WORKERS COMPENSATION AND INJURY MANAGEMENT BILL 2023

Committee

Resumed from 15 August. The Deputy Chair of Committees (Hon Dr Sally Talbot) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Progress was reported after clause 93 had been agreed to.

Clause 94: Workplace rehabilitation fees and charges order —

The DEPUTY CHAIR (Hon Dr Sally Talbot): I draw members' attention to supplementary notice paper 99, issue 3. The question before the chamber is that clause 94 do stand as printed, and I draw members' attention to the fact that clause 94 is subject to amendment 5/94.

Hon MATTHEW SWINBOURN: Before we get to the amendment in my name on the supplementary notice paper, I want to cover some things that are outstanding from the debate yesterday.

Hon Dr Steve Thomas asked for information relating to the number of working directors who opt to be covered under the workers compensation scheme rather than seek alternative insurance arrangements and the number of workers who receive extensions to the current medical expense cap of 30 per cent of the prescribed amount, which the government will be doubling to 60 per cent.

WorkCover WA does not collect data on the number of working directors who opt to be covered under the workers compensation scheme. This is because the process for opting in is an arrangement between the company and its insurer; however, WorkCover WA does collect data on all claims and can identify claims by working directors from this dataset. WorkCover WA confirms that working directors make, on average, about 170 claims each year, based on the previous five financial years.

It is not possible to quantify the number of extensions to the medical and health expenses cap under the current act because sometimes insurers will approve extensions without a formal application being made in the conciliation and arbitration services. This is particularly so in relation to the first extension.

To assess the potential cost impact of the government's changes to the medical expenses cap, the scheme actuary examined medical and health payment claim data and identified claims that received compensation beyond the current medical expenses cap. Based on that analysis, on average 281 claims a year received funds beyond the medical expenses cap under the first extension. On average, 46 claims a year received funds under the second extension. That represents around 1.4 per cent of total claims over the period. I hope that information is useful to the member.

The DEPUTY CHAIR: Parliamentary secretary, do you wish to move the amendment standing in your name?

Hon MATTHEW SWINBOURN: I need to move that amendment, yes. I refer to supplementary notice paper 99, issue 3. I move the amendment in my name at 5/94 —

> Page 82, lines 18 and 19 — To delete the lines.

For context, again this amendment is required due to the commencement of the Legislation Act 2021 on 1 July 2023, which, amongst other things, provides for publication of certain subsidiary legislation on the Western Australian Legislation website rather than in the *Government Gazette*. Note 1 currently contained under clause 94(7) refers to the publication of the workplace rehabilitation fees and charges order being published in the *Government Gazette*. Parliamentary Counsel's Office advises it is likely that the fee order will be prescribed under the Legislation Regulations 2023 because it is specifically identified as subsidiary legislation. Parliamentary Counsel's Office advises the simplest approach is to delete note 1 to clause 94. That is the explanation for why we are moving this amendment. As I say, it is technical in nature and will not substantially change the legislation. It will have effect only in terms of publishing certain things that were formerly in the *Government Gazette* but are now likely to be published on the website.

Amendment put and passed.

Hon Dr STEVE THOMAS: The other night, we started dealing with division 6, "Compensation for workplace rehabilitation expenses". This is a change the government will implement in applying workplace rehabilitation expenses to employers rather than it being a part of the insurance claim. I am interested in that. Can I confirm that is a change, parliamentary secretary? I am also interested in the average cost. What is the transfer, if that is correct? It was in various submissions, including from an employers group. There was also concern, I think, from the Chamber of Commerce and Industry of Western Australia. It came up with a figure of $17 000 for additional costs. I do not know whether that is accurate because I have nothing to compare it with. The parliamentary secretary might be able to give us some more up-to-date numbers.

Hon MATTHEW SWINBOURN: I think the submission the member is referring to was on an earlier draft of the bill. The provisions we have here now will not change anything of that nature. It will remain the same as it is under the current act.

Hon Dr Steve Thomas: So it can be claimed under insurance?

Hon MATTHEW SWINBOURN: Yes, and it will remain at seven per cent of the maximum weekly compensation limit. That will not change.

