WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Consideration in Detail

Clause 1: Short title —

Dr D.J. HONEY: I am interested in the consultation process undertaken on this bill. I think the minister would appreciate that the reason I ask that question is that sometimes, post-legislation, people complain or make comment that a bill is egregious in some way or that something should have been done by the opposition on a bill. I listened closely to the minister's second reading reply and to his comments about the consultation process, but could the minister outline some of the more significant organisations that were consulted? If I could have the minister's indulgence on that, that would assist the discussion on this bill subsequent to its passage through this place.

Mr W.J. JOHNSTON: I do not believe that any legislation that has ever come to this chamber has undergone such an extensive consultation process. It started in 2008, and that led to the review that was released by the former government in 2016. That was followed by a review of that review. In July 2017, cabinet gave approval to draft the bill. The bill went through 24 drafts to get to the stage that we are at now. That included detailed consultation with 86 stakeholders. There are eight workers compensation insurers in Western Australia—namely, the Insurance Commission of Western Australia and seven commercial insurers. All those insurers were consulted, as was the Insurance Council of Australia. I also met personally with all the principal employer associations in Western Australia, UnionsWA and other individual unions, plaintiff lawyers, and a number of other interested parties. I would be shocked if anybody missed out on that consultation. If we think about it, the process has taken 15 years, and during that time everything has been done publicly. The final set of targeted consultation was obviously not done publicly, but it was done with a massive range of interested parties.

Dr D.J. HONEY: I thank the minister for that answer. As I mentioned in my contribution to the second reading debate, my door has not been beaten down by organisations complaining about the legislation. A couple of the major organisations that I approached were not able to provide any significant commentary on the bill. I appreciate that we have now reached the twenty-fourth version of the bill. I am not seeking an exhaustive history of the concerns raised during that process, but by the time the bill reached the twenty-fourth version, were there any sticking points from those groups? The minister mentioned that plaintiff lawyer companies have come out at the eleventh hour and raised a concern. The minister has already dealt with that and I am not asking the minister to deal with that again; however, were any other substantive bones of contention raised at the time the minister got to this version of the bill?

Mr W.J. JOHNSTON: If the member wants, I can read out the 86 organisations that were consulted on the consultation bill, which, as the member would remember, was the last step of the consultation. At the end of the consultation process, about two dozen issues remained to be resolved and for me to make a decision about. The good thing about being in government is that we get to make those decisions. On almost all those issues, different arguments were raised; some people wanted certain things, and others wanted the opposite. The role of government is to make final decisions on issues. I will take the terrorism issue. The Insurance Council of Australia does not agree with the exact wording in this bill on that issue. It wanted the government to provide greater indemnity. Not everybody gets what they want. As I understand what the member has said in his second reading contribution and also today, notwithstanding the extent of the consultation that the member and the shadow minister have had, no-one is saying to them that this is not good legislation. That demonstrates that although not everybody got what they wanted, everybody got what they needed.

Clause put and passed.

Clauses 2 to 4 put and passed.

Clause 5: Terms used —

Dr D.J. HONEY: I am definitely not going to play the game of going through an exhaustive examination of every definition. The only one I want to focus on is the definition of "document". In my early professional career, it was memos that had to be signed and sent back and then we got into the era of emails and attached documents. However, I have noticed that increasingly people are using text communication or other electronic communication via the mighty phone. In my world sometimes people send quite serious communication by that means as though it is a formal communication. I have read the list of documents. Would communication by whatever platform—via mobile phone, documents, WhatsApp, Signal or Messenger—be considered a document, or do they fall outside the scope of that definition?

Mr W.J. JOHNSTON: The intention of this definition is to broaden what would be seen as a document to include all the modern options. The specific wording in paragraph (a) is —

> a record of information, irrespective of how the information is recorded or stored or able to be recovered;

That is pretty broad. Paragraph (f) states —

> a thing on which information is recorded or stored, whether electronically, magnetically, mechanically or by some other means;

That is very, very broad. I note that paragraph (d) states —

> a thing on which there are marks, figures, symbols or perforations that have a meaning for persons qualified to interpret them;

A braille document, for example, would be a document. This is just modernising the capture of anything that anyone could record information on to make that a document. That will allow us to move entirely online to deal with claims and will also allow all the procedures for the disputes process, both conciliation and arbitration, to be done online. It is a much more modern and contemporary approach to deal with all these types of things.

Clause put and passed.

Clause 6: Injury —

Dr D.J. HONEY: The key definition in this clause relates to injury. Clause 6(3)(a) refers to an aggravation or acceleration of an injury or disease due to work. Perhaps there will not be a specific answer to this issue, but I raise it in the context of the ability of an employer to assess an employee's injury record. The difference between an injury history and a workers compensation history is a distinction I had not lighted on properly. Nevertheless, in that context of aggravation, does it highlight the importance that an employer understands the disease or injury history of a person before they employ them?

Mr W.J. JOHNSTON: The first thing to note is that there are only 24 self-insured employers in Western Australia, so hundreds of thousands of employers are covered by the legislation. They all have an insurance company and the insurance company is the one that does the interpretation and deals with the claim. It is not necessary for a small business person to have a detailed understanding of exactly where all this sits together because they have somebody else to do it for them. I want to emphasise that.

