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WorkCover IN Victoria

The Victorian government has now moved to amend the WorkCover scheme. After surprisingly being elected to office in late 1999 the government established a Working Party to report on and make recommendations concerning the restoration of common law rights and statutory changes to the WorkCover system, necessary to provide 'fair and equitable benefit levels'.

The State opposition decided not to oppose the 'Accident Compensation (Common Law and Benefits)' Bill introduced into the Parliament by the government which is now expected, with minor amendment, to receive royal assent in June.

Working Party

The Working Party consisted of trade union, employer, and legal representatives and commenced meeting in November 1999 with a final report being provided to the Minister for WorkCover, Mr Bob Cameron, on 29 February. The terms of reference for the Working Party included ALP WorkCover election commitments which were:

- The restoration of common law rights for seriously injured workers
- Fair and just benefits
- Premium levels that are competitive with other States and which do not unfairly burden small business
- Appropriate encouragement for resumption of work, including access to proper rehabilitation programs
- Proper recognition of the extent of the injury; and
- Access to fair and equitable dispute resolution

Of these it was the restoration of common law rights, and that of premium levels, which were the most contentious. From the outset employer representatives opposed the restoration of common law rights and any increase to current premiums. For their part trade union representatives, supported by plaintiff lawyers, were critical of the government parameter of a premium rate no higher than 2.14%. While an increase on the current artificially low premium rate of around 1.9%, it would still be one of the lowest premium rates in Australia, and well below that of New South Wales' of 2.96% . As for common law, plaintiff lawyers and the trade union movement sought restoration of rights retrospectively to 12 November 1997.

Throughout the process APLA members played a crucial role in providing Working Party representatives with information and views about these issues.

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Changes

The essential features of the changes proposed in the Bill and the Second Reading Speech are:

- Restoration of common law rights effective from 20 October 1999
- Changes to the 'serious injury' narrative test including a 40 per cent threshold of loss of earning capacity for damages claims for economic loss
- Establishment of an 'Intensive Case Review Program' for those workers seriously injured between 12 November 1997 and 20 October 1999 who continue to have no common law entitlements
- Improved benefits between the 10% to 30% impairment assessment levels for statutory non-economic loss for permanent impairment
- Review of the operation of the AMA Guides 4th edition in impairment assessment
- The inclusion of regular overtime and shift allowances for the first 26 weeks of weekly payments
- Average premium rate for employer contributions to be increased to 2.18% per cent of wages
- Minor changes to the operation of the Medical Panels
- Amendments to correct anomalies or difficulties concerning the 'run-off' periods of pre-1992 and pre-1997 common law claims
- Consequential amendments in relation to the restoration of common law entitlements including: provision for structured settlements; access to the common law provisions of the *Transport Accident Act* 1986 concerning injuries arising out of a transport accident; and restoration of third party claim rights
- Changes to legal costs provisions
- Amendments to the *Sentencing Act* 1985 to exclude compensation claims for pain and suffering pursuant to s 86 where there is an entitlement pursuant to the Accident Compensation Act, or the *Transport Accident Act*
- Amendment to the death benefit provisions of the *Accident Compensation Act* (sections 92A to 92C)

The Bill contained drafting errors, some of which have been addressed in amendments proposed by the Minister but there still remain significant concerns. In particular the unreasonably narrowed scope for third party claims and confusing, constitutionally questionable provisions concerning Ministerial power to decide the ambit of medical questions to be determined by a Medical Panel.

Common Law

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20 October, 1999 (ie. the date the government was sworn into office). Whilst the decision to restore these rights is welcome and a clear recognition of community support for this issue, the date of effect means that those workers who were seriously injured between 12 November 1997 and 20 October 1999 will continue to have no common law entitlement.

Workers will be able to commence an action for common law damages (in which they still have to establish negligence) if they satisfy the test of serious injury. The 'serious injury test' will continue to have two gateways.

The first gateway requires that the worker have a 30% whole person impairment as assessed according to the American Medical Association Guides 4th edition. This is a much tougher test than the pre-12 November 1997 test which was based on the AMA Guides 2nd edition.

The second (alternative) gateway requires that the worker satisfy the narrative test which in the absence of agreement is determined by a Court. Under current provisions the worker must establish that she/he has suffered a serious injury which is defined as:

(a) Serious permanent impairment or loss of body function; or
(b) Permanent serious disfigurement; or
(c) Severe permanent mental or severe long term behavioural disturbance or disorder; or
(d) Loss of a foetus

In contrast to the 30% whole person impairment test, the narrative test for serious injury examines the consequences of the injury on each injured worker.

The narrative 'serious injury' test contained in the Bill has been codified to broadly reflect legal principles established by the Full Court of the Supreme Court of Victoria (*Humphries v Poljak* 1992 2 VR at 129).

In common law proceedings a seriously injured worker seeks damages compensation based on loss of enjoyment of life (ie pain and suffering), and past and future economic loss. Consistent with the principles established in *Humphries v Poljak*, the legislation will now require that in deciding whether an injury is serious a court must:

- Subjectively consider the effects of the injury on the particular worker and objectively compare it with other cases which are in the range of possible similar loss;
- Not determine a loss to be serious unless the court finds the consequence to be more than 'significant or marked' and is, at least' 'very considerable';
- Find that the loss is 'permanent' (replacing the current requirement of 'long-term') which is explained in the Second Reading speech to mean 'indefinitely for the forseeable future'.

The legislation will continue to maintain the distinction between the requirement of a 'serious' impairment or loss of a body function or 'serious' disfigurement, and a 'severe' mental or behavioural disturbance or disorder. Importantly a physical injury is not to be combined with the psychological or psychiatric consequences of a physical injury.

