Non-Adversarial Justice: Implications for the Legal System and Society Conference

Legislating to Prevent Further Harm to the Harmed

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Workers who contract disease or who are injured in the course of their employment not only suffer the consequences of a work injury or disease in terms of disability and impairment. In addition some workers are subjected to a myriad of claims procedures, medico-legal investigations, dispute processes and surveillance which retards recovery and produces further assault on the workers' physiology *and* psychology. The delay in recovery for these workers has economic consequences for them, the employer and the economy as a whole. The consequences of this double harm frequently arise out a deep scepticism directed towards claimants. Often inexperienced claimant litigants seek workers compensation income support from government and corporate agencies who are frequent players in a complex legal and medical system. This paper sets out to integrate the principles of therapeutic and non-adversarial justice so as to formulate a framework of legislative objectives for systems of income support for disability and impairment which are premised on the prevention of further harm to workers. These legislative objectives are designed to prevent harm through bureaucratic claims processes, over zealous claims management and lack of good faith in claims handling.

1. Introduction

This first part to this paper draws on the seminal work of Canadian Researcher Katherine Lippel who initiated a dialogue on therapeutic and anti-therapeutic consequences of workers' compensation systems. Her paper *Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation* [1] published in 1999 drew on the work of Wexler,[2] relating to the principles of therapeutic jurisprudence, provides an important perspective on personal injuries claims. Lippel outlined a number of concerns with the existing workers compensation schemes in United States and Canada, observing that

[1]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546

[2]Wexler's work is legion but one paper, Wexler D B Therapeutic Jurisprudence in a Comparative Law Context, (1997) 15 *Behavioural Science Law* 233 provides particular context for this discussion.

whilst such schemes had been established for the benefit of workers there was evidence that workers compensation schemes had serious negative outcomes for some workers. She noted that tort systems have been acknowledged as being effective in allowing an injured person in 'having their day in court' to tell their story and to empower that individual in being part of a process which sent a message to the defendant that the plaintiff had been wrongly harmed. However, she also noted that many argued that the anti-therapeutic affects of this system outweighed the positive effects.[3] These anti-therapeutic effects include long delays in the litigation process often resulting in, at least interim, poverty for claimants, hostile working environments and reduced prospects of full return to work.[4] She observed that

> While many assume that workers in the compensation system behave in the way they do because they have an economic incentive to do so, few have looked at the system itself to find out how the process impacts on the mental health of the claimant. …Injured workers have often demonstrated behaviour that would lead one to believe that the system itself is, if not directly responsible for, at least causally related to, psychiatric injury that can have nefarious consequences, not only in terms of lost work days but far more importantly, on the long-term health of the worker.[5]

Workers compensation systems do alleviate some of the anti-therapeutic effects of tort systems by providing, in most cases, rapid payments of income maintenance and medical treatment, which reduces the potential for dwelling on the circumstances of an injury or disease.[6] However opportunities for *blaming* still arise in workers compensation systems. These opportunities arise around questions concerning the causation of a workers disability, the level of incapacity and the requirement for ongoing medical and related treatment. As a consequence there are many points of tension in workers compensation systems. A number of studies confirm that workers experienced the workers compensation system as cumbersome, frustrating and demeaning.[7] Workers compensation systems are also characterised by allegations of fraud by workers resulting

[3]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 524
[4]Ibid at 524-5
[5]Ibid at 527
[6]Ibid at 541
[7]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 345

in stigmatisation of claimants.[8] There is evidence that some of these effects slow the recovery and return to work of the injured.[9]