The next thing is that aggravation is an existing arrangement in the legislation; there is no change. A person might be fit to work but has a sporting injury. Let us say that the sporting injury occurred before they were engaged and it was not so severe that they could not do the job, and then they suffered an injury at work that aggravated the existing injury; that would be compensable. That remains the same today. It is not a new arrangement; it is an existing arrangement. It then gets to the question of the impact of that and how much was caused by the pre-existing injury and how much was caused by the aggravation. Again, insurance companies have a high level of understanding of the challenges that arise, which is why they obtain medical reports et cetera. That then becomes a matter of fact and there is a process through conciliation and arbitration to determine what the facts say, and on appeal on matters of law to the court as well. This is nothing new. It is the sort of stuff I was dealing with back in the mid-1990s when I was a union official. There is absolutely nothing surprising to an insurance company in this list of what an aggravation is. It is not necessary for a small business person to know the details because they are insured, and if they are not insured, they are breaking the law. It is the insurance companies that understand these things and deal with them. Its intent is exactly the same as the current intent.

Clause put and passed.

Clause 7 put and passed

Clause 8: Injury from employment: work related attendances —

Dr D.J. HONEY: I appreciate that the intent of this clause is to ensure that all the places that a worker might be required to go for their job are covered, including attendance at an educational place or attending treatment and the like. I am interested by that. I note that journeys are taken into account in clause 9. Does travel to places that are not a person's normal place of work, even if they are travelling there from their home, also come within the scope of workers compensation if they have an accident during that travel?

Mr W.J. JOHNSTON: The question of going to and from work is, of course, one of those controversies of the past. It was considered controversial when the journey travel was removed from workers comp, but it is not something that many people argue about now. This is already the law. Yes, if someone was travelling from their home to attend treatment, if it was work-directed travel, that is the question. Work-directed travel is already covered by compensation. I clarify that: it has got to be in the course of employment, not going to work. Does the member see the difference?

Dr D.J. Honey: Yes.

Mr W.J. JOHNSTON: Let us say that a worker was going from a house in Victoria Park to Cannington every day because Cannington was their office. That is a journey to work and, as the member says, it is covered elsewhere. However, if the person was required for work reasons to do something else, that would be a work-directed journey and it would be covered. This is not new. If the person is at work in Cannington and is sent to see a medical practitioner

in Nedlands, that is a work-directed journey and they are covered. If a person drives a truck from the warehouse in Kewdale to the delivery point in Armadale, it is a work-directed journey. These matters are well understood. They do not create new entitlements or a new situation that needs to be resolved. The seven commercial workers compensation companies all have a very clear understanding of these things that are not being argued about or like the controversial issues that we talked about before.

Dr D.J. HONEY: I appreciate that my questions may reflect my lack of detailed knowledge in this area, but it does assist me. Clause 8(b) reads in part "while the worker attends at a place for any treatment". If the worker is mistreated to the extent that it causes significant aggravation or an extension of the injury, will that person be covered by the workers compensation scheme?

Mr W.J. JOHNSTON: I am not sure that is related directly to this clause, but the answer is yes. It is a no-fault scheme, so the worker would still have an action against the workers compensation insurance scheme. If the treatment of a medical practitioner or someone like that led to the injury, it might bring about a common-law action against the practitioner. But the workers compensation scheme is a no-fault scheme and anything related to a person's work is compensable. That is what the insurance policy covers. It is not covered at an additional cost to the small business, because it is required that the worker be insured and the insurance company include it in its scheme. Of course, it might have a negligible impact on the future premium rate, but it would be so small as to be almost unnoticeable. It is a no-fault scheme. Anything to do with work is compensable at no extra cost to employers because it is included in the scheme.

Clause put and passed.

Clause 9 put and passed.

Clause 10: Prescribed diseases taken to be from certain employment —

Dr D.J. HONEY: I appreciate that we will deal with this bill clause by clause, but my discussion will range over clause 10, "Prescribed diseases to be taken from certain employment", and clause 11, which refers to firefighters. I also note a clause related to jockeys later on. I can see the logic in dealing with jockeys separately in that their work is quite complex; they may ride, they may not ride and many work in a vast number of locations, especially if they are involved in country races; they can literally go from one end of the state to the other and the like. I can see why it is necessary to have a separate clause for jockeys. Was there any reason to have firefighters dealt with under clause 11 other than to preserve historic recognition? I listened intently to a good explanation of the question I raised around whether, for example, female reproductive diseases should be included in this legislation. The minister made the point about his regulation-making capacity—this is something he is reviewing—that there is a prudent approach to this to make sure that we follow science, that he has looked at what has been put to him and that there are two areas in which he has made some additions. But if that is the case and if we can do it by regulation, what necessitated keeping this specific recognition of firefighters as a separate group in clause 11? I will not re-ask the question when we get to that clause, given that we are on clause 10.