Clause, as amended, put and passed.

Clauses 95 and 96 put and passed.

Clause 97: Entitlement to lump sum permanent impairment compensation —

Hon NICK GOIRAN: We are still in part 2 of the bill and there are 15 parts. Once we get through part 2, I think we will make a bit more expeditious progress. We are now at division 7, "Lump sum compensation for permanent impairment from personal injury by accident". There has been an ongoing issue under the current act about whether a schedule 2 permanent impairment lump sum should be paid for a personal injury by accident only or whether that should include the aggravation of a pre-existing condition. This clause seems to expressly state that compensation can be paid only if the worker suffers a personal injury by accident. It seems that this clause will then result in certain workers being worse off under the new bill. What is the justification for excluding other injuries that are covered by the act, which give rise to permanent impairment?

Hon MATTHEW SWINBOURN: The position of the government is that there is nothing in this clause that alters the current entitlements that exist under the act. Going forward, I think we have used language previously about whether there is a contraction of those entitlements. My advice is that, in this clause—I am not trying to use tricky language here—there is nothing that reduces the current entitlement. I suspect the member has more questions that arise from that. We will flush that out a bit more but that is the government's intention here.

Hon NICK GOIRAN: If we compare this clause, clause 97, with clause 6 earlier in the bill where we have agreed what the definition of "injury" is, the parliamentary secretary will see that the definition comes in two parts. It is either from "a personal injury by accident" or "a disease, or the recurrence, aggravation or acceleration of a pre-existing disease". Under clause 97, it is plainly the case that one will be able to obtain a lump sum compensation for any permanent impairment suffered for the first of those two limbs or types of injury. Will there be any lump sum compensation available for the second type—that is, "a disease, or the recurrence, aggravation or acceleration of a pre-existing disease"?

Hon MATTHEW SWINBOURN: My advice is that no, there is no provision in the bill for a lump sum payment in relation to a disease, or the recurrence, aggravation or acceleration of a pre-existing disease, but I am also advised that that is also the position under the current act. We have not taken away or created a new entitlement.

Hon NICK GOIRAN: The position of the government is that there has never been a lump sum payment under schedule 2 for a permanent impairment for a disease, or the recurrence, aggravation or acceleration of a pre-existing disease?

Hon MATTHEW SWINBOURN: My advice is that that is correct.

Clause put and passed.

Clause 98: Amount of permanent impairment compensation based on degree of permanent impairment —

Hon NICK GOIRAN: For the purposes of this round of questions, it really could take place anywhere under division 7. I will use clause 98 as the basis for the questioning, but if the parliamentary secretary prefers me to do it under a different clause in division 7, I would be happy to move there. The questions refer to the way in which one assesses a permanent impairment. What guides are used to assess permanent impairment?

Hon MATTHEW SWINBOURN: I am advised that WorkCover releases guides for assessing the degree of permanent impairment and that those who undertake the assessments are obliged to use those guides. In terms of what happens on the commencement of this bill, those guides will have to be reissued because they will need to be updated to reflect the terminology in the new act. There is no intention to change the substance of those guides. Only the form will be changed to reflect the change in wording. As I say, no changes will be made to the—for want of a better word—test that the guides create.

Hon NICK GOIRAN: It is WorkCover that releases these guides. I know that once upon a time, it used to use the fifth edition of the American *Guides to the Evaluation of Permanent Impairment*. Is that still the case?

Hon MATTHEW SWINBOURN: I am advised that the answer is yes, but with modification for our circumstances.

Hon NICK GOIRAN: Do those guides also include a guide with regard to back injuries?

Hon MATTHEW SWINBOURN: Yes, I think "spinal injuries" is the preferred reference rather than back injuries, but the member may want to expand on a different kind of back injury that does not relate to the spine, or be more specific in the terminology, but I think he was referring to spinal injuries.

Hon NICK GOIRAN: Can I get the parliamentary secretary to turn to clause 101 that contains a number of tables. In particular, he will note at page 89 of the bill that one of the tables refers to "back, neck and pelvis". I notice it does not say "spinal". Nevertheless, I understand the point that the parliamentary secretary made on the advice that he received. Do the guides that have been provided include capacity for an assessment of back injuries? Is there some kind of percentage or threshold that is used with regard to back injuries, like some form of a range?

