

WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Consideration in Detail

Resumed from an earlier stage of the sitting.

Clause 52: Additional income compensation —

Debate was interrupted after the clause had been partly considered.

Dr D.J. HONEY: I have had a bit more time to read this clause since my initial skim, but perhaps the minister could confirm my understanding. I have a colleague who was concerned that a worker could be paid 150 per cent of their total eligible compensation for the injury. Perhaps the minister could confirm whether my understanding is correct, which is that this clause for additional compensation will be triggered only once it is at the point that the compensation exceeds 75 per cent of the designated maximum for that injury, and, in any case, the total amount paid, with additional payments, cannot exceed 100 per cent for a particular injury. Is that the case?

Mr W.J. JOHNSTON: It does provide that they can be paid more than the cap. That is the existing provision, it is not a change, and it is 175 per cent, so it is the cap plus a maximum of 75 per cent additional. That is what I have been advised. It is under subclause (3).

Clause put and passed.

Clauses 53 to 55 put and passed.

Clause 56: Maximum weekly rate of income compensation —

Dr D.J. HONEY: With regard to the maximum weekly rate of income compensation, I will not read the whole provision, but how does that clause sit alongside clause 52, or what impact does clause 56 have on clause 52?

Mr W.J. JOHNSTON: I am just making sure I get this right. This is the cap on weekly payments. High-income earners would not necessarily get their income because it is capped. That is in respect of weekly payments paid by the insurer under an insurance policy, whereas clause 52 relates to orders of the arbitrator, so they deal with separate issues.

Clause put and passed.

Clauses 57 to 60 put and passed.

Clause 61: Leave while entitled to income compensation —

Dr D.J. HONEY: If I understand the provisions around this point correctly, if someone is paid sick leave or other leave entitlements whilst they are injured, that amount will come off the total amount of compensation paid, but the leave itself, sick leave or whatever, has to be reinstated. I am wondering why that would occur if the person is actually away from work? Why is there a recharging, if you like, when the person is actually away from work?

Mr W.J. JOHNSTON: That is a reasonable question. If we think about it, if a person is injured and is absent from work, and has made a claim but the claim has not yet been accepted, they are still entitled to their sick leave because they are entitled to sick leave under their employment arrangements—an award, contract or whatever. They get paid sick leave even though the claim has not been accepted, because even though they have made a claim, they are still sick, so they get paid sick leave. Then, if the claim is successful, they will obviously be reimbursed for the sick leave. They do not get any extra money because the employer is reimbursed out of their workers compensation insurance. The employer is not disadvantaged, so the employee should not be disadvantaged, and they get their sick leave back. It is axiomatic.

The alternative is that if their workers comp claim is not successful, they are still absent from work by reason of illness and therefore they are still entitled to sick leave in the ordinary course of events. That is what subclause (3) is about. On the other hand, if they are taking annual leave or long service leave, that is a different entitlement and will be impacted on differently. We can see at clause 61(2)(d) a provision about the worker accruing leave entitlements. That is the matter that was raised by the member for Cockburn in his commentary. That is the existing law; it has just been codified. Again, this is the existing provision. Some of it has been codified from common law and some has simply been translated from the previous legislation.

Dr D.J. HONEY: I thank the minister for that; that clarifies my question about sick leave. Can the minister please explain the annual leave component of that? I guess it would depend upon whether the worker returns to work or not, but if the worker has not returned to work and they are on leave in any case, why would they take leave or long service leave in that period?

Mr W.J. JOHNSTON: Workers can only take leave by agreement. They have the right to access the leave, but that does not mean that they can access the leave, because that is a separate question in accordance with their contract of employment or other entitlements. That is in respect of paragraphs (a) and (b) under subclause (2). Paragraph (c) provides that they cannot take sick leave if they are on workers comp, but that is the corollary to subclause (3) under

which, alternatively, they are not on compensation and can take sick leave. They cannot have both sick leave and workers comp. Under subclause (2)(d), they still accrue their entitlements even though they are being paid workers compensation.