No fault workers compensation systems were initially developed in United States and Australia to reduce the anti-therapeutic affects of torts systems. These systems would, in theory, avert hostile litigation and eliminate the need to blame the employer.[10] The historical reasons for the adoption of no-fault schemes varied somewhat. In the United States no-fault workers compensation schemes were adopted in the early part of the 20th Century in a historic bargain between employers who agreed with workers to accept workers compensation liabilities on condition that workers abandon rights to bring negligence actions against them.[11] In Australia, tort law co-existed with workers compensation until the 1980s when some State and Territory jurisdictions abolished workers rights to bring negligence actions against employers.[12] Other States and Territories either retained tort law rights or imposed limitations upon workers access to tort law by implementing gateways or thresholds which allowed access to tort only where the worker was severely injured.[13] The historical differences between the United States and Australia may have influenced later responses to the operation of workers compensation systems. In particular there has been a different response the acceptance of the tort of breach of good faith in relation to workers compensation claims management. The purpose of this paper is, in part, to revisit Lippel's work in the Australian context, and in part to propose the adoption of a therapeutic approach within the Australian systems based on a principle of *Above All Do No Harm*. This paper will firstly consider the issue of causation in the context of workers compensation claims, and then it will examine the evidence of workers compensation fraud in Australia. It will then consider the development of the tort of breach of good faith in workers compensation claims in Australia, contrasting this with the United States response. Finally the paper will develop

[8]Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30 at 31

[9]Dichraff, R. M. When the Injured Worker Retains an Attorney (1993). *AAOHN Journal, 41*(10), 491

[10]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 527

[11]Purse K The evolution of workers compensation policy in Australia (2005) 14 *Health Sociology Review* 8-20

[12] South Australia and Northern Territory

[13]Western Australia and Victoria

the principle of *Above All Do No Harm* as it could be applied to workers compensation claim management and will attempt to provide a blueprint for this approach.

2. Causation

All Australian workers compensation jurisdictions predicate acceptance of a workers compensation claim on the proof of three essential thresholds. First, that the injured person is a *worker*. For the purposes of the present paper the legal formulae which determines whether a person is a worker is not central to this discussion. However it is worth noting that in many cases the legal relationship between the injured person and the person or body which has engaged them is complex and only resolved by lengthy litigation which in most cases is not conducive to the return to work or physical or mental recovery of the worker. Second, and importantly for this discussion, the worker is required to prove the causal connection between their injury or the contraction of a disease for which they make a claim. Third and related to the second issue, compensation is preconditioned upon the requirement to prove that the injury or disease causes incapacity. Thus the question of causation features in two of the preconditions for a successful workers compensation claim. Difficulties with causation are potentially a feature of any claim; however they consistently feature as concerns in relation to musculo-skeletal conditions, so-called stress claims and RSI claims in particular which are difficult assess and measure empirically.[14] As a consequence first line workers compensation administrators (in Australia, this is generally insurers) develop an institutionalised scepticism for such claims. In many instances because of the additional scrutiny applied to these claims the dignity of the claimant may be lost.[15] Lippel has also noted that in some instances gender plays an important part in the determination of workers claims, particularly where there is a concentration of a certain adverse health

[14]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342

[15]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342 and Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 538

outcomes in portions of the workforce dominated by women.[16] The need to prove the relationship between work and the injury, (or disease) and continually establish ongoing incapacity, frequently involves the worker in medical examinations which do not assist in the process of medical recovery or treatment and often make the workers condition worse.[17] Lippel notes that

> As with all medico-legal issues, cases raising issues of causation expose the worker to multiple medical investigations and the necessity of repeating their personal medical history and the evolution of their current injury. Thus anti-therapeutic consequences…will arise continually as the causation issue is presented. It is common to see causation questioned several times during a claim. First, when the initial claim is examined. Then once the injury is judged to be work related, corollary questions as to the duration of disability, the nature of the permanent disability and the functional limitations will follow. All these issues allow for a debate on causation.[18]

Continual scrutiny, if not surveillance, are features of most workers compensation systems.[19] This may not always be anti-therapeutic. For example, it is hard to argue against the attention given to those workers who are provided with early intervention assistance to aid return to work. However, the payment of compensation by income maintenance, which is a feature of all Australian jurisdictions, means that the worker is under constant scrutiny in relation to earning capacity. Leaving aside problems that can arise when claims are disputed and payments are delayed[20] other issues can arise because of this form of periodic payment. Income maintenance systems make periodic payments subject to the workers capacity to earn. As the workers condition improves the potential for income maintenance payments to be reduced increases as payments are linked to the workers ability to earn. Lippel argues that experience rating, which is the process of assessing workers compensation premiums for employers based on their accident/disease record also provokes scrutiny of claims and incites adversarial approaches as employers

