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Command and Control – Is Regulation Good for Injury Management?

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Presented by Karl Luke, Partner

What is Injury Management?

- The co-ordination / management of the rehabilitation and return to work process
- Managing the injury (section 26)
- Identifying “suitable employment” in order to assist a worker to return to work (section 28A)

Why is Injury Management Important?

- Fundamental to scheme return to work goals

“A key objective of workers compensation schemes is to achieve fast and durable return to work outcomes for injured workers. This provides both the optimal outcome for the injured worker and is the single most effective way to contain scheme costs”¹.

¹ page 61 Review of the South Australian Workers' Compensation System Report

Before the New Scheme

- All the necessary machinery to achieve good return to work outcomes already set out in the Act
- Successful rehabilitation and return to work is contingent upon a range of factors including knowledge of the workplace, good workplace culture, motivation of the worker, the nature and extent of the worker's disability. (i.e: good injury management = good outcomes)

Machinery Provisions - Administrative Discretion

- Section 26 provides that the Compensating Authority establish programmes with the object of ensuring that workers:-
 - Achieve best practicable levels of physical and mental recovery
 - Where possible, restored to the community

Machinery Provisions, but no Command / Control

- Successful rehabilitation is not necessarily about “return to work”

Rehabilitation and Return to Work Plans (RRTWPs)

- Section 28A provides the Compensating Authority with a discretion to establish a RRTWP
 - CA required to consult with worker and employer during the preparation phase of the RRTWP.
 - CA required to review medical information and consult with treating medical experts
 - CA can impose obligations on worker and/or employer
 - RRTWP is binding on worker and employer
 - There are various sanctions that can be imposed on workers and employers who fail to comply with their obligations

Regulation of “Programmes” and “Plans”

- All form and no substance
- Content – discretionary
- Capacity to innovate in injury management is not restricted by the legislation

RRTW - Regulations

- RRTWP - it must have as its objectives—

“the return of the worker at the earliest practicable time to suitable employment at a level of remuneration which, as near as practicable, is not less than the worker's pre-injury remuneration;”

RRTW – Regulations (cont.)

- RRTWP must have one of the following objectives:-
 - (A) *the worker's return to the pre-injury employment with the pre-injury employer;*
 - (B) *the worker's return to different employment by the pre-injury employer;*
 - (C) *the worker's return to the pre-injury employment but with a different employer;*
 - (D) *the worker's return to different employment with a different employer;*
- (A) and (B) involve compliance with section 58B

Regulations - RRTWPs

- Can have more than one return to work goal (unrestricted)
- Other regulations deal with what needs to be included in a RRTWP, such as details of work to be offered; start and finish dates of RRTWPs; methods by which reviews will take place etc. (Again, all form and not restricting the content/ substance).

Good Injury Management

- Successful outcomes (return to work) dependent upon good injury management
- Capacity to innovate to achieve successful outcomes not fettered by the legislation or the regulations.

Poor Injury Management

- Failure to identify “suitable employment”
- Failure to choose the appropriate return to work objective/ goal
- Ambiguity / poorly drafted plan
- Unrealistic goals and/or objectives
- Employer unable and/or not willing to provide suitable duties (section 58B issues)
- Worker not motivated to return to work
- Sustainable return to work unlikely?

Cause of Poor Scheme Performance?

- Benefits too generous creating a disincentive to return to work
- Claims management unable to reverse the spiraling upwards of claims costs through effective injury management and claims management²

² page 78 Review of the South Australian Workers' Compensation System Report

Solution to the Problem?

- Based on the Victorian experience –

“Outcomes that accord with scheme return to work goals are best achieved through a sound legislative framework accompanied by strong and informed managerial action”. (p83, and see also p 158)

- Solution:- Amend the legislation to facilitate return to work and strive to achieve excellence in injury management

³ page 83 - Review of the South Australian Workers' Compensation System Report

⁴ see also page 158 - Review of the South Australian Workers' Compensation System Report

“Building blocks for a new scheme”

- The *“fulcrum”* to effective return to work is a *“highly dedicated commitment to quality injury management and return to work practice across the scheme involving all scheme actors”*⁵

⁵ Review of the South Australian Workers' Compensation System Report

New Legislative Scheme – a Multi-Level Approach

- New amendments intended to facilitate/ assist injury management to focus on return to work
- Encourage early intervention (provisional liability/ rebating employer excess)
- Use of quality approaches at a workplace-based level (return to work coordinators)
- Removing anti-rehabilitative effects (redemptions)

New Legislative Framework

- Designed to enhance return to work (but will it assist injury management?)
- New scheme may have the effect of ‘forcing’ workers and pre-injury employers together
- Will this lead to sustainable return to work outcomes?
- Will the new scheme act as a disincentive to innovate?

New Legislative Framework (cont'd)

1. Injury management a central focus – “objects of the Act”
2. Introduction of “return to work incentives”
3. Introduction of “provisional liability” (to assist early return to work)
4. Introduction of rehabilitation and return to work coordinators (RRTWCs)
5. Incentives for early reporting of disabilities
6. Removal / reduction of redemptions

Objects of the New Scheme

- Section 2 – Objects of Act provides:-

“The Corporation, and the employer...must seek to achieve a disabled worker’s return to work (taking into account the objects and requirements of the Act)”. (section 2(3)) ;

New emphasis on the role of the pre-injury employer in return to work

Primacy of Return to Work

- The amendment to the “Objects of Act” highlights the importance of return to work to the scheme
- What is the new legislative and regulatory machinery that sits behind this new objective?