That was the specific issue raised by the member for Cockburn. Someone might, for some reason, want to access annual leave. They are not going to be double-paid—they will not get workers comp and annual leave—but they are entitled to take annual leave. Of course, they would have to choose to take annual leave and the employer would have to agree to it. Let us say, for example, someone wanted to go overseas. The employer might say, “That’s not part of your rehabilitation. You’re still not ready to return to work but you’re going overseas on annual leave.” That is just a what-if, but, again, it is not a new provision; it is the existing law. Subclause (2)(d) codifies the existing law, but it is not a change.

Dr D.J. HONEY: If someone takes annual leave, will that extend the compensable period by the duration of leave, or is it inclusive whether or not they take annual leave?

Mr W.J. JOHNSTON: The question of the duration of workers comp relates to the degree of their injury. If they recover, they are obliged to return to work, so there is no change to the length of time that a person would be on workers comp, because that is determined by their injury or illness. On the other hand, if they are not paid workers comp for two weeks because they are on annual leave, that is not deducted from the maximum payments under the legislation, but that is a separate issue. The length of the absence is related to the medical treatment of the worker.

Clause put and passed.

Clauses 62 to 64 put and passed.

Clause 65: Worker not residing in State: failure to provide declaration —

Dr D.J. HONEY: Clause 65(3) refers to the suspension of the payment of income compensation. What form will that notice take to have effect? When a worker is uncontactable or for some other reason, I am not a lawyer —

The ACTING SPEAKER: Member, is that clause 66 or 65?

Dr D.J. HONEY: It is clause 65(3), which states —

Before payment of income compensation can be suspended under this section, the insurer or self-insurer must first give the worker a written notice ...

I just want to be clear, minister. What form does it have to be in to be deemed a notice?

Mr W.J. JOHNSTON: Again, this is not a new provision; it is a translation of the existing arrangement. If a person is out of the state, they will have to give a three-monthly declaration to the employer through the insurer. That will be on a prescribed form. If they fail to do that, their benefit can be suspended. Again, there will be prescribed processes for the insurer to notify the worker.

Clause put and passed.

Clauses 66 to 71 put and passed.

Clause 72: Requirement that medical and health expenses be reasonable —

Dr D.J. HONEY: As I was reading through this bill, I got excited about what “reasonable” was. Sensibly, that is in clause 70 and then clause 72 goes through and describes that.

How does the minister define the type of service that falls under the clause 72 requirement that medical expenses be reasonable? Obviously, within any law, the normal things are always covered, but there are extreme things. Treatments are available but if someone persuades their practitioner that they want stem cell therapy or some novel therapy that is expensive and falls within the scope of that, how will we determine what is reasonable for that treatment, please?

Mr W.J. JOHNSTON: Again, this is an existing issue that has been translated into the new legislation. We do not want to have excessive costs, just like Medicare does not reimburse 100 per cent of medical expenses. Some doctors charge more for workers compensation consultations compared with Medicare consultations, so there is always some variability in the charges. If the insurer does not think that something is reasonable, it could argue about that, and in the end that would be a matter for the arbitrator to determine.

Having said that, clause 73 sets out that the minister, on the recommendation of WorkCover WA, will be able to set maximum fees for specific procedures. There is the question of the reasonableness of the treatment and then the reasonableness of the fee. If a medical practitioner says a person has an injured shoulder and the insurer asks why they are then operating on the hip, that might not be a reasonable operation. On the other hand, if a person has an injured shoulder and it will cost \$57 000 for surgery, maybe that is not a reasonable fee. It could be that the medical intervention may or may not be reasonable in the insurer’s view and it would dispute that. The dispute would go to the arbitrator and the arbitrator would make a decision based on the relative merits of the case, both to the question of the reasonableness of the treatment and the reasonableness of the cost.

Dr D.J. HONEY: I was going to say, minister, that my brother is an orthopaedic surgeon, so any amount for surgery is obviously justified! He has a nice house up in Peppermint Grove and elsewhere to justify it.

That being said, it was mentioned that the minister could set a fee for a service. Is there a list of fees that have been set by the minister? Does that list exist somewhere; and, if so, where?