If a worker is seeking damages for 'pain and suffering' the above criteria will apply.

If however, a worker is also seeking damages for economic loss there will be an additional element to the serious injury test.

In particular a worker will have to satisfy a new 'loss of earning capacity test'. This will be defined to mean the loss of 40 per cent or more of the worker's annual gross income, having regard to the income of the worker over the three years immediately proceeding the injury. Consideration will also be given to the workers' projected annual gross income in the three years following the injury. It will also be necessary to establish the loss taking into account opportunities for rehabilitation, or retraining and suitable employment. The onus will be on the worker to prove any inability to be retrained or rehabilitated, or to undertake suitable employment including alternative employment or further or additional employment. This is a major change to the pre-12 November 1997 narrative test and will result in a significant number of seriously injured workers being unable to pursue a common law claim. The government estimates this to be about a 20% reduction in potential common law claims.

Common law rights for seriously injured workers to sue for damages based on negligence against third parties (ie. not the direct employer) will be restored effective from 20 October, 1999. Importantly there will be no 30% whole person impairment or serious injury test threshold (gateway) on many of these claims.

The Bill unduly restricts the ambit of threshold-free third party claims by limiting them to 'deemed injuries' under section 83 (1) of the Act which occur away from a fixed place of employ-

ment (eg a worker injured in 'third party circumstances' in a café while on a lunch break away from the workplace would be covered, while the same worker would not be covered if she/he had been sent to purchase lunch for her/his employer). These actions are further restricted by the requirement that the employer is not a party whereby a non-employer tortfeasor could join the employer to proceedings (although there be no ultimate liability on the employer) simply to defeat a third party claim.

'Intensive Case Review Program'

Finally the government has characterised as a 'uniquely disadvantaged group' those workers who have suffered serious injury in potentially negligent circumstances between 12 November, 1997 and 20 October, 1999 and who will now continue to be denied common law rights because of the government's decision to restore such rights on a partially retrospective basis. Any seriously injured workers who have been on weekly benefits for over 104 weeks and have a 30% whole person impairment according to the AMA Guides 4th edition may be eligible, where appropriate, for a lump sum settlement of their future weekly benefits. This is a very small concession for compensation for seriously injured workers who have been injured in potentially negligent circumstances.

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APLA members have pursued these issues directly with the Minister contending that the proposal constitutes a somewhat bureaucratic and clumsy method of dealing with that group of seriously injured workers that the government has recognised as a 'uniquely disadvantaged group'. Rather perversely the benefits would be denied to a worker who say has lost a foot, yet returned to work. Similarly, a worker with a severe facial or bodily disfigurement caused by an explosion (eg Longford), and unlikely to rate 30% whole person impairment, would be excluded from compensation, whether working or not. It is to be hoped that the government approaches this matter with a more flexible approach than currently proposed.

Impairment Assessment & Lump Sum Compensation

Practitioners may recall that a "dramatically improved impairment scheme" was the 'no fault' springboard that was used to justify the removal of common law rights in November 1997. Sweeping changes in this area in November 1997 saw the introduction of the AMA Guides 4th Edition (replacing the 2nd Edition) to measure impairment, and a threshold of 10% whole person impairment to access compensation benefits. At the time the Victorian WorkCover Authority actively championed the change.

Information flushed by the recent advisory committee review has established that the VWA had misconceived the effect of the 1997 amendments.

The AMA Guides 4th Edition brought a major change to the assessment of back injuries. Previously, back injuries had been assessed under the AMA Guides 2nd Edition. Evidence submitted to the Working Party by the Convenor of Medical Panels indicated that the gross compensation for the group would reduce from $1.3 million to $80,000. One example was an injured worker with a serious back injury who was erroneously assessed by an insurer under the pre-November 1997 assessment criteria as having a 25% impairment level and entitled to compensation of approximately $35,000. Under the post-November 1997 assessment criteria the same injured worker was assessed at a 5% impairment level and therefore received no compensation.

APLA members also provided the Working Party with survey material which demonstrated that significant proportions of injured workers would receive less under the post-November 1997 statutory non-economic loss benefits than they would have received under the table of maims.

Accordingly the Working Party report recommended a review of permanent impairment assessment and lump sum compensation for non-economic loss and the Minister is currently developing terms of reference for such a review. Plaintiff lawyers should be actively involved in this process.

APLA members have already made representations to the Minister concerning the proposed review and have expressed a strong view that the review should not be carried out by the VWA. Throughout the Working Party process the VWA demonstrated a failure to actively monitor and evaluate the major changes implemented in this area against not only the stated objective of 'improving statutory lump sum no-fault benefits (November 1997), but also the requirement to provide 'adequate and just compensation to injured workers' as set out in the objects of the Act. The VWA have demonstrated a partisan approach to these issues and therefore lack the requisite objectivity necessary to oversee the review process.

Summary

At the time of writing the legislative package has passed through the lower house and appears certain to pass through the Parliament. Certainly it is a major advance towards restoring fairness and equity to the WorkCover system. The Working Party process, and the campaign in support of its recommendations, has created a new climate of optimism concerning government commitment to a just workers' compensation system in Victoria. Much credit should be taken for this by APLA members who provided assistance and resources to particularly the trade union and legal representatives on the Working Party.

Given the electoral prominence of this issue however, it is unfortunate that the government was not bolder in the reform agenda. In this regard plaintiff lawyers should support the reforms proposed, and actively engage in the review of permanent impairment assessment and lump sum compensation for non-economic loss arrangements which has been foreshadowed, and likely to commence in the near future. Maintaining pressure and involvement will ensure that plaintiff lawyers' experience and understanding inform the outcome, and at the same time encourage the government to continue the reform process.