WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from 17 August. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 365: Representation —

Progress was reported after the clause had been partly considered.

Hon MATTHEW SWINBOURN: It has been some time since we last dealt with this matter. During the debate some matters arose on which I can provide further information to the chamber before we strictly get back to clause 365. On 17 August, Hon Nick Goiran during consideration of clause 164 asked about discretion as to costs in an application for dispute resolution by an employer when the worker has not given a progress certificate of capacity within the seven-day time frame. In responding on this issue, I mentioned that there was no capacity for costs to be awarded at the conciliation stage of the dispute, as it is a no-cost jurisdiction. That was, in fact, incorrect. Costs recoverable at conciliation will include the costs of a party, including fees, charges and disbursements, and the costs of proceedings. That is also the case under the current act. The following explanation is intended to clarify the situation in relation to costs at the conciliation stage of a dispute and the discretion with respect to costs of an application.

Before I proceed, I apologise to the chamber for providing incorrect advice previously. There will be no fees for making an application in a conciliation service or an arbitration service. However, parties will be able to choose whether they wish to be represented by a legal practitioner or an authorised agent. If a party to a dispute is represented, that party might incur costs associated with engaging that person. Costs will be recoverable by legal representatives and authorised agents on a milestone basis. The costs determination, the mechanism for which is found elsewhere in the bill, sets out the maximum costs and time allowable for certain events relating to disputes. For example, the current costs determination allows three hours for preparation and lodgement of an application with the conciliation service. The bill provides that the awarding of costs in dispute resolution will be discretionary and the relevant conciliator or arbitrator may determine by whom, to whom and to what extent costs are to be paid. In the example provided by Hon Nick Goiran, a conciliator is highly unlikely to award costs against a worker when the certificate of capacity has been provided outside the seven-day period but prior to the conciliation conference being held. I hope that clears up that point.

During consideration of clause 358 on 17 August, Hon Dr Steve Thomas queried what the rate of interest will be on unpaid sums. It is intended that the rate of interest to be prescribed in regulations under clauses 358, 359 and 360 will be six per cent per annum. The rate of six per cent was inserted in the current regulations in 2005. A six per cent interest rate is consistent with judgement sums on an order of the WA Magistrates, District and Supreme Courts. WorkCover WA does not collect data on interest required to be paid from arbitration proceedings, which I think is the answer to an additional question that the member asked.

Hon Dr Steve Thomas: It is probably a reasonable number, given the current circumstances.

Hon MATTHEW SWINBOURN: Yes. During consideration of clause 365 on 17 August, Hon Nick Goiran queried the reference in subclause (2)(c) to a person authorised by the relevant rules to represent a party, compared with the reference in clause 303 to a person authorised by the regulations to provide agent services. He specifically asked what was the difference between the second class of person in clause 303 and the class of person in clause 365(2)(c). I took that question on notice and have an answer now. The classes of persons referred to in clauses 303 and 365 are different. Authorised agents recognised by the regulations will be able to represent parties and provide other agent services. I again refer to clauses 303 and 365. Clause 365(2)(c) will enable the relevant rules to authorise people who are not authorised agents recognised by regulation under clause 303 to represent a person. An example of a class of person who might be recognised under the rules is a director, secretary or officer of a body corporate where the body corporate is a party, or a public sector employee of a public sector body where the public sector body is a party. Persons recognised under rules will be limited to representation in a conciliation conference or an arbitration hearing, whereas authorised agents will have a broader role and will be able to recover costs for all agent services they provide. I am sure we can get further into that aspect as we are still on clause 365.

There were some additional matters. During the debate—I do not have the date that this first came up—Hon Nick Goiran pursued a line of questioning and a particular point about who might constitute a support person. Issue may have been taken with any proposed restrictions on workers represented, for example, by a union or a lawyer as a support person at a worker's return-to-work case conference. Although the issue of who will be able to attend will be set out in regulations and consulted on before a position is determined, I wish to provide a more fulsome statement on this point. The regulations will provide for matters such as the conduct and procedure of return-to-work case conferences, the number of times and frequency a worker must attend, and, I emphasise, who may attend.

In relation to attendance, it is proposed that the worker may have any support person, although a support person will not be defined. The regulations will therefore not necessarily prevent someone who is a lawyer, a union official, a representative or an authorised agent from supporting a worker in a return-to-work case conference. However, the regulations will clarify what can and cannot be discussed to ensure the focus remains on a worker's recovery and opportunities to assist in the worker's return to work. Regulatory clarity about what can and cannot be discussed is intended to prevent liability, claim and disputed matters from being aired; it is not so much about preventing people from having a person of their choice present to support them. It is very important for return-to-work case conferences to remain informal and for discussion to focus on the return to work and not disagreements or disputes about liability, when formal representation could be used on other aspects of a worker's claim. I think that is where we are up to at the moment. There may be some questions from members.

Hon Dr STEVE THOMAS: Minister—sorry; parliamentary secretary. I was promoting him!

Hon Martin Aldridge: As he should be.

Hon Dr STEVE THOMAS: He probably should be up the top.

Hon Tjorn Sibma: At the absolute apex.

Hon Dr STEVE THOMAS: Yes, at the apex.

We are dealing with clause 365, which is about representation. We cannot read this clause without also dealing with clause 366 on the meaning of "prohibited person" because they are integral to each other. Before we diverged onto other legislation a few weeks ago, the government effectively said that someone would have to be a lawyer to represent somebody. I get that.

Hon Matthew Swinbourn: No, it is not a lawyer. It can include someone employed by a union, for example.

Hon Dr STEVE THOMAS: Sorry, or an authorised representative, but not necessarily agents that have been previously —

Hon Matthew Swinbourn: There are currently five in that particular group.

Hon Dr STEVE THOMAS: If the person subject to the workers compensation claim and process uses an agent for advice et cetera, but also has, for example, under clause 366, a legal representative with an Australian practising certificate, will the person who is currently in that group of agents be excluded from interactions in relation to proceedings? Will they be at risk of offering advice that could not be supported? I am not talking about the active person under clause 366 who conducts the proceedings on behalf of the client—the legal representative or union representative—but one of those people who are currently agents. Will there be an issue with them proffering advice and support or will there be no risk to them in proffering that advice? It is an awkward question.

Hon MATTHEW SWINBOURN: If we are talking about the time after which the current agents will no longer be permitted to fill that role but they then work for a union or within a law firm and provide advice in that situation, they will be entitled to continue to do that kind of work. They will not be excluded from working within the workers compensation system. However, if they still essentially act as an agent without the protection of the system, they will be engaging in legal practice, which, off the top of my head, is prohibited under the Legal Profession Uniform Law Application Act. Therefore, they potentially could be dealt with under that act for engaging in uncertificated legal practice. The bill will not exclude them from working within the system. I think the member was asking whether they would be booted out of the system entirely or whether they would still have a place. They will still have a place if someone is prepared to employ them. They could be employed by a lawyer or a trade union, or they might work for an employer. Their knowledge might be useful in an employer-focused role, not as an advocate but in terms of the knowledge they have.

Progress reported and leave granted to sit again, on motion by Hon Matthew Swinbourn (Parliamentary Secretary).