[16]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 530-2
[17]Ibid at 534
[18]Ibid at 535
[19]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342
[20]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342

seek to protect their premium rates by contesting claims.[21] The link between injury and disease rates and insurance premiums may also lead to forms of employer fraud discussed below. The causation concern is linked inextricably with the need for medico-legal examinations. As Lippel notes

> Ison's research has shown the necessity of proving causation in workers' compensation schemes leads to a multiplicity of nontherapeutic medical evaluations, including invasive tests designed not to better treat the worker but to show the cause of the disability. In cases of injuries that could be caused by a variety of circumstances, stressful litigation adds to the multitude of medical exams. Ison argues that a compensation system based on disability rather than cause would reduce the litigious aspects of current compensation systems, allowing for rapid recovery without exacerbating medico-legal complications.[22]

Strunin and Boden conducted a study of self-reported experiences of workers compensation claimants with back injuries in Florida and Wisconsin in the United States.[23] At the time of their study Wisconsin was regarded as a low litigation jurisdiction which allowed workers the right to seek alternative medical care at the employer's expense. Florida employers by contrast did not pay for treatments which were not provided at the employer's request. In Florida the employer had the right to choose the treating physician. The findings of this study are interesting in the context of a therapeutic approach. First, Strunin and Boden found that workers who reported a positive rapport with the employer's workers compensation insurer found these relationships to be caring and supportive. However, Strunin and Boden found that more workers described problems with interactions with workers compensation than reported positive experiences. Overall workers found their experiences in the workers compensation system to be cumbersome, frustrating and demeaning. This conclusion is supported by Niemeyer who found that workers experience of compensation systems was that they felt demoralised and invalidated in circumstances where their credibility was put

[21]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 539
[22]Ibid at 526 (references omitted)
[23]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 341

in issue.[24] The issue of credibility has been noted by Lippel who referred to Ison's research;

> Ison has shown how medico-legal issues adversely affect the worker's relationship to his doctor, how the mere fact that an injury could be compensable sometimes dissuades a physician from accepting a worker as a patient, and how the adversarial atmosphere surrounding contested claims may incite workers to exaggerate their symptoms, the more they are confronted with manifestations of disbelief.[25]

Interestingly Strunin and Boden found that the experience of workers in Wisconsin was much the same as those in Florida, probably because although workers had the right to chose medical care they were more likely to have problems with the insurer in paying for that treatment. Some workers were so frustrated with the insurer delays they applied for payment of medical expenses through their own health insurance.[26] This United States research is mirrored in Australia. Roberts-Yates who researched the issues and concerns of injured workers in relation to workers compensation claims in South Australia found that the workers she interviewed considered that the workers compensation claims procedures added to their disability and created stress. She found that workers felt they were portrayed as abusing the system but had no option but to endure this stigma. Workers considered that the perceived belligerence of some workers could be explained by the sense of grief experienced through lost careers, status, friendships and financial status.[27] She recommended a paradigm shift in claims management towards a partnership based relationship with workers to develop quality injury management processes.[28] She noted the importance of focussing on return to work.[29] Similar outcomes were noted in a Western Australia survey completed in 2007 which found that 'nearly three in ten

[24]Niemeyer L O, Social Labeling, Stereotyping and Observer Bias in Workers' Compensation: The Impact of Provider-Patient Interaction on Outcome 1 *Journal of Occupational Rehabilitation* 4, 251-269 at 264

[25]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 526

[26]Strunin L and Boden L, The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 345

[27]A very similar investigation was carried out in Canada with almost identical conclusions, see Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30

[28]This is also advocated in Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30 and Kirsh B McKee P The needs and experiences of injured workers: A participatory research study (2003) 21 *Work* 221-231