Hon MATTHEW SWINBOURN: I do not know that we quite understand the member's question, but I think I have an inkling of what he might be asking: is there a minimum threshold of impairment for back/spinal injuries that gives rise to compensation? As we understand it, the guide does not provide a minimum amount of impairment, such as a percentage loss of function or something of that kind. There are multifaceted criteria or guides that they have to adhere to and it is a clinical thing. Nobody at the table has clinical qualifications. Obviously we can describe the instrument and what it might contain, but getting down to the clinical-type stuff is probably beyond us.

Hon NICK GOIRAN: In this instrument—that is, the guides that are released by WorkCover based on the American guides—is there, for example, a guide as to how an assessment is done that determines that a person has 13 per cent permanent impairment? I specifically say "13 per cent" for a reason, which will become apparent in due course. Is that included in these WorkCover guides?

Hon MATTHEW SWINBOURN: Hon Nick Goiran will tell us what the reference to 13 per cent is in due time. I am advised that the guides exist as a means to assist assessors to arrive at the degree of impairment. I am advised that the guides have provisions on a certain degree of impairment—I am going to be careful with the word "impairment" because that relates to the percentage. If a person is impaired in a certain manner, the guide will provide guidance that that is three per cent of total body impairment. There might be multiple factors that lead to a final assessment of 25 per cent of the body because the percentages are aggregated. It is not a threshold to reach to be entitled to compensation; it is a way of getting to the final answer on the degree of impairment.

Hon NICK GOIRAN: After using these guides, a medical practitioner might issue an assessment that a person has a 13 per cent permanent impairment to their back. The parliamentary secretary will see that item 39 in the table on page 89 states —

> Impairment of the back (thoracic spine or lumbar spine or both)

It then provides a figure of 75 per cent. In the 13 per cent scenario, will it be the case that the worker will receive 0.75 per cent of 13 per cent of the lump sum?

Hon MATTHEW SWINBOURN: I do not quite remember the formula that the honourable member put to us, but the formula to work out the amount is included in the bill. A note at clause 101(1) provides an example of how that might play out. The note states —

> For permanent impairment of the sight of 1 eye, the Table indicates 50% of the lump sum limit. This is the amount of permanent impairment compensation payable for a degree of permanent impairment of the sight of 1 eye of 100%. For less than 100% permanent impairment (for example, 80%), the amount of permanent impairment compensation is calculated as 80% of 50% (to arrive at 40%) of the lump sum limit.

I will try my best to use Hon Nick Goiran's example. A spinal injury is 75 per cent of the lump sum. This is the amount of permanent impairment compensation payable for a degree of permanent impairment of the spine of 100 per cent, so it would be 75 per cent of that amount. For less than 100 per cent permanent impairment—for example, 13 per cent—the amount of permanent impairment compensation is calculated as 13 per cent of 75 per cent, to arrive at 9.75 per cent. Obviously, it would be 9.75 per cent of the lump sum amount. I hope that we are in agreement.

Hon NICK GOIRAN: We are in furious agreement. I thank the parliamentary secretary. The parliamentary secretary can see the importance of being able to precisely specify the percentage. The guides that are released from WorkCover give the possibility of an assessment, in the example I have given, of 13 per cent. Of course, as the parliamentary secretary said, there is the possibility of 100 per cent, in which case the person with a 100 per cent back injury will not get 100 per cent of the lump sum; they will get 75 per cent. Why? Because as outlined in item 39 in the table at page 89, that is what this statute will say a person will be entitled to, compared with a person with 100 per cent impairment of both feet, at item 32, who will be eligible for 100 per cent of the lump sum limit. Are the guides that WorkCover releases from time to time, including the ones currently in use, capable of being tabled at this time?

Hon MATTHEW SWINBOURN: They are gazetted and we could table them; we just do not have them with us today. If it satisfies the member, we can table copies of them tomorrow. I think they are also available on the WorkCover website, but, again, I am not saying that is sufficient for the member's needs. We will produce them tomorrow.