Mr W.J. JOHNSTON: I am in such a pleasant spirit today that I am not even going to raise an objection to the fact that the member asked the question in the wrong spot. I could just tell him to ask me when I get to clause 11, but I am not going to be unfair and unreasonable today. I am going to be very generous and engage with the member on everything. I am in such a happy mood.

Mr P. Papalia: Is it your birthday?

Mr W.J. JOHNSTON: No, my birthday is in August, mate. You are older than me, remember.

Yes, this has been done because of the historic manner in which the existing legislation has been laid out. We preserved the firefighters in their own clause. We could have used the regulation-making powers in clause 10, "Prescribed diseases taken to be from certain employment", to include the matters covered in clause 11, but as I keep saying, the intention is to translate the existing arrangements into the new legislation—and we have done that with clause 11. As I explained in my second reading reply, we can go further on the questions being raised with us by the United Professional Firefighters Union of Western Australia. We will continue to engage with that union. As I explained, we had work done by an independent expert who has been used by the Australian Council of Trade Unions on a number of matters. She reviewed all the evidence that was available and made recommendations. We are looking through that and talking to the union about what we might do next. Yes, we could have just used the powers in clause 10 to deal with the matters raised in clause 11, but given that we did not want anybody to feel that something in the act is lost in the bill, we have retained the specific matters in clause 11 that are effectively just a translation of the existing arrangements in the new legislation. I hope that answers the speculation and questions that the member has in mind. I look forward to his next interrogation.

Clause put and passed.

Clause 11: Diseases of firefighters taken to be from employment —

Dr D.J. HONEY: How were "qualifying periods" determined? It was put to me that the qualifying periods may come from another jurisdiction that already has similar legislation and there may not necessarily be science behind why they have been put in here. In any case, I would appreciate an explanation of how these qualifying periods were determined.

Mr W.J. JOHNSTON: I am advised that the qualifying periods are consistent with those in Comcare, which is the commonwealth government's workers compensation scheme. I am told that one adjustment has been made following updated scientific advice, but that the qualifying periods are based on the professional expert advice that has previously been sought and received by WorkCover WA. As I said, item 12 has had its qualifying period adjusted based on updated evidence we received. Again, we are always open to reconsider evidence provided to us. We had a grievance this morning from the member for Belmont about silica and silicosis. I am indebted to the research work done by one of the medical colleges on that issue that has changed the way in which we approach the management of health and safety in respect of silica. We are always very happy to respond to data and analysis and additional research; we are not fixed. But, as we stand here today, we have this professional expert advice that says that these are the relevant cancers and the relevant time periods. We have indicated that we are working with the United Professional Firefighters Union of Western Australia on the outcomes of the most recent expert advice that we have received, and we will continue to engage with that body. As everybody says, if the facts change, my opinion will change; if the facts were to change in the future, we will, of course, entertain further change.

Dr D.J. HONEY: What will happen in the event that someone develops a cancer within this period? As I am certain the minister knows—I know that he is a learned person—cancers are, in effect, a probabilistic occurrence. As the minister knows, there are people who have worked at Wittenoom their whole life, smoked heavily and lived until they were 95; equally, there are people who were exposed to asbestos once and ended up developing mesothelioma, and it was literally a quirk of fate that that set of biological circumstances arose and a cancer developed. All these periods would have to be based on some sort of probability cut-off. But there could be—in fact, it is certain that there will be—individuals who will develop certain actual occupational diseases that are directly due to their workplace within this period. What will happen in a case in which someone's claim falls outside this qualifying period? Will they be excluded per se, or will there be some flexibility that they can argue their case separately from these cut-off periods?

Mr W.J. JOHNSTON: I thank the member for the question. It is an interesting question, but I will explain why it is not quite correctly directed. This legislation will not have the effect that people will not be able to claim under different circumstances. Under this legislation, if a worker makes a claim after the qualifying period, the insurer will have to prove that the cause is not work related. If a worker develops cancer—of course, it could still be work related—and makes a claim before this qualifying period, they will have to prove the causation. Once the worker reaches the qualifying period, it will be assumed that the causation was work related unless the insurer can demonstrate that it was not. It will reverse the onus onto the insurer. There is nothing in this legislation that will stop a person from claiming.

If I can take the member away from cancer, I just mentioned PTSD. I think that about 85 per cent of firefighters who claim for PTSD have their claims accepted. Even without a presumption, there is a high level of success in the claim, because it is easy to demonstrate the connection. Let us assume that somebody in the firefighting industry develops primary site brain cancer, which is item 1, after three years of employment. They would probably have a clear pathway to show that they were exposed to carcinogens that may have been the cause of that cancer, and their union and representatives would develop an argument about the causative link. However, once the person gets beyond the threshold, then the onus will be reversed. To refuse the claim, the insurer will have to prove that the causation was not work related. The legislation does not provide that a claim within less than that period will not be pursuable; it provides that the worker will have to demonstrate a connection to prove the causation. That onus will reverse once the qualifying periods are met.

Dr D.J. Honey: That is clear. I thank the minister.

Clause put and passed.

Clauses 12 and 13 put and passed.