[29]Roberts-Yates C, The concerns and issues of injured workers in relation to claims/injury management and rehabilitation: the need for operational frameworks. (2003) 25 *Disability and Rehabilitation* 16, 898-907

respondents indicated that they felt the process of making a workers' compensation claim had made things worse for them'. This survey found that 'being fit to go back to work, feeling pressured by the insurance company, being offered part-time work and a worker's family wanting them to go back to work were statistically influential in a worker's decision to return to work'.[30] The importance of return to work surfaced as a key issue following a major inquiry into workers compensation fraud in Australia during 2002-3. The inquiry was conducted by the Australian Government House of Representatives Standing Committee on Employment and Workplace Relations (the Standing Committee) which produced the report *Back on the Job: Report into aspects of Australian workers compensation schemes (Back on the Job)*. [31] The findings of the Standing Committee are discussed below.

3. Workers Compensation Fraud in Australia

In 2002 the then Minister of Employment and Workplace Relations asked the House of Representatives Standing Committee on Employment and Workplace Relations to enquire into;

> 1 The incidence and costs of fraudulent claims and fraudulent conduct by employees and employers, and the structural factors that may encourage such behaviour;
> 2 The methods used and costs incurred by workers' compensation schemes to detect and eliminate:
> (a) fraudulent claims; and
> (b) the failure of employers to pay the required workers' compensation premiums or otherwise fail to comply with their obligations; and factors that lead to different safety records and claims profiles from industry to industry and the adequacy, appropriateness and practicability of rehabilitation programs and their benefits
> 3 Factors that lead to different safety records and claims profiles from industry to industry, and the adequacy,

[30]WorkCover WA (May 2007) "Have Your Say Survey Report No. 1: Return to Work – A comparison between WA and other jurisdictions using the RTW Monitor Report", Perth, Western Australia: Western Australian Government p 32

[31]The Parliament of the Commonwealth of Australia *Back on the Job: Report into aspects of Australian workers compensation schemes* House of Representatives Standing Committee on Employment and Workplace Relations (2003) Canberra (Back on the Job)

appropriateness and practicability of rehabilitation programs and their benefits

From the terms of reference it can be seen that considerable focus for this enquiry was placed on the issue of worker and employer fraud. The Standing Committee concluded in its report that in fact the level of employee fraud was generally considered to be low, although it is difficult to quantify. Very few witnesses to the enquiry were able to support assertions of wide-spread fraud with data.[32] The Standing Committee observed that there was little consensus in relation to the definition of workers compensation fraud (which is often undefined in statutes). For workers this probably involves a spectrum of behaviours commencing with unwitting and innocuous embellishment which is reinforced by doctors, solicitors, unions, family and friends which may (apparently in a minority of cases) culminate in deliberate, conscious and focused attempts to deceive.[33] For employers the range of activities which could amount to fraud included, not obtaining insurance coverage, falsely declaring the number of workers and the nature of their work to reduce premium imposts, not paying full entitlements to workers and incorrectly informing workers that they were not covered under the relevant legislation.[34] Service provider fraud included the submission of false invoices for services not provided, medical incompetence, legal delays caused by not progressing claims and overserving in relation to rehabilitation.[35] Significantly, for the purposes of discussion below, insurer fraud was noted to occur when insurers were inactive in claims management and contributed to fraudulent claims, poor or no existent claims investigation which is influenced by pressure from employers not to pay genuine claims, obtaining medico-legal reports from practitioners who have a vested interest in reporting in favour of the insurer (doctor shopping), and a lack of duty of care in presenting reports which favour the worker, failure to notify the worker of contradictions in employer statements and inaccurate reporting by the employer.[36] The Standing Committee noted that the perception of fraud differs depending on the individuals' role and experience with

