall state of the marketplace, discounting could achieve a number of objectives including:

- maintain or extend market share
- maximise cash flow for investments
- maximise profits

A market share objective may eventually prove unprofitable if based upon unsound rates. Naturally insurers respond by substantially increasing rates or restricting cover to good risk clients to rebuild profitability.

If the premium rating process is to remain, it should be independent of the workers' compensation authority; it should have access to accurate and timely data and establish a credible and transparent actuarial rating process.

Recommendations

CCIWA recommends that workers' compensation insurance should be de-regulated.

CCIWA recommends that if premium setting continues it should be independent of the regulatory authority.

CCIWA recommends the premium rating processes be transparent and actuarially sound.

National Self Insurance Arrangements

The lack of a competitive workers' compensation insurance market has encouraged employers to consider self insurance as a viable option to the traditional insured arrangement.

The major long-term benefit of self insurance is a significant saving in workers' compensation costs. Expected outcomes include more efficient management of injury and claims administration.

Self insurance internalises responsibilities particularly in critical areas such as:

Claims monitoring and progress
Injury management/return to work
Claim settlements

Other influencing factors include:

Minimising validity of costs through exposure to insurance market.

Costs directly related to experience.

Control and decision making resides with the employer.

The objective for self insurance is a balance between establishing the most efficient and effective nationally consistent self insurance requirements and localisation of claims and injury management, compliance and performance outcomes monitoring.

The major issues making the operation and management of self insurance across Australia most difficult are nationally inconsistent prudential requirements, benefit structures, data reporting and monitoring. Other inconsistencies such as bond and reinsurance requirements should be addressed.

Comments in support of a nationally consistent benefit structure were made previously. National prudential requirements for self insurers under the control of the Australian Prudential Regulation Authority (APRA) are essential.

Data reporting in accordance with the National Data Set is achievable in the medium term with more reliable analysis if benefit structures are made nationally consistent. Whilst nationally consistent reporting requirements are essential, existing data collection systems used by self insurers are limited, complex and generally require considerable lead time to accommodate major changes.

A national self insurance scheme is likely to provide some economies of scale for national organisations in centralised system control and claims management. However, the ability to establish and manage workers' compensation from a national base may have a detrimental effect on claims outcomes where decision making is national or alternately injury management is managed separately from claims management.

Successful workers' compensation and injury management performance is based on internalisation of responsibility, good management strategies and flexible and immediate decision making particularly at the coalface.

Good injury management outcomes are achieved where the programs are established quickly, closely monitored by the employer, adapted quickly where workplace or injured worker needs require it and kept consistent with and supportive of other claim management strategies.

If claims management becomes detached from proactive injury management then ideal outcomes from both are rarely achieved. Both claims and injury management should be delivered at a local level and be cognisant of workplace involvement in achieving the best return to work outcome.

Self insurers contribute to the administration of the local scheme. The contribution should be consistent with the contribution of the insured employers. A consideration of the Productivity Commission Review should be the impact of removing the contribution from local premium pools. As well, the growing number of self insurers is likely to have an adverse impact on the viability of the workers' compensation premium pools, particularly in smaller jurisdictions.

A further consideration under a national scheme is the provision of local support services including dispute resolution.

Self insurance provides an opportunity to opt out of the premium regulated market that discriminates against small to medium employers. Consideration has been given to mutual arrangements for medium and small employers in Western Australia. Given both the historical performance and recent national experience regarding broader mutual insurance arrangements, CCIWA does not favour the establishment of mutuals without intense investigation of viability and effectiveness.

CCIWA supports nationally consistent arrangements for self insurers in preference to a national self insurance scheme. Any proposal for a national scheme would need to be supported by clear evidence that the scheme would provide greater benefits to all parties than can be achieved through a more consistent workers' compensation and self insurance framework managed at a local level.

Recommendations

CCIWA recommends the adoption of nationally consistent prudential, data reporting and monitoring requirements for self insurers.

CCIWA recommends the development of consistent claims management and claims administration procedures for self insured organisations.

CCIWA recommends that claims and injury management for self insured organisations be delivered locally.

Licensed Insurers

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 CCIWA's view difficult to justify. Governments should not treat the insurance of workers' compensation liability differently from other forms of insurance, apart from requiring it to be compulsory.