Clause 14: Labour hire arrangements —

Dr D.J. HONEY: One of the things I observed in this clause—I mentioned this in my second reading contribution—was that companies look to outsource risk through contractors doing work and the like. I see the labour hire arrangements at clause 14(3). If I read that correctly, when a worker is doing work for a company but not through a direct relationship with that particular company, the labour hire company is the worker's employer for the purposes of workers compensation. Will that still be the case? In some arrangements, people work for extreme periods. In fact, although a person is employed by a labour hire organisation, they may work in only one workplace; they may

work there all the time. Will that person still fall under the labour hirer's responsibility for workers compensation, or would they in fact fall under the responsibility of the primary place of business, if you like?

Mr W.J. JOHNSTON: I thank the member for the question. Again, this is not a new arrangement. This is existing law, but, again, it is clarified to make it simpler. If someone is an employee of a labour hire business, that labour hire business has an obligation of workers compensation insurance and is liable for workers compensation for that person as an employee. That removes any misunderstandings or doubt that a labour hire business might say, "I didn't take out workers compensation insurance because I thought the host employer rather than the direct employer would be covered." I highlight the difference here. This legislation states that it will be 100 per cent—no question—the labour hire business that must maintain the workers compensation insurance policy. Of course, under the work health and safety legislation, the labour hire business is a person conducting a business or undertaking, but so is the host employer. This will overcome problems that we have had in holding employers to account in cases in which they had multi-levels of labour hire—there might have been a commissioning business that hired a contractor that hired a labour hire business—and then, under the old Occupational Safety and Health Act, they would say that nobody was responsible for health and safety. That will be fixed under this WA legislation because the commissioning organisation is a PCBU and will be responsible, the contractor is also a PCBU and will be responsible, and the labour hire business is also a PCBU and will be responsible. But this legislation is not about health and safety responsibilities; it is about who will have the legal responsibility to hold insurance. This clarifies that there is no question that a labour hire business will be required to have an insurance policy for its workers, and that that insurance policy will be the policy that will be claimed against if a worker is injured in a workplace.

Dr D.J. Honey: That is clear. I thank the minister.

Clause put and passed.

Clauses 15 to 18 put and passed.

Clause 19: Employment must be connected with this State —

Dr D.J. HONEY: I ask the minister for clarification. Clause 19(1) states —

> Liability for compensation arises only if the worker's employment is connected with this State.

What will happen in the case of a worker who is employed by a company here—this increasingly seems to be the case for a lot of businesses—but permanently resides in another state if that worker is working for their employer who is based in this state but gets injured in that other state? Will they fall under this state's compensation laws, or, in fact, will they fall under the compensation laws in the other jurisdiction? Going further than that, again, it is increasingly the case that a number of Western Australian companies now have fly-in fly-out workers working in parts of Asia, Africa and even Russia, so those workers are working completely outside the Australian jurisdiction. What happens if those workers are injured? What if that place ends up being their permanent place of work and they are not ever working in Western Australia? If they are employed by a Western Australian firm but they are completely outside the country, will they still be covered by the workers compensation rules in this bill?

Mr W.J. JOHNSTON: Australian workers, like a Queensland worker who comes to WA, are covered by our legislation; it is where the work is being performed. Somebody employed by a Western Australian company to work outside Western Australia is covered. Let us assume somebody worked for Alcoa in Australia, was employed in Australia to do an Australian job, but they were sent overseas. They would be covered by the legislation unless clause 19(b) applied—that is, that they had been continuously resident outside Australia for more than 24 months. If Alcoa Australia employed an executive to run its residuals challenges and that person was sent overseas to the United States and stayed there for six months, then came back and went again for six months, they would be covered. If they went to the US for two years, they would not be covered because that exclusion would apply. Likewise, as the member knows, many Australian companies have operations in Africa and have a big economic connection there. If they hire a worker in Africa, that worker is not covered, but if they send an Australian worker to Africa for less than 24 months continuously, they are covered by the legislation.

Dr D.J. HONEY: In the minister's last comment he meant they would not be covered. As the minister would understand, companies have fly-in fly-out workers who work overseas for years. They might occasionally visit the head office here, if at all, but they do not work here. Just to be clear, if workers working overseas at a particular location—even though they are Australians domiciled here, but flying to that location—are there for more than 24 months, they are not covered. I suspect that may be a surprise to some if they have no coverage for workplace injuries.

Mr W.J. JOHNSTON: There has to be a connection to Western Australia. Clause 19(3)(b) states —

> has been continuously resident outside Australia for more than 24 months when the injury occurs.

They have to be resident outside Australia.

Dr D.J. Honey: So it is continually offshore?