Hon NICK GOIRAN: I thank the parliamentary secretary. I think we might take up that opportunity. If I can foreshadow where I am going with this, it might be better taken up at a later clause of the bill, and particularly clause 187. However, it is useful to deal with this at the time that we are dealing with the percentages, particularly with the back, when we get to clause 101. I appreciate that we are on clause 98, which deals with the amount of permanent impairment compensation based on a degree of permanent impairment. That is to be done in accordance with the calculation under clause 101, so they are plainly interrelated. In terms of the guides that are used to determine back injury, we have used the example of 13 per cent. Do the guides also provide guidance on how one might make an assessment of 18 per cent impairment of the back?

Hon MATTHEW SWINBOURN: I do not quite know where the member is going with 18 per cent. He has been very specific. I have a sneaking suspicion that I am going to find out very soon why he said that! All I can make are general comments about what I said previously about how it is going. So long as the aggregate of those things under the guide could add up to 18 per cent, it is theoretically possible. The guide provides for rounding to the nearest whole number. A person can have impairment of one per cent up to 100 per cent and, depending on the nature of the assessment, anything in between. I am sure the member is going to let me know something that I do not know.

The DEPUTY CHAIR (Hon Steve Martin): I think we are about to find out, parliamentary secretary!

Hon NICK GOIRAN: No, deputy chair. Rather, I think the best way for us to make the most progress at this point is to wait for the guides to be tabled, because then we will both have the same information in front of us, and we can work through this example, particularly when we get to clause 187. I am grateful for the indication that those documents can be tabled tomorrow, which I accept are readily gazetted, but for the purpose of this debate, we will need to have them in front of us. That said, I indicate through the deputy chair to the Leader of the Opposition that I have no further questions on division 7.

Clause put and passed.

Clauses 99 and 100 put and passed.

Clause 101: Calculating permanent impairment compensation —

Hon Dr STEVE THOMAS: This is the table that my good friend Hon Nick Goiran referred to in the debate on clause 98. The explanatory memorandum suggests that none of the numbers have changed from the previous incarnation. I want to check and make sure that is the case, because we have a couple of different versions of this going on.

Hon MATTHEW SWINBOURN: I can confirm that nothing from the current act has changed in the bill that is before the house.

Clause put and passed.

Clauses 102 and 103 put and passed.

Clause 104: Special provisions for AIDS —

Hon Dr STEVE THOMAS: This clause deals with the special provisions for acquired immune deficiency syndrome; I think it is still a syndrome. I think it is fine; it is a 100 per cent payout in the case of an infection occurring at work. This clause is a repeat of the section in the existing act. Has this section been used; and, if so, how often have payouts been made under this section?

Hon MATTHEW SWINBOURN: I am advised that the provision was introduced in 2004, and the advisers at the table are not aware of any claim being made under those provisions.

Hon Dr STEVE THOMAS: That is interesting. I do not have an objection to that clause; I was just interested in the numbers. That being the case, I am happy to move on to division 8 and jump to clause 107. I will try to do a couple of things just to cross the whole of division 8.

Clause put and passed.

Clauses 105 and 106 put and passed.

Clause 107: Terms used —

Hon Dr STEVE THOMAS: There is a breakdown of division 8. In fact, I might do it this way. From my perspective, this might be really quick. Divisions 8, 9 and 10 deal with specific circumstances: hearing loss in division 8, dust diseases in division 9 and injury causing death in division 10. Maybe this is the simplest question: are there any differences in this bill from what is in the existing act in those three divisions, or do these divisions, in effect, replicate those in the current act? From my perspective, that would probably negate the need to look into this much further.