CCIWA 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.

The ability to insure across jurisdictional borders should be permitted and encouraged.

Where insurers operate in more than one jurisdiction, claims management should be provided at a local level with insurers required to involve employers in claims management. Insurers should be responsible to the local jurisdiction in regard to administrative and reporting arrangements and financial support.

APRA should be responsible for establishing and maintaining prudential requirements for workers' compensation insurers.

Based on the West Australian experience, the involvement of licensed insurers in the workers' compensation system is supported. Western Australia has a successful privately underwritten system. The state imposes no limits other than prudential, administrative and performance requirements on the writers of workers' compensation insurance business.

The number of approved insurers in the state and premium rating data indicates that there is the prospect of profit in the area. In the privately underwritten market, competition between insurers appears to be dependent upon the stability of the environment and the predictability of claim outcomes. In the eighteen months prior to October 1999, the WA system became increasingly unstable and competition between insurers severely diminished. Following legislative change in late 1999, the system has stabilised and workers' compensation insurance appears to be competitive for good performers.

However, the other side of competition is the prospect of insolvency. Since the late 1970's, Western Australia has experienced the liquidation of four companies (Palmdale/AGCI Insurance Company, Bishopsgate Insurance Company, and National Employers Mutual Insurance Company) and more recently HIH. The Western Australian Supplementation Fund has underwritten the cost of claims associated with the failed insurers.

The number of insurers operating in the workers' compensation has reduced due to company takeovers, terrorism activities and new federal prudential requirements.

Despite the adverse activity, the privately underwritten market operates well for other forms of insurance where it is not overly controlled and should do so for workers' compensation if subject to limited conditions.

Recommendations

CCIWA recommends that workers' compensation insurance be deregulated, with this type of insurance being treated no differently from other categories of insurance.

CCIWA recommends that workers' compensation insurance be privately underwritten.

CCIWA recommends that insurers offering workers' compensation cover be subject to national prudential requirements.

CCIWA recommends that the insurers be subject to nationally consistent administrative and performance requirements.

Interrelationship between Workers' Compensation and OHS Legislative Frameworks

Prevention and compensation should be considered separately when assessing the issue of work related injury or illness. A number of reasons justify this approach.

- Prevention requires a proactive approach whilst workers' compensation by its very nature requires a reactive approach
- The cost of compensation and injury management are more easily measured in dollar terms than the benefits of prevention (often invisible). Thus prevention may lose some priority to the more tangible issue of compensation if they were to be combined in one system
- The environment in which workers' compensation operates is often adversarial due to disputes and significant financial implications for both employers and workers. Prevention is most successful in an environment characterised by high levels of trust, openness, consultation and participation.

CCIWA made the following comments in its response to the Industry Commission report 1994:

Surely the most important aspect of any workers' compensation system is that of compensation itself. We should not mould the nature and level of compensation benefits in order to achieve outcomes in another area, such as prevention. The aim should be the provision of a compensatory environment that makes fair restitution for injury and suffering caused, while at the same time creating an incentive to rehabilitate.

CCIWA does not accept the proposition that workers' compensation is the most appropriate avenue by which to encourage prevention. Workers' compensation is a reactive concept, while prevention should be proactive. Indeed, compensation should focus on the needs of the injured party above all else. It is too late, once an injury has occurred, to prevent it. At best, a similar accident in the future may be prevented. Additionally, compensation forms the most tangible aspect of the workers' compensation system, while the benefits of prevention, although they are just as significant as the costs of compensation are not as obvious. Thus by combining these two distinct functions under the one regulatory umbrella, both prevention and compensation lose their focus.

It is clear in CCIWA view, that the realm of workers' compensation does not provide an environment that is conducive to an adequate consideration of the issue of prevention. Unfortunately, due to the tangible, monetary aspects of any compensatory system, the field of workers' compensation can often become adversarial. Employers, employees and insurers attempt concurrently to mitigate their losses, which, in a zero game, can only occur at the expense of the other parties. While this is undesirable it is an inevitable product of both the system itself, and of human nature. Prevention, on the other hand, is best dealt with in an open, consultative, and participative environment, where the parties work together in an atmosphere of trust to develop practices and policies that attempt to reduce work related injury. Plainly, these two environments are incongruous, and attempting to force the issue of prevention, as the area of focus onto the workers' compensation system, is analogous to trying to fit a square peg into a round hole.