Mr W.J. JOHNSTON: That is correct. If they are coming back and forth, they are not continuously resident outside Australia, so they are covered. Again, using the drilling contractor in Africa as an example, if a Western Australian business runs an African drilling contractor, they hire an Englishman to be their manager in Africa and the Englishman returns to London for his breaks, he is not covered. If the company hires an Australian who comes back and forth from Perth every six months, he is covered. He will probably need other insurances and who knows what other rules might apply. An African worker would not be covered, because they are not resident in Australia. In the case of an Australian worker who goes to work in Africa for more than two years, I have to be careful here because it says, "outside Australia for more than 24 months when the injury occurs". If they take a three-year appointment but are injured after one year, they are covered because they have not been continuously resident for 24 months, but once they have been continuously resident for 24 months, the scheme does not apply. Again, this is a statutory scheme; it does not cover everything. I imagine that executives would look at these issues themselves. For the company to get value out of a worker being sent to these places, they will have to be somebody with specific skills. We imagine that person will seek their own advice and will probably get other insurances, but this is the statutory minimum scheme that applies to injured workers in Western Australia. It will do what it does. It will not do other things, but it is designed to be as clear as possible, and we are trying to make that provision clear. It is not intended to be particularly different from the existing provision, but it is designed to be as clear as possible.

Clause put and passed.

Clause 20: Compensation excluded: serious and wilful misconduct —

Dr D.J. HONEY: The minister, with his occupational health and safety hat on, would be alive to the issue of compensation excluded for serious and wilful misconduct. I will relate this to the issue of synthetic stone. As I mentioned in my contribution to the second reading debate, I have observed that many employers in those industries do nothing whatsoever to enforce safety rules. They continually allow their employees to avoid safety rules. I had a child who briefly worked in the construction industry, and he observed, much to his dismay, that senior management did nothing whatsoever to enforce the requirement for personal protective equipment and the like. This is a workplace where custom and practice is that stone is being cut dry and with no wearing of masks, goggles or anything. That is custom and practice—everyone in the workplace does it and management routinely tolerates it. Perhaps I have chosen a bad example because dust diseases may be accepted. Say a worker injures themself in some way because of a failure to wear protective equipment, which is custom and practice, does that still exclude that worker from workers compensation coverage? This is an area I discussed, and I observed that the principal failure around PPE is a management failure, not a work failure.

Mr W.J. JOHNSTON: I thank the member for the question. "Serious and wilful misconduct" is a common term in industrial relations and has a specific meaning. It has been dealt with by courts over a long time. It is when an employee deliberately and purposefully ignores an instruction from the employer. Remember, this is a no-fault scheme, but let us assume that the employer was at fault and did not provide health and safety equipment, PPE. Clearly, the worker has not engaged in serious and wilful misconduct because they have not ignored a specific direction from the employer. On the other hand, if a good employer says to a worker not to go into a part of a workplace until they have done certain tasks—for example, not to go into a confined space until they have a confined space working certificate—but a worker does that, I am not saying they would be involved in serious and wilful misconduct, but it could be considered in the question of serious and wilful misconduct. The most common example back in the day when I was around this field, was that the Chamber of Commerce and Industry of Western Australia would always report with questions of alcohol consumption. That was a common issue discussed in the literature back then. The bill here talks about drugs of addiction. Serious and wilful misconduct is a very, very high bar. Very, very few workers would engage in serious and wilful misconduct. Therefore, that conduct would meet the standards being talked about in this provision on a very small number of occasions. I also acknowledge that this is an existing arrangement in workers compensation schemes. Of course, in fault schemes, this is a very important issue, but, again, this is a no-fault scheme. Therefore, the question of the conduct of the employee does not ordinarily arise. We are saying that with this provision, although it is no-fault, there can be circumstances that are so serious that we have to consider the behaviour of the employee, but, generally speaking, the behaviour of the employee is not a relevant matter because it is a no-fault scheme.

Clause put and passed.

Clause 21 put and passed.

Clause 22: Person not to be paid twice —

Dr D.J. HONEY: This clause relates a bit to the example I gave in my second reading contribution of someone who had been paid out by a previous employer as being totally and permanently disabled. They were paid what was a large sum at the time—$600 000. They attained re-employment, became a permanent employee and then effectively sought to apply for a TPD payment again. Would such a case trigger this clause?

Mr W.J. JOHNSTON: The short answer is no. The longer answer goes like this. Let us assume that there was a compensable injury. "Totally and permanently disabled" is an interesting set of words because we do not use them in this legislation. Let us assume that a worker who has an injury receives a settlement, which might include common-law damages, and that is the end of that matter and that claim is complete. If they continue their work or they go to work somewhere else and they get an aggravation or a fresh injury, even if it is an aggravation, the previous matter is already settled. Given that it is a fresh claim, it is judged on its merits and dealt with under the legislation. The fact that there had previously been a settlement does not prevent a new claim being made; it is a claim based on the new circumstance of that injury, not the previous injury. Proving the claim might go to the question of what happened in the past, but the claim itself is a fresh claim. Remember, we just had that discussion about the legislation applying outside Western Australia. Let us go back to the worker working for Alcoa in the United States. The United States probably has workers compensation insurance schemes, so the worker can make a claim in the US. That will then be discounted by our scheme. Also, let us say he got over the gate to make a common-law claim. The common-law award would take account of the workers comp scheme compensation in that award. Workers will not be paid twice for the one injury.

Clause put and passed.

Clauses 23 and 24 put and passed.

Clause 25: Making claim for compensation —

Dr D.J. HONEY: Clause 25(1) states —

> A claim for compensation must be made within 12 months after the injury occurs.