Hon MATTHEW SWINBOURN: I am not sure it is as easy as just dealing with it as a single thing, not because anything has changed in the negative. The entitlements essentially remain the same in those divisions, except for perhaps an additional entitlement under division 10. There are no changes to the structure or quantum of compensation payable to the dependants, or to the claims process, and the bill provides minor drafting improvements and

consolidation of provisions relating to death entitlements. However, the bill clarifies the status of an unborn child of a worker at the time of the worker's death. The definitions of "child" and "dependant" in clause 131 will ensure that a child of a worker conceived before but born after a worker's death will be eligible to receive compensation if they would have been dependent on the worker at the time of the birth had the death not occurred. That is a new entitlement that does not currently exist. That is at clause 131; I do not know whether the member wants to deal with that when we get to that clause. For the dust diseases, there is some streamlining of the processes of assessing those diseases, but it will not change the entitlements for workers. The process has just been streamlined, I think from a beneficial point of view. My understanding is that the procedures for noise-induced hearing loss are currently in the act, but under the bill before us, a regulation-making power will mean that they will be regulated and obviously can be adjusted over time. I am sure that gives rise to further questions.

Hon Dr STEVE THOMAS: Actually, that is pretty reasonable. I thank the parliamentary secretary. I was aware of the changes in paragraph (b) to the definition of "child", and in paragraph (c) to the definition of "dependant" at clause 131 and I do not think we have any issues with that. I might have another look at the hearing loss provisions, but I am happy to progress to the next clause. Hon Nick Goiran might also have questions on division 8.

Clause put and passed.

Clauses 108 to 146 put and passed.

Clause 147: Deductions from wages towards compensation not lawful —

Hon Dr STEVE THOMAS: We are at division 11, on miscellaneous matters, if you will. Clause 147 deals with deductions from wages towards compensation. I am interested in the circumstances in which that occurs, because the explanatory memorandum repeats the wording of the bill. Under what circumstances will an employer or insurer deduct from the wages of presumably a worker, the worker involved in a claim or workers generally? Is it to prevent them taking that away from workers as generalised fundraising to cover the cost of their insurance, or is there a specific thing that the government is trying to prevent from happening with specific claims?

Hon MATTHEW SWINBOURN: I am advised that it is in the current act and it will not change from that, but that was not quite the member's question. Essentially, it is a deterrent for wage theft and the circumstances when someone has received compensation for an injury, whether that be weekly workers compensation payments or some other kind, and a particularly unkind or nasty employer saying, "I'm going to deduct those amounts from your wages." If they were on weekly workers compensation payments for the full amount, because they were totally incapacitated, they might be drawing them down, for example, from their annual or personal leave entitlements or things of that kind. I am also advised that the advisers from WorkCover WA are not aware of any circumstances under the current act when it has needed to be prosecuted. One might say that could be because there is a sufficient deterrent in there, or more likely it is not a practice that is engaged in commonly. It is obviously there for any circumstances in which it might arise.

If members recall, and this is not about workers compensation, but some years ago there were significant legal proceedings against 7-Eleven for having practices in which workers were paid an amount in their salary or wages and then required to give cash back to the employer. On the books it looked like they were getting paid, but in fact they were being required to pay back parts of the money they had earned. That organisation or company was successfully prosecuted by the Fair Work Ombudsman and received quite significant fines and penalties. That kind of behaviour, not specifically in relation to workers compensation, can happen. We are trying to deter it and if there is an issue, it will provide for not only a penalty, but also a sufficient remedy at subclause (2) for the worker to sue, for want of a better word, for the recovery of those amounts.

Hon Dr STEVE THOMAS: I have no objection. I cannot imagine a circumstance in which, having been an employer, an employer would garnish either wages to cover the cost of workers compensation insurance or garnering it after the fact. Perhaps it looks unnecessary. I get the government's intent. I am always concerned about the potential vilification of employers without having an example. Can the parliamentary secretary confirm, as far as his advisers are concerned, that he is not aware of not just any prosecutions under the equivalent clause of the existing act, but can they also check to see whether they have been made aware of any complaints under the equivalent clause of the existing act?

Hon MATTHEW SWINBOURN: For both elements raised by the member, the advisers are not aware of there being any of those things.

Hon Dr STEVE THOMAS: I will take the parliamentary secretary at his word that the intent is reasonable. I might ask one of those questions on notice once a year to see whether there is any development in those areas. I will not oppose the clause on the basis that the provision has never been used, although Michael Mischin might disown me as part of that.

Clause put and passed.

Clause 148 put and passed.