The responsibility for the prevention of industrial accidents and illnesses should therefore continue to lie with the relevant OHS jurisdiction. We know that OHS regulations enhances prevention and it would seem that the mere presence of a structured system of workers' compensation (in place of market-determined risk remuneration) actually increases the rate of work related injury.

Occupational Health and Safety Framework

The diversity of jurisdictional law in OHS has created difficulties for industry. Understanding the various requirements and establishing workplace systems to meet the differing legal frameworks is challenging for employers operating in more than one jurisdiction.

Effective OHS management in every workplace is essential. The principles of good management are well documented and able to be applied in all workplaces.

However, many commercial and externally imposed OHS systems have become extremely resource intensive to establish and maintain with limited OHS specific data to show successful outcomes. Frequently the programs are aimed more at legal compliance than accident prevention.

To comply with a legislative or regulatory requirement does not necessarily mean prevention of a workplace accident. Specific and detailed regulations still exist and lack the flexibility necessary to implement in all workplaces. As well, smaller employers are not resourced to understand and implement changes quickly and easily.

Additionally, the current move by some jurisdictions towards high penalties including imprisonment has the potential to encourage employers to give consideration to the protection of their interests resulting in a reduced emphasis on prevention. Punitive down-stream measures will not necessarily prevent accidents. Rather they may have a negative impact on workplace morale and costs the jobs of workers.

OHS is about balance. A balance between essential workplace regulation, accident prevention, mutual responsibility of parties to the workplace and cost of compliance. Workplace regulation must be simple, presented in a practicable form, supported by sufficient information and advice with enforcement strategies that identify unsafe workplaces and practices before the accidents occur.

The establishment of the National Occupational Health and Safety Commission has provided a forum for employers, worker representatives and the jurisdictions to work together to develop, implement, maintain and monitor simple, consistent and practicable workplace health and safety initiatives.

More recently, the diverse groups have shared the vision for occupational health and safety articulated within the National OHS Strategy. The strategy is a major achievement for the Commission and demonstrates the maturing environment in which OHS matters are addressed.

All parties to the Commission are showing a far greater willingness to co-operate, consult and work towards the goal of providing outcomes that can be consistently implemented across the country.

CCIWA supports the ongoing role of NOHSC. It must seek to provide simple solutions to complex problems in a form that can be easily understood by small and medium businesses and practical to implement and maintain. Cost benefit must always be a major consideration in OHS reform.

At a workplace level, a number of factors influence safety performance. These include the size and nature of the business, the severity of risks associated with the work, the ability of employers to practically manage the risks, and in the case of injury, the capacity to manage injured workers back into the work environment.

Other factors may include labour market arrangements including the impact of industrial relations, guidance and other resources available on industry specific risk management and local enforcement activity.

The Royal 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 construction 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 (i.e. mining) and particular groups have significantly improved performance by making prevention the major priority for the group. However, one 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 also the way in which that performance is measured. The CPM project has and continues to struggle with the measurement of consistent performance across all jurisdictions due to the operation of different recording systems.

The depth of the problem is demonstrated in the inability to accurately measure workplace fatalities in Australia. NOHSC has recently implemented a fatality advice service to Commission members that is breaking down some of the barriers to early reporting. It also identifies the limitations of using workers' compensation data to drive a safety message.

Workers' Compensation Framework

A number of matters have already been addressed in regard to the workers' compensation framework. The following are also important considerations in maintaining adequate systems.

The changing nature of the labour market raises the issue as to how workers' compensation systems should respond to working relationships outside of the employer-provided workplace. It raises questions as to whether contractors should carry their own insurance and whether that insurance should be required to be workers' compensation or other liability and income protection that can be gained in a more competitive market.

Employees working from home raise a different set of considerations. Occupational health and safety legislation is not clear on the degree of mutual responsibility between employer and home workers. If employees are to work from home there is certainly an argument to say that workers' compensation cover can only be provided for injury occurring from hazards over which the employer may have an appropriate level of control. The solution to this issue must take into account some transfer of risk to the worker for the home workplace and the role of appropriate private insurance.