How was that period chosen? When a claim is made so late, how will the employer be expected to validate the claim? Given that there are very tight schedules for most other things within the bill—the order of 14 days or those sorts of things—I would have thought it would become very onerous for an employer to reconcile the circumstances around the injury or even whether that injury was work related 12 months later.

Mr W.J. JOHNSTON: I thank the member for the question. Firstly, I wish to make it clear that this will be an obligation on the worker, not the employer. This is a translation of section 178 of the current act. A worker can seek leave to make a late claim; the bill will not completely exclude claims. We should remember that the worker is obliged to prove the claim. Obviously, if they have delayed the claim, it becomes harder to prove both the circumstances of the injury and the injury itself. It is in the interests of workers to claim as quickly as possible because that means the evidence and the impact of the injury will be more available to them because they are the ones obliged to show the connection to their employment and that they have had a loss. In the absence of a connection of employment and in the absence of a loss, there is nothing to be compensated.

This clause simply translates section 178 of the current act. It will be possible for a worker to make a claim after 12 months under this legislation, as is already the case in the current legislation. The employer has no obligation to do so; there is an obligation on the worker. We should remember that other than those 24 self-insured employers, every other employer has an insurance company that manages the claim. There will be no expectation of individual small businesses having a detailed understanding of every single clause in the act because those seven large multibillion-dollar companies will manage the workers compensation claims on behalf of employers.

Clause put and passed.

Clauses 26 and 27 put and passed.

Clause 28: Insurer or self-insurer to make decision on liability —

Dr D.J. HONEY: Clause 28 includes a prescribed period within which the claim has to be dealt. There will be a significant fine of $5 000 if that is not achieved. What will happen if the worker holds up the proceedings by failing to get back with some information or even if, through no particular fault, there is an administrative oversight and so on? What latitude will be given around the period of 14 days and the application of a penalty? Obviously, if someone overtly or wilfully ignores the claim, it is pretty clear-cut, but if information was not provided, there was an administrative oversight or someone made a genuine mistake, what would happen?

Mr W.J. JOHNSTON: That is an interesting question. The person making the claim will have to demonstrate the connection to their employment and the impact of the outcome on them. That is an obligation of the claimant. If the insurer or self-insurer does not believe that the claim is valid, they can reject it. This is an interesting issue because it will push people to make a decision. Some people argue that this provision will not be in the interests of the worker because it will make the chance of a refusal higher than under the current arrangements. However, on balance, it is better to get the insurance company to make a quick decision. They can pend the claim, but after two weeks and 28 days, they will have to start paying provisional compensation. The absence of the worker is known because the employer knows they are not at work. If they are at work, the claim is about medical and other expenses, so the risk to the employer will be actually quite low through this process. Encouraging insurance companies to make

a quick decision in the end, on balance, is the appropriate approach. If they pay the provisional compensation, that will not stop them making the decision that they might want to later. Again, I want to emphasise that for all claims, just like at the moment, the obligation to prove the claim will still be on the worker. Perhaps that is what the plaintiff lawyers were complaining about. They will have to show the connection to their employment and that there has been a loss. If they do not have those two things, nothing will ever be paid.

Clause put and passed.

Clauses 29 and 30 put and passed.

Clause 31: Claims on uninsured employers —

Dr D.J. HONEY: I was a little confused about subclause (3), which states —

> Subsection (2) does not apply to an employer who is an uninsured employer because the employer's insurer has refused to indemnify the employer against the liability as permitted by section 241.

What happens in those circumstances? Who will be responsible for compensation in those circumstances?

Mr W.J. JOHNSTON: It is an interesting question. Again, this provision already exists. I just took advice from the officials here that there are probably far too many employers that are underinsured but only a small number of claims from workers of uninsured employers. WorkCover runs a safety net that is paid for by a levy on premiums. Again, because it is borne by everybody, it is only a very small amount. WorkCover would seek to recover costs from the uninsured employer, but that is often very, very difficult because there are often no assets. Generally speaking, employers that are uninsured usually have other problems, and so it is often very difficult to recover costs from them. The worker is not the one who suffers; perhaps it is the scheme. But we do our best to try to recover costs from uninsured employers.

Clause put and passed.

Clause 32 put and passed.

Clause 33: Incapacity after claim made —

Dr D.J. HONEY: I will go straight to my concern with this clause. If the worker receives a certificate of capacity that specifies an incapacity for work, the worker may then obtain another subsequent certificate. Does this clause introduce a risk of, in this case, doctor shopping? I know that the great majority of cases are dealt with properly, but could someone secure one claim and then simply hunt around until they can get another certificate that applies a greater restriction and hence a greater level of workers compensation support?

Mr W.J. JOHNSTON: Back in the day, I often had both insurers and employers tell me about doctor shopping by employees, but I also make the comment that I have often seen the same doctor provide medical reports on behalf of insurers with identical wording. Some might argue that insurance companies doctor shop for the doctors who will say that everybody is fit to return to work. Anybody who sees a doctor's certificate that does not match their personal opinion thinks that that is evidence of doctor shopping. In the end, the Australian Medical Association will probably have to explain whether its members are guilty of those heinous crimes, but every time I talk to the AMA it tells me that doctors do not do that; they only provide medical certificates that are reflective of the outcome of their medical examinations.