Clause 149: Commuting compensation liabilities by settlement agreement —

Hon NICK GOIRAN: We are now moving to the final division in part 2, having moved past division 11. It was rather triggering to hear that there are provisions that have never been used. It reminds me of the specialised retraining programs, but let us not reopen that can of worms after yesterday.

Division 12, "Settlement of compensation claim", has attracted my attention. Has the government received any submissions or concerns from stakeholders about the settlement agreement process?

Hon MATTHEW SWINBOURN: Submissions on the 2021 consultation draft of the bill raised concerns with the perceived constraints on settlement, notably the requirement for six months to elapse from the date of injury unless there are prescribed circumstances, and the requirement for liability to be accepted or determined for a settlement to be made. Concern was raised that forcing matters into conciliation and arbitration services would ultimately end in settlements that may not be in anyone's best interests. Submissions suggested that more flexibility is required for the early settlement of complex claims. The government responded to those settlement constraints in the 2021 consultation bill relating to the six-month period and the requirement for settlement of only accepted or determined claims and they are not replicated in the bill before Parliament. This will facilitate settlements that will be subject only to the normal checks by the director of conciliation and arbitration services as specified in clause 154. I am advised that there is almost universal support from stakeholders for the position at which we have now arrived.

Hon NICK GOIRAN: It is the case that currently, a settlement agreement can include the discharge of a common law damages claim, but it appears that pursuant to clause 153 in this twelfth division of the second part of the bill, this will no longer be possible. What has justified this change?

Hon MATTHEW SWINBOURN: I am going to try to answer but, as I have indicated to the advisers, my experience in workers comp did not extend to the settlement of claims. I do not want to do a disservice to the advice I have been given or give the member a misleading answer. What I gather from the advice I received is that the justification for the change is essentially to close a loophole in which people, after settling a common law claim, have been able to settle the statutory entitlements as well. Essentially, that is putting the cart before the horse. What is happening is that the bill will provide for the settlement of statutory claims through this process. Common law claims will still be able to be settled, but if someone wants to settle a statutory aspect of their claim, they will have to use the process in this bill rather than going about it the other way, which is to have a common law settlement that effectively settles their statutory entitlements in reverse, if I can put it that way. The starting point is the settlement of their statutory entitlements under the statutory workers compensation claim. It will not stop people from settling their common law claims—it is not about that—it just means that they will have to do it in steps. I am getting a shake of the head. Let me leave it at that and the member can ask more questions. As I said, I might be doing a disservice to my advisers.

Hon NICK GOIRAN: I am trying to get a handle on what is the mischief that we are trying to fix. If there has been historically, for quite an extensive period, an efficient mechanism for workers to be able to settle their claims—whether statutory or common law—the last thing we would want to do is to be putting in any extra barriers, hoops or hurdles for them to be able to settle those things. If it is routinely the case that, pursuant to a settlement agreement, workers are discharging a common law damages claim at the same time, it is not readily apparent what the concern is that the government has about workers doing that. Perhaps the parliamentary secretary can explain.

Hon MATTHEW SWINBOURN: The member used the common term "mischief" and asked what we are trying to address here.

Hon Nick Goiran: In the context, we mentioned a loophole.

Hon MATTHEW SWINBOURN: Yes. Under the current act, lawyers are filing writs in the District Court to, in effect, settle a statutory claim. That offers more flexibility because some of the constraints that exist under the current statutory process are not affected by the District Court process. We will be offering more flexibility—in effect, closing that loophole—by removing the constraints that exist under the current system that encourage people to go to the District Court to file their writ. They never pursue a common law claim. They are effectively using that as the vehicle to settle a statutory claim to avoid some of the time delays, and checks and balances—for want of a better term—that exist under the current regime.

I am advised that people are happy with what we are doing because it effectively will make the statutory pathway much more flexible and will not have the constraints that exist under the current act. It is a reform that they will welcome. One of the government's concerns is that using the District Court to file writs is obviously a more expensive pathway, in and of itself, because it requires lawyers' fees, but there can be other benefits for workers in going down that quicker pathway. We are just trying to meet where the market is—again, for want of a better term.

Progress reported and leave granted to sit again, pursuant to standing orders.