The whole issue of private insurance is an interesting one particularly where private insurance (i.e. mortgage support) combined with statutory benefits can provide a disincentive for early return to work. More information is required on the role and utilisation of private insurance to determine its impact on workers' compensation outcomes.

Consistent data collection and analysis remains a major issue for NOHSC and the jurisdictions. The data is used to drive prevention strategies and the framework for workers' compensation. However the data is limited for both purposes.

It is not always recognised 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 and the employee's willingness to return to work, particularly where a benefit structure discourages early return. The influence of external parties including service providers is also a consideration.

The establishment of NOHSC has provided a forum for the consideration of relevant OHS issues and the resource to establish appropriate strategies to address relevant issues. Whilst NOHSC has a difficult task in reaching agreed positions, the outcomes from agreements has been positive. Workers' compensation lacks a similar forum and process.

The Heads of Workers' Compensation Authorities has provided opportunities for jurisdictions to consider matters of mutual interest. Outcomes from the arrangement appear to be extremely limited and not generally transparent. The forum lacks employer engagement and the broader ownership of and commitment to outcomes.

Establishing consistent arrangement in workers' compensation will require a national forum including employers, to provide for adequate and appropriate debate, consultation and committed decision making.

Consideration should be given to an independent workers' compensation forum structured to facilitate genuine outcomes. It may be administered by NOHSC, but workers' compensation should not be part of the functions of NOHSC.

Recommendations

CCIWA recommends the continued separation of the preventative and compensatory aspects of the workers' compensation equation;

CCIWA recommends the establishment of a national workers' compensation forum to facilitate the development of appropriate nationally consistent workers' compensation arrangements.

Workers' Compensation Coverage and Cost Sharing

The issue of cost sharing is a difficult and complex one. The responsibility of injured workers cannot be view as belonging totally to the employer.

The likelihood of a compensable injury or illness occurring is affected by a plethora of factors, including:

- education;
- transport and road systems;
- statutory requirements faced by industry;
- climate;
- economic and population growth rates;
- industry expectations; and
- social influences and expectations.

Therefore injury at work is a community cost. The consideration for this review is how to appropriately apportion costs.

Under workers' compensation, cost shifting is likely to be dual in context. A workers' compensation claimant may receive benefits and damages and eventually social security payments. On the other hand, workers injured outside of the workplace may not receive workers' compensation. It is frequently difficult to differentiate between work and other causation for some physical and health conditions. As well, work may simply aggravate an existing condition but workers' compensation insurance provides for ongoing treatment of the condition.

The ageing population will present a unique set of considerations for workers' compensation systems. Workers injured at work should have access to statutory benefits. The degenerative changes associated with physical ageing will impact upon the physical strength and capability of workers and potentially make them more prone to serious injury. Strict evidence based claim determination will assist with differentiating between physical degeneration and work caused injury, however the matter does raise serious consideration regarding access to common law, particularly for minor impairment.

The extent to which cost sharing occurs by both the community, the worker and the workers' compensation system and the impact of cost sharing should be fully investigated to ensure any proposed changes are fair and equitable.

Recommendations

CCIWA recommends that the extent and impact of cost sharing by the community, worker and the workers' compensation system be fully investigated.

CCIWA recommends consideration be given to the impact of the ageing workforce on workers' compensation statutory benefits and common law access.

Conclusions

The two areas of occupational health and safety and workers' compensation are interrelated but should not be interdependent. Retention of the two separate systems is essential.

CCIWA does not support a national workers' compensation system, however it does support greater consistency in critical areas such as benefits, premium determination methodology, self insurance requirements and data reporting.

The role and retention of the National Occupational Health and Safety Commission is supported. However OHS outputs need to be simply communicated and practically orientated to be effectively embraced by employers.

Workers' compensation will benefit from a national forum structured to facilitate genuine outcomes on matters of national consistency. Employers must be directly involved in the determination of nationally consistent workers' compensation matters.

The most important goal of both systems into the future is greater consistency across the country. Guiding principles for both areas can be determined nationally, however implementation and monitoring should occur at a local level.

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