Mr W.J. JOHNSTON: Yes. At the moment, there is a slightly different procedure; the fees are set by regulation. This bill will allow for fees to be set by an order. This will make it simpler to issue the fee. The process will effectively be the same because it will be a decision based on a recommendation, but —

Dr D.J. Honey: Sorry, minister. How does someone know where that is? Where does that exist?

Mr W.J. JOHNSTON: At the moment, it is a regulation, and in the future it will be an order, so it will be available on the WorkCover website. We are talking about RiskCover plus seven private companies. There is not an extensive number of people who operate in this business. The employer does not have to know the detail because it is the insurers that exercise the responsibilities on behalf of the insured employees. There are 24 self-insurers, but they have to meet very high standards, including financial standards, and they have to demonstrate their capacity to cope as a self-insurer. By the way, they are all publicly known. Executive Council makes those orders, so they are again included in the *Government Gazette*. They are all public. A very limited number of businesses—31 private businesses plus RiskCover—operate in this system. Of course, there are a lot of doctors, but, again, certain organisations are involved in the medical sector and they engage with WorkCover, so there is no question about that. The people in the system understand these costs, and if you are a small business man or woman, you can relax because your insurer has that detailed understanding.

Clause put and passed.

Clauses 73 to 75 put and passed.

Clause 76: Notice to worker that 60% of general limit reached —

Dr D.J. HONEY: My question relates to the notice to the worker that 60 per cent of the general limit has been reached. How has that figure been lighted upon as a critical figure?

Mr W.J. JOHNSTON: The maximum amount for notice of medical expenses will be set at 60 per cent of the prescribed amount. When the worker has used 60 per cent of their maximum entitlement, the insurer will be required to advise them that they have done that. Effectively, they will have a capped maximum for medical expenses and when they have used 60 per cent of that capped maximum, the insurer will be obliged to tell them that they have got to 60 per cent. We do not want them not to be aware that they were getting towards the limit and then suddenly find they have a large bill that was not settled. This is to make sure that they will be advised by the insurer well in advance of them reaching the maximum prescribed amount for medical expenses.

Clause put and passed.

Clause 77 put and passed.

Clause 78: Increase for special expenses in the medical and health expenses general limit amount —

Dr D.J. HONEY: Clause 78(6) states —

An application for a special increase cannot be made more than 5 years after the relevant determination of liability for the injury ...

What will happen if the nature of the injury means it goes past that five-year mark and more extensive medical procedures or the like are needed? What will happen in the eventuality that a worker is faced with that? Will there be another process or a catch-all to make sure that they are not disadvantaged?

Mr W.J. JOHNSTON: No, if they have not made the application within the time, they will not be able to do so. However, I think I should draw the member's attention to clause 78(3), which says —

On application under this section, an arbitrator may order that the general limit for the claim is increased if —

- (a) the worker has a degree of permanent whole of person impairment of at least 15% as a result of the worker's injury as determined under section 79; and

More paragraphs follow and they each end with "and". The point is that 15 per cent will be the gate to get access to common-law damages. A person in this case would also have recourse to common-law damages. It is not all workers. Most workers do not get 15 per cent total impairment. That is a significant amount of impairment, so the overwhelmingly majority of claims in the workers compensation system will not reach the 15 per cent limit. It will be just for this subset. They could apply to the arbitrator within the five-year period to get the increase. If they did not do that, they would still have access to common law because they have that through the so-called gate and could take the matter to the common-law courts and then there are no limits. There are time limits in common law, but the point is that they will have access to other alternatives. Many people consider common law to be a superior

jurisdiction to the WorkCover jurisdiction. The only comment I would make is that this is a no-fault jurisdiction, whereas common law is a fault-based jurisdiction; therefore, different questions are being resolved in those two matters. The point is that this will be for a relatively small subset of workers who are quite severely injured.

Dr D.J. HONEY: This is a comment. I suspect this would be the minister's argument for people being members of a union because for an individual to undertake civil proceedings could be daunting. The minister does not have to answer.