[32]Back on the Job p 4
[33]Ibid at 8 and 13-15
[34]Ibid at 16-17
[35]Ibid at 19
[36]Ibid at 20-21

workers compensation schemes[37] and that what constitutes fraud and fraudulent behaviour are subject to significant subjective variation. It also noted that some activities which were perceived as fraud may be related to inaction and incompetence.[38] The Standing Committee was unable to cite any definitive data which quantified worker fraud, although the overall view of witnesses to the enquiry was that worker fraud was overstated and not significant. It did note that there was a body of opinion which drew a distinction between "hard" fraud which related to willful dishonesty and deception and "soft" fraud which related to forms of exaggeration of medical conditions. In relation to the latter there was some evidence to the effect that this form of fraud was more prevalent.[39] That said there was also evidence to the Senate Standing Committee that high numbers of workers did not lodge claims for work related injury and disease in part due to the stigma associated with claiming as well as not wishing to prejudice future employment.[40] As Lippel has observed in this regard;

> It is recognised that acceptance of a compensation claim offers the worker not only economic support, but social legitimacy. The corollary is that the refusal of benefits is often a denial of social legitimacy. When discriminatory stereotypes contribute to systematic refusals of compensation claims, adverse health effects may be even more severe, given the additional component of unfairness.[41]

In relation to employer fraud, the Standing Committee found that in large part this was due to the failure of employers to insure or fully insure. Employer advocates argued that this may be due to the complexity of the workers compensation system and/or the failure of small businesses in particular to understand their obligations. The failure of an employer to pay the correct premium rates has an impact upon all other employers whose rates may accordingly be affected.[42] Importantly in all Australian jurisdictions systems of investigation and auditing are in place to attempt to detect employer non-compliance

[37]Back on the Job p 4
[38]Ibid at 4
[39]Ibid at 30-31
[40]Ibid at 32–35. This is also supported by studies in other jurisdictions, for example Canada. See Shannon H S Lowe G How many workers do not file claims for Workers' Compensation benefits? (2002) 42 *American Journal of Industrial Medicine* 467-473
[41]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 526
[42]Back on the Job p 39-40

although there are low rates of prosecution due largely to administrative sanctions being imposed.[43] Likewise, in relation to service providers the ability to detect over servicing largely depended on audit systems and generally did not result in criminal sanctions.[44] Workers compensation investigators are used in Australia to gather evidence for insurers so that claims can be assessed. In some cases this evidence may show the worker performing activities inconsistent with their injuries.[45] The Standing Committee however, noted evidence to the effect that investigators were encouraged not to collect evidence detrimental to the insurer/employer.[46] This aspect of workers compensation claims management will be discussed further below. It is telling that the Standing Committee recommended that a national code of practice be developed for those engaged as investigators in pursuing potentially fraudulent claims.[47] These practices were also allied to reported insurer behaviour which involved denial of natural justice to workers through the failure to provide workers with opportunities to comment on contradictory statements obtained from employers and witnesses.[48] The Standing Committee heard evidence that in some jurisdictions the funds expended on pursuing fraudulent claims exceeded the amount spent on rehabilitation of workers.[49]

The Standing Committee found that the evidence of claimant fraud was minimal and the costs of fraud are not known. The findings of the Standing Committee are by and large supported by academic literature. For example, based on her review of the literature Niemeyer established that the actual percentage of outright malingers – sociopaths and 'Bunco artists,'[50] who commit deliberate fraud – appears small, between 2-10 percent in most medical practices.[51] She also asserted that

[43]Back on the Job p 43
[44]Ibid at 45
[45]Recent examples which have been noted at trial are *Pointer v Local Government Association* [2008] SAWCT 11 and *Ambelidis v Cantire Investments Pty Ltd* [2008] VCC 970
[46]Back on the Job p 55
[47]Ibid at 221
[48]Ibid at 57
[49]Ibid at 62
[50]A confidence man or con artist referred to at http://www.wkonline.com/d/con_artist.html last viewed 14th October 2008
[51]Niemeyer L O Social Labeling, Stereotyping and Observer Bias in Workers' Compensation: The Impact of Provider-Patient Interaction on Outcome 1 *Journal of Occupational Rehabilitation* 4, 251-269 at 261.