Again, this is not new. A person might have medical expenses for an injury but they do not have time off work, and then subsequently there is time off work. Given that is the case, there has to be a set of procedures to deal with that. This is the regulation that will allow that to occur. Remember, the employee has to prove that there was an injury, that it was work related and that there has been a loss. It is not a question of changing the obligation on the employee because they already have that obligation; it will just allow for regulation-making powers to deal with a situation in which a claim has been accepted when there was no absence from work but there is now, and the procedures to deal with that claim.

Clause put and passed.

Clauses 34 and 35 put and passed.

Clause 36: Requirement for provisional payments —

Dr D.J. HONEY: I will not go through all the subclauses in agonising detail. I assume that there will be a determination, based on the initial claim, of a certain level of incapacity or whatever, and workers compensation provisional payments will be made based on that. What would happen in the circumstances outlined at subclause (1) in which a decision is delayed because other expert advice and all those things are needed, and it then turns out that the extent of the injury is far less than the original claim for which a significant payment was made, or, even worse—I appreciate this is not the normal situation but I know there are some circumstances—a completely fraudulent claim is made and the worker pretends that they have an injury and a significant payment is made to the

individual? What will happen in relation to those payments? Is it just tough luck and the insurers or the employers will pay it or is there some clawback?

Mr W.J. JOHNSTON: I again want to emphasise that employers never pay anything unless they are self-insured; it is the insurance companies that bear the costs. Irrespective, a fraudulent claim is already illegal and there are lots of things that can be done to deal with a fraudulent claim. I was a workers compensation officer for almost five years and I never once had an insurance company show me a fraudulent claim. I am not quite sure how often they occur, but to the extent that they do occur, they are already illegal. They will continue to be illegal and there are processes for recovery. Provisional payments are not recoverable because a person's absence from work existed. Not every workers comp claim involves absence from work, but every absence from work is an absence from work. It is not a dispute about the injury; it is a dispute about the causation of the injury and the extent of the injury. People only get time off work if they have a doctor's certificate. They must be injured because otherwise they would not have a doctor's certificate. The question is not usually about the injury; it is the causation. That is usually what is being argued about. It is not normally the case that the insurance company needs to get additional advice about whether the injury requires an absence from work, because, generally speaking, people understand that a person is either able to go to work or not. I am sure that there will be some claims, but that is not the most common. The most common reason is that the insurer says that the causation was not related to work.

Again, there are some stakeholders who think that 28 days will not be long enough to make a decision because they say that the insurer should have more time to make a decision, as they do now. There are other people who say that putting a time limit on the decision will encourage a negative decision from the insurance company. Do not forget there is a disputes settlement procedure—a conciliation and arbitration service—and at any time, both parties will have access to conciliation and arbitration. They can access the conciliation and arbitration process about elements of the claim. It will not have to be about the entirety of the claim; it could be about individual parts of the claim.

Of course, there is also professional advice from WorkCover WA on a without prejudice basis. There are seven multibillion-dollar companies that sit between the employer and the claim. They have immense experience and enormous resources to make decisions. I do not think we should feel sorry for the insurers. Just before my friends at the Insurance Commission of Western Australia ring me up to have a go at me, they perform an important part in the system. I am not criticising them at all. I am just saying that I think they have adequate resources to make decisions. Not every element of the bill is uniformly supported, but, in the end, insurance companies will have to make a decision and the faster the decision is made, the better it will be for the worker.

This is a workers compensation scheme. It is about injured workers. If there is fraud, fraud is illegal. Fraud has always been illegal. It is illegal today and it will be illegal when this legislation comes in. That is not related to this legislation. This bill is about dealing with claims. A person's absence from work is because there is medical evidence that the worker cannot go to work. We know they are not able to work because they have medical evidence to say they cannot work. It is usually a question of the causation of the injury rather than the injury itself.

Clause put and passed.

Clauses 37 to 44 put and passed.

Clause 45: Terms used —

Dr D.J. HONEY: This clause comes under the division that refers to additional income that a worker will receive above and beyond their normal pay. As I indicated in my contribution to the second reading debate, I can understand how typical bonuses and the like that a person is paid and their overtime allowances, for example, basically become their normal income and that it would cause great hardship if they were to lose them if they were injured at work and cannot attend work. I know this is just the definition stage, but I was interested in the inclusion of "board and lodging". I am intrigued to understand how it would apply as well as some particular allowances. For example, if someone is required to live away from home, when they board away, their employer will meet their board and lodgings, but if they are not working, they are not required to meet that expense. I assume that the board and lodgings payment is not just a ruse for additional income. I differentiate it quite significantly from overtime payments and other similar allowances. Why would that be compensable if the worker is not incurring that expense when they are not working? I assume board and lodging compensation is to cover board and lodging while the worker is away from their home.