The ACTING SPEAKER: I think that is rhetorical, minister.

Mr W.J. JOHNSTON: Any sensible person joins a union. I am still a member of a union. I am a member of the Australian Services Union, in which the member for Mirrabooka used to be a senior official. Yes, indeed. It is a big advert for unions because a union could help people through these procedures, but to give proper due to plaintiff lawyers—there are no lawyers in the room, apart from the Acting Speaker, though you were not a plaintiff lawyer, were you?

The ACTING SPEAKER (Ms M.M. Quirk): Absolutely not.

Mr W.J. JOHNSTON: I did not think you were. This is clearly a case in which a plaintiff lawyer would have a good role to play.

Clause put and passed.

Clauses 79 to 85 put and passed.

Clause 86: Wheelchair —

Dr D.J. HONEY: This is an inclusive or exclusive clause. Obviously, for someone who has lost both legs or is paralysed in both legs and needs a wheelchair, it refers to the regulations limiting the amount payable, potentially. But what about other injuries—for example, lung injuries—whereby people cannot walk? We heard stories in the second reading debate—I am just trying to remember which member it was—about someone who literally cannot talk and walk at the same time and needs a wheelchair. I would have thought intuitively that they would be compensable for a wheelchair if they had that type of injury, but I am interested in whether this clause will preclude that.

Mr W.J. JOHNSTON: This will not restrict people. For example, the member referred to someone losing lung capacity and not being able to walk. This does not say that they could not have a wheelchair. It says that in these cases it will not be counted in the cap. There will be caps on each auxiliary expenditure. Again, it may well be that we should look at broadening this, but this is out of existing legislation. It is about where it fits into the system, because a prescribed amount is set and then medical expenses are 60 per cent of the prescribed amount. There are other things. Each category of expenditure is referenced back to the prescribed amount. This says that if someone has a wheelchair in respect of clause 86(1)(a) and (b), they are entitled to it. It is not a matter for argument and it is not included in the limits that will be created by those other provisions in the act. But it does not mean that it is not reasonable to have a wheelchair in other circumstances; it is just that this provision applies in this circumstance.

Dr D.J. HONEY: The minister went down this path a bit, but maybe it is an area within which it could be more general to say that if a person requires a wheelchair, that is in addition to; I assume that a normal award would not necessarily look at the form of treatment. There will be prescribed maximums for a particular injury, but there may be an opportunity in a future review.

Mr W.J. JOHNSTON: There we go. This shows the value of consideration in detail, because this matter was not raised during the consultation process. It is simply translated out of the existing legislation. The member probably raises an important issue and WorkCover will undertake to consider that at an appropriate time in the future after the legislation has been dealt with.

Clause put and passed.

Clauses 87 to 98 put and passed.

Clause 99: Worker's degree of permanent impairment —

Dr D.J. HONEY: Clause 99(2) states —

In the case of permanent impairment comprising the contracting of AIDS that under section 104(1)(b) ...

And so on. I will not read the whole thing; the minister can read as well as I can, or better! I am just wondering what led to the categorisation of someone with AIDS as permanently incapacitated. I am, quite clearly, no medical expert. However, my understanding is that with antiviral and other treatments that are available today, many people with AIDS lead perfectly normal, active and healthy lives. Although they may have the virus, the treatment suppresses it pretty well completely. As I understand, it can suppress it in certain cases to the extent that the disease disappears and is undetectable. Why does it require a special category and why would it automatically be categorised as a permanent impairment? I would have thought that it would depend on the medical assessment of the individual, rather than designating it per se.