> The malingerer is a distinctive category of individual: injured workers with chronic pain may exhibit unusual or noteworthy illness behaviours.[52] This salience may lead workers compensation service providers to overestimate the incidence of malingering among injured workers in general and their caseload in particular, thus reinforcing the expectation that they will encounter more of the same.[53]

Medically, many cases in which malingering or fraud are alleged may arise due to the inability of the medical profession to diagnose physical injury with accuracy.[54] Likewise, because insurers have conflicting goals; to assist policy holders and to make a profit by limiting the amount of any payout, this may affect the perceptions of decision makers who are unconsciously and subtly affected by these conflicting goals.[55] This may in some instances result in insurers making decisions bases on limited, incomplete or biased information.

RSI[56] is a case in point – in Australia where it was alleged that there was evidence of "mass psychogenic illness" arising from the sharp increases in reportage of these kinds of conditions.[57] Aggressive behaviours by insurers together with cultural stereotyping[58] in

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[52]Niemeyer L O Social Labeling, Stereotyping and Observer Bias in Workers' Compensation: The Impact of Provider-Patient Interaction on Outcome 1 *Journal of Occupational Rehabilitation* 4, 251-269 at 256

[53]Ibid at 262

[54]Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30 at 31, Ison T The Therapeutic Significance of Workers Compensation Structures (1986) 64 *Canadian Bar Review* 605 at 614, cited in Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 530

[55]Wilkinson W Therapeutic Jurisprudence and Workers Compensation (1994) 30 Arizona Attorney 28 cited in Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 530 and Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342

[56] RSI is not a universal label. It is used in Australia and New Zealand as well as Occupational Overuse Syndrome, which is said to be a subset of Musculoskeletal Disorders. In Europe, the term Work Related Musculoskeletal Disorders is used. Repetitive Motion Trauma is adopted in the USA where the condition is also referred to as Cumulative Trauma Disorder. In Japan and Scandinavia it is known as Occupational Cervicobrachial Disorders

[57]Note the controversial views in Y Lucire, 'Neurosis in the Workplace' (1986) 145 *The Medical Journal of Australia* 323 who considered that RSI was not an organic condition. See also R Spillane & L Deves, 'RSI: Pain, Pretence or Patienthood?' (1987) 29 *Journal of Industrial Relations* 41; R Spillane & LA Deves, 'Psychosocial Correlates of RSI Reporting' (1988) 4(1) *Journal of Occupational Health and Safety* 21; G Bammer, 'The arguments about RSI: An Examination' (1988) 12(3) *Community Health News*, 348; G Bammer, 'Occupational Disease and Social Struggle: The case of Work-related Neck and Upper Limb disorders' (Working Paper No. 20, National Centre for Epidemiology and Population Health, 1990); G Bammer, 'Repetition Strain Injury in Australia: Medical Knowledge and Social Movement' (Working Paper No. 19, National Centre for Epidemiology and Population Health, 1990); G Bammer & B Martin, 'The arguments about RSI: An Examination' (1988) XII(3) *Community Health Studies* 348; C D Nolan, B M Nolan & D K Faithful, 'Occupational Repetition Strain Injuries: Guidelines for Diagnosis and Management' (1984) 146(6) *The Medical Journal of Australia* 329; E Willis, 'RSI as a Social Process' (1986) X(2) *Community Health Studies* 210

relation to class, gender[59] and ethnicity[60] probably contributed to influencing medical opinions sufficiently to reduce claims for this condition to the point where the theory of mass psychogenic illness could be supported. There is evidence that claims of this kind come under more scrutiny than other claims.[61]

The Standing Committee concluded that a large proportion of what is perceived as fraud or fraudulent behaviour reflects inefficiencies, incompetence, mismanagement, misinterpretation and lack of understanding of the process of and the perspective of the other participants.[62] They observed;

> In an adversarial system the participants appear to be largely focused on regulatory compliance or perceived lack of compliance by others and this has, on occasion, taken precedence over the goal of returning the injured workers to meaningful employment. In cases where fraud or overservicing is suspected, the timely return to work of the claimant will reduce costs and to a large extent control the extent of fraudulent activities without extensive use of legal intervention.[63]