Mr W.J. JOHNSTON: These are terms used and individual sections deal with how the terms are applied. The question of how board and lodging will be dealt with under compensation comes under its own provision. Payment of compensation is clarified later on. This is just to define what it is. Many FIFO workers do not have permanent accommodation in Perth. They live out of a suitcase. When they are in Perth, they live in temporary accommodation. Then they pack themselves up, stick their stuff in a cupboard and go away. They use, as part of their income, the fact that they do not have to pay for their accommodation while they are away. I personally know people who do

that. It is actually not quite as straightforward as the member suggests. As I say, the way board and lodging will be handled is dealt with under clause 58, later on in this division.

Clause put and passed.

Clause 46 put and passed.

Clause 47: Obligation to pay income compensation —

Dr D.J. HONEY: An employer must make payments regardless of whether the employee is indemnified by the insurer. Sorry, minister; bear with me.

Mr W.J. Johnston: Yes. If you haven't paid your insurance, they still have to pay.

Dr D.J. HONEY: Sorry; I was reading that as "employee". I have answered my own question.

The ACTING SPEAKER (Ms A.E. Kent): That was easy!

Clause put and passed.

Clauses 48 and 49 put and passed.

Clause 50: Order that worker is taken to be totally incapacitated —

Dr D.J. HONEY: Clause 50(4) reads —

> The order must not be made unless the arbitrator is satisfied that —
>
> (a) the worker has taken all reasonable steps to obtain, and has failed to obtain, suitable employment; and
>
> (b) the failure to obtain suitable employment is wholly or mainly a result of the injury.

Surely whether a person is totally incapacitated is a medical decision rather than whether they can obtain employment. There are many reasons someone might not be able to obtain employment, depending on the employment market at the time, for example. The employee may be going out of their way to make themselves unemployable. I would have thought that total incapacitation would be a decision of medical experts rather than just that the person being unable to obtain employment.

Mr W.J. JOHNSTON: The member is picking at a scab here. One of the things that used to annoy me enormously when I was a workers compensation officer was that an injured worker would be said to be fit to do work as a service station attendant—a console operator at a service station—or perhaps a car park attendant and therefore, because they had fitness to work, they were no longer totally incapacitated and that meant that workers compensation could cease. Even though they could not return to their own job, they could go to that job and therefore the insurer would give notice to cease their payments. That used to be one of the most annoying things in the world. A worker could have a specialist job, say a window-dresser at Myer—a highly skilled occupation—but would be told that rather than doing the window-dressing job, they would have to become a pump attendant at a service station. Given that there were no jobs as service station attendants because they had gone down to one person per site, it was not possible to get that job even though they were fit to do it.

This provision will allow the arbitrator, if they believe it is appropriate in all the circumstances, to order that compensation must continue to be paid. This is an existing right, but it is not used often, generally because by the time the matter got to that stage, it would have been settled and the case closed, and the person would have gone on to do something else with their life. The reason for this provision is to allow the tribunal to make what it believes is the appropriate decision in all the circumstances. Other issues might lead the arbitrator to decide that notwithstanding that the person was fit to do a job, they are unfit to do their former job, and justice would be best served by awarding them continued compensation.

Let me make it clear: in order for a worker to get to arbitration, they effectively have to go through conciliation, although that can be waived. It is not a rapid process. The employer will be represented through their insurer. There is absolute capacity for the insurer and their lawyer to bring evidence to explain their perspective, and for the worker to explain their perspective. If the arbitrator is convinced of the issues that have been raised, they have the power to make these orders. That seems perfectly reasonable to me. It is an existing power. It is rarely used. However, it is important for the purposes of justice that this power exists.

Clause put and passed.

Clause 51 put and passed.

Clause 52: Additional income compensation —

Dr D.J. HONEY: Clause 52(4)(b) on page 46 of the bill states —

> the additional compensation income should be allowed, having regard to the social and financial circumstances and the reasonable financial needs of the worker.

I am intrigued to know why the word "social" has entered this clause. I can understand financial circumstances, but it almost smacks of elitism that social circumstances should matter. Why has "social" been included?

Mr W.J. JOHNSTON: This is an existing power that has been given to the arbitrator. Let us assume that the worker who was making the claim was a single parent. That is an important social circumstance that the arbitrator might take account of when making their determination. I think that is appropriate. I emphasise again that the employer, through their insurer, would be able to make submissions at arbitration. It is not an easy process to get to arbitration; a lot of steps need to be taken before that can be done. The insurer would be able to present any matter that they considered relevant, and the worker would likewise be able to make their submissions. If the arbitrator thinks that justice requires a decision to be made, this provision will give them the power to make such a decision.

I note that if the insurer thought that the use of this power was beyond scope, they could appeal to the court on a question of law. Obviously, they could not appeal the terms of the decision, because an arbitrator's decision is not appealable on its merits, but if the insurer believed that the decision was beyond power, it could be appealed for the court to reconsider the decision. I think the member for Mirrabooka would agree with me that many people would see this as an inadequate provision because it does not provide enough protection for workers. That might be one of the reasons that our friends the plaintiff lawyers have come out to attack it. This is an important provision because it will enable justice to be served. It is not a requirement. It is a power that has been given to the arbitrator to make a decision based on the evidence that is presented during the arbitration process.

Debate interrupted.

[Continued on page 1799.]