Mr W.J. JOHNSTON: I am advised that the provision in the existing legislation was inserted in 2004 and that there has not been a claim. I can point out to the member that this is, of course, for when the individual contracted AIDS as part of their employment. We would expect them to be a health worker, for example, so it is a specific set of circumstances. It is not about valuing the suffering of different members of the community who have AIDS; rather, it is about the question of dealing with workers compensation payments. It is not valuing one disease over another or one person's transmission pathway compared with another; it is simply saying that when somebody has contracted AIDS as part of their employment, this provision will apply. We are fortunate that in the 19 years since the original provision was inserted, we have not had to assist anybody who has suffered in this way. I think that is a good thing. Therefore, when calculating the premiums, it is a very small cost to give confidence to workers that if they suffer this situation, they will be protected by the workers compensation system. Again, I also point out that the question of permanent impairment has impacts elsewhere in the legislation. It will give the individual entitlements to other things, including getting through the gate to common-law opportunities, if that is what they seek to do. It is more than just making a decision about total body impairment. It is also about where the person then fits into the legislation in other regards.

Dr D.J. HONEY: This is by way of comment, with the minister's indulgence. Early in my career, I was a forensic scientist. I was working at a chemistry centre and it had no occupational hygiene practices at all. When AIDS became a common disease in the community, the protections for workers improved quite dramatically. However, it was a real risk and fear in that workplace in the early stages. The minister does not have to comment.

Clause put and passed.

Clauses 100 to 130 put and passed.

Clause 131: Terms used —

Dr D.J. HONEY: In looking at clause 131 on page 108 of the bill, I noted that after going through the definitions, there is a subsequent table that codifies how payments will be split. Paragraph (b) of the definition of "partner" in clause 131 states that it can be someone who has previously been a spouse or de facto partner of the worker. How will that apply to the parameters of the compensation split if the people were married and are now divorced, or were de facto and are now leading completely separate lives? Why is there a requirement to include the former spouse or former de facto partner of the worker in that split?

Mr W.J. JOHNSTON: I thank the member for the question. This is actually an issue that was canvassed when we amended the legislation in 2018. Of course, the person would still have to be a dependant. The person could be dependent on an ex-partner and therefore still need to be compensated for a suffered loss. It is a question of dependency, in the same way that if someone has children from multiple partners, they are still children. A person might have dependencies created through their life circumstances. Although the individual might have ceased to be a partner, they would still have a dependency. That is why it needs to be included in the definition. It states —

dependant, of a worker, means a partner, child or extended family member of the worker who —

It then sets out the three criteria. There could be a person who is a former spouse who still meets the criteria in paragraphs (a), (b) and (c). Of course, someone could also have a former spouse who does not meet the criteria in paragraphs (a), (b) and (c), in which case there would not be an entitlement. To the extent that they are dependent, they have to be protected.

Clause put and passed.

Clause 132 put and passed.

Clause 133: Lump sum compensation for death resulting from injury —

Dr D.J. HONEY: I have a question on the highly specific codification of the compensation split. In earlier clauses, we have talked about the social and economic circumstances of people in terms of looking at other payments and the limit on a payment and the like. I am wondering how the splits in the table in clause 133 have been derived. Is there an opportunity to vary that, depending on the circumstances, for example, of the spouse or the child, in terms of their individual requirements and degree of dependency?

Mr W.J. JOHNSTON: Yes. We just discussed a minute ago the definitions in clause 131. If a person meets the definitions in clause 131, they would get the split in accordance with clause 133. However, they will first have to meet the definition before they will get the entitlement. If an individual has met the definition, the entitlement will automatically flow. There is not a separate debate. In fact, this is designed to prevent any disputes because it sets out in a mathematical formula how to divide up the benefit that is payable. The member can see the way it works. Clause 131 determines who will be entitled and clause 133 sets out what the entitlement will mean.

Dr D.J. HONEY: I will give an example. I have six kids and completely independent adult children. I have a couple of kids who are nominally away from home but still depend on help from mum and dad, and a couple of kids at home who essentially completely depend on their parents. If I were to die, their needs would be quite different. In this case,

we would be talking about semi-dependent and totally dependent children. As I read this legislation, a semi-dependent child would get the same payment as the totally dependent child, but I know that their needs are different.

Mr W.J. JOHNSTON: It does not matter how old the children are; they will get their share. We would expect that because it is an entitlement that flows from the death. Of course, there is another provision in here regarding children of an age at which they still have a more active dependency. Again, that is one of the things that we modified in 2018 when we updated the payments made to children. That is dealt with in a separate provision for children under the age of 16 or 21 years, depending on the particular circumstance. They get an ongoing payment. This is for the lump sum compensation. That therefore goes to all the children, whether or not they are actively dependent.