Reduction in Benefits – Return to Work Incentives

- Changes to benefit structure
- Step-downs (based on length of time in receipt of weekly payments) (90% after 13 weeks, 80% after 26 weeks)
- Lower weekly payments to act as an incentive to return to work
- 130 week benefit “cut off” based on “work capacity assessment” (if no current work capacity, continue to receive payments...)

Current Work Capacity

Definition of “*current work capacity*”

- *Current work capacity; in relation to a worker, means a present inability arising from a compensable disability such that the worker is not able to return to his or her employment at the time of the occurrence of the disability but is able to return to work in suitable employment*

Work Capacity Assessment (cont'd)

- The determination of “Current work capacity” involves an assessment of a worker’s capacity to undertake “suitable employment” (especially at 130 weeks)
- Effective injury management still involves the identification of “suitable employment” as part of the return to work process

Identifying “Suitable Employment”

- New scheme requires management to focus on identifying “suitable employment” for the purpose of :-
 - Determining the worker’s entitlement to weekly payments (particularly at 130 weeks)
 - Ensure the employer complies with its obligation to provide suitable employment (section 58B)
 - Determine whether rehabilitation goal should be a return to pre-injury employment or different employment (and/or different employer)
 - Section 58B issues may arise post work capacity assessment

New Definition of “Suitable Employment”

“in relation to a worker , means employment in work for which the worker is currently suited, whether or not the work is available, having regard to the following;

- The nature of the worker’s incapacity and previous employment;*
- The worker’s age, education, skills and work experience;*
- The worker’s place of residence;*
- Medical information relating to the worker that is reasonable available, including in any medical certificate or report;*
- If any rehabilitation programs are being provided to or for the worker;*
- The worker’s rehabilitation and return to work plan, if any”*

Suitable Employment

- New definition of “suitable employment” likely to influence injury management (information needed for work capacity assessments)
- Compensating authority will be seeking to prove that a worker has a “current work capacity at 130 weeks”

Supportive Workplace Culture

- Research from North America indicates that the strongest and most consistent correlate to effective and durable return to work is a strong and supportive workplace culture
- Barriers to return to work arise when there are departures from or breakdowns of a supportive work environment (for a variety of reasons)⁵

⁵ Alan Clayton Review into Rehabilitation 2005 at pages 35-36

Introduction of Rehabilitation and Return to Work Coordinators

- Mandatory for an employer to appoint a rehabilitation and return to work coordinator (RRTWC). (Section 28D(1))
- RRTWCs to assist in developing a “supportive” return to work environment
- To ensure that the employer takes an active interest in injury management
- However requirement only applies to employers with 30 or more employees
- Query whether employers with less than 30 employees are the very group that need to take a greater interest (and assistance) in injury management?

RRTWCs - Functions

- *“...to assist workers suffering from compensable disabilities, where prudent and practicable, to remain at or return to work as soon as possible after the occurrence of the disability...”*

RRTWCs – Functions (cont'd)

- *“...to assist with liaising with the Corporation in the preparation and implementation of a rehabilitation and return to work plan for a disabled worker...”*

RRTWCs – Functions (cont'd)

- *“...to liaise with any persons involved in the rehabilitation of, or the provision of medical services to, workers...”*
- *“...to monitor the progress of a disabled worker's capacity to return to work...”*
- *“...to take steps to, as far as practicable, prevent the occurrence of a secondary disability when a worker returns to work...”*
- *“to perform other functions prescribed by the regulations”.*

RRTWCs – Facilities and Assistance

Employer must

- provide facilities and assistance to a RRTWC as necessary to enable the RRTWC to perform his or her functions. (Section 28D(5))
- comply with any training or operational guidelines published by the Corporation from time to time

RRTWCs – Comments (cont'd)

- Section 28D creates a potential for the Corporation to control the employer with respect to a worker's rehabilitation and return to work.
- However it is usually smaller employers (below 30 employees) that struggle to provide suitable employment and who require greater assistance than employers with 30 or more employees.

Provisional Liability

- Scheme Review:- Injury management must focus on “early return to work”
- Introduction of “provisional liability” designed to remove adversarial barriers to early return to work
- Compensating authority must make weekly payments in the absence of a “reasonable excuse” (command / no discretion) with no requirement to re-pay weekly payments in the event that the claim is rejected (unless can prove dishonesty)

Provisional Liability (cont'd)

- Compels employers (and injury management) to focus on rehabilitation and return to work regardless of liability issues

No Redemptions

- Limitation on redemptions
- Redemptions seen as a disincentive to return to work
- Amendments to disallow redemptions save and except in certain limited circumstances
- Restriction on redemption to eliminate the “lump sum” culture and enhance return to work

Injury Management Still Reliant Upon Management Discretion

- Will the new scheme enhance the return to work process?
- Ultimately successful return to work is about good injury management, ie, good evidence based decision making
- Well trained/ experienced management the ultimate driver of scheme success
- Not clear whether the new scheme will lead to successful return to work outcomes

New Benefit Structure

- Will likely change worker behaviour?
- Provision of suitable employment of paramount importance to injured worker (especially at 130 week cut off)
- Medical panel (wild card)
- Medical panel will determine what is suitable employment
- Worker behaviour post “work capacity assessment”

Behavioural Change ?

- Behavioural change necessary for scheme viability? (or are changes in benefit structure enough?)
- Will injury management change?

Potential Problems?

- New scheme places a significant onus on pre-injury employers to provide duties (see section 58B(3))
- Does the scheme place too much of an onus on return to work with the pre-injury employer?
- Will the new scheme change behaviours that have led to the current blow out in scheme liability?

Where To Get More Information

- For further information on training, workshops or briefing papers go to www.donaldsonwalsh.com.au
- If you have any questions or need advice in relation to the new WorkCover Legislation, please contact Karl Luke, Partner