Clause put and passed.

Clauses 134 to 177 put and passed.

Clause 178: Performance monitoring and review of approved workplace rehabilitation providers —

Dr D.J. HONEY: Looking at the performance monitoring and review of the workplace providers, I refer to the requirement for WorkCover to look into a provider's financial records. I can understand why we might want to make sure that a provider is competent in providing the service it claims to provide, but what requirement is there for WorkCover to look into a provider's private financial records?

Mr W.J. JOHNSTON: Thanks for the question. This is a refreshed oversight provision; there is already an oversight function for WorkCover. That refresh is to make sure that WorkCover will have sufficient power to do a proper oversight of the rehabilitation providers. We would not want a rehabilitation provider's charges to be so out of sync with its underlying cost structure that it removes the benefits for the workers. Remembering that we have a series of capped payments, we want the rehabilitation provider to do its work for the benefit of the worker. We want to make sure that the provider is not overcharging or that any other improper conduct is being done by the provider.

Dr D.J. HONEY: Thank you very much, minister. I would have thought that the way WorkCover would deal with that is it would simply look at the range of providers and the fees that are charged and quickly ascertain whether a provider was way out of whack. As I said, I still cannot understand why WorkCover needs to go in and look at the intrinsic cost structure of the provider as long as that is competitive. The delivery of medical services has changed dramatically since I was a boy. Now, some providers have introduced highly efficient work practices. That is their model and they may remunerate employees differently to incentivise them, basically, to go into their business rather than work as an independent business. I would have thought that surely WorkCover would look at it on a cross-provider competitive basis and would not burrow into each provider and define that a provider will be allowed to make only a 10 per cent profit or some such thing, because that may discourage innovation.

Mr W.J. JOHNSTON: Rehabilitation providers are not regulated by anybody else. They are not regulated by whatever the health model is called—I cannot remember the name. Effectively, these rehabilitation providers have sprung up to respond to the workers compensation scheme, and so we want to have a thorough head of power to allow WorkCover to regulate those providers. Of course, the workers compensation system applies equally to the entire state, so it is not clear whether there would actually be competition in every location in the state. Therefore, sometimes direct intervention by the regulator may be appropriate. It does not say that WorkCover has to exercise these powers; it just says that these are the powers it has so that it can exercise them in those circumstances if it needs to. Let us imagine that a rehabilitation provider was in a location where there was no competition and a worker came to WorkCover and said, "I'm not happy with the charging structure. That means that my access to rehabilitation is being reduced compared to somebody in another location." It seems appropriate, given there is no other regulatory framework, that WorkCover would have the power to take whatever action it thought was appropriate in exercising its responsibilities to get value for money out of this very important scheme.

Dr D.J. HONEY: Thanks, minister. I think that is a reasonable explanation for why it may wish to do that. Just to be clear about that, it is obviously for approved workplace rehabilitation providers. Does that mean that when there are competitive providers, WorkCover can definitely exclude providers, for example, that charge a very high cost for the service they provide or if they do not provide an adequate service?

Mr W.J. JOHNSTON: Yes, that is right. Remember that a provider has to be in the scheme to get access to the scheme payment. A provider that acts as a workplace rehabilitation provider in the workers compensation scheme has to be registered—I do not know what the proper word is—with WorkCover. Of course, there can be rehabilitation providers that do not work in the workers compensation scheme. They might take private clients or whatever, they might work in the NDIS or do some other work, and so they would not have to deal with this. But WorkCover—not any other regulator—will be the regulator for those providers working in the workers compensation scheme. Therefore, WorkCover will need the powers necessary to exercise its responsibilities. As I said, just because it has the power to inspect financial and other records does not mean it will inspect financial and other records, but we would expect that it will diligently perform its responsibility to make sure there is value for money in the workers compensation scheme.

Clause put and passed.

Debate adjourned, on motion by **Ms C.M. Rowe**.