The *Back on the Job* report is significant for a number of reasons. First, it stands as the most comprehensive investigation of workers compensation fraud attempted in the history of workers compensation is Australia, Second, and significantly for this discussion, the Standing Committee clearly shifted its attention from the issue of fraud, to the issue of the return to work of injured workers. Although the terminology of therapeutic jurisprudence is not used in the report it is clear that the Standing Committee appreciated that the administration of claims may have anti-therapeutic consequences upon workers. This shift in focus gives an important signpost to the possible future directions for the treatment of workers and the administration of workers compensation

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[58]Niemeyer L O Social Labeling, Stereotyping and Observer Bias in Workers' Compensation: The Impact of Provider-Patient Interaction on Outcome 1 *Journal of Occupational Rehabilitation* 4, 251-269 at 263

[59]See for example, Reid J Ewan C Lowry E Pilgrimage of pain: The illness experiences of women with repetition strain injury and the search for credibility (1991) 32 *Social Science Medicine* 5, 601-612

[60]Chung J, Cole D Clarke J Women work and injury, in T Sullivan (Ed) Injury and the new world of work (2000) pp69-90 Vancouver Canada UBC Press , Niemeyer L O Social Labeling, Stereotyping and Observer Bias in Workers' Compensation: The Impact of Provider-Patient Interaction on Outcome 1 *Journal of Occupational Rehabilitation* 4, 251-269 at 259

[61]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342

[62]Back on the Job p 69

[63]Ibid. These views have considerable support in the academic literature, as noted in the literature review in Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30 at 31-33

claims and this theme will be revisited below. Given the appreciation by the Standing Committee that the administration of workers compensation claims is critical element of scheme design, it is now appropriate to consider the issue of good faith in workers compensation claims management.

4. Good faith in Workers Compensation claims in Australia

As noted above, the Standing Committee found that although the evidence of worker fraud in relation to claims was minimal, there was some evidence of inactive, poorly informed and biased claims management added to the costs of claims and the distress for workers.[64] The failure to handle workers compensation claims in an efficient, fair and unbiased manner raises the concept of good faith claims management. Lippel noted that in United States the duty to act in good faith in assessment of insurance claims is well established in the common law[65] and under statute.[66] Such a duty requires an insurer to assess any claim in a timely manner and to come to a decision based upon evidence which the insurer has made its best efforts to substantiate. The existence of the duty to act in good faith acts as a bulwark against excessive vigour by insurers in denying claims which have merit; ignoring evidence in favour of the workers claim; and acceptance evidence against the workers claim without properly testing the veracity of that evidence.[67]

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[64]Back on the Job p 58-61

[65]See generally Houser D G, Clark RJ , Boldum LM, Good Faith as a Matter of Law – An update on the Insurance Companies "Right to be Wrong" (2003) 39 *Tort Trial & Litigation Practice Law Journal* 1045 and Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at footnote 70. A small sample of the leading cases includes *State Farm Lloyds v Nicolau* 951. S.W. 2d 444 (Tex 1997), *Lundstrom v United Service Auto Association* CIC, 192 S.W. 3d 78 (Tex 2006) *In re Texas Workers Compensation Insurance Fund* 995.S.W. 2d 335,(1999) *American Motorists Insurance Company v Fodge* 63 S. W. 3d 801 (Tex.2001)

[66]See the schedule attached to the article by Houser D G, Clark RJ , Boldum LM, Good Faith as a Matter of Law – An update on the Insurance Companies "Right to be Wrong" (2003) 39 *Tort Trial & Litigation Practice Law Journal* 1045 and for example Texas Insurance Code Annotations which is particularly detailed

[67]See generally the overview of the United States development of these principles in Brown J L, Harwood S B, Duties of good Faith: Where lies the pendulum between insurer and policyholder? *FDCC Quarterly* (2003) available at http://findarticles.com/p/articles/mi_qa4023/is_/ai_n9204889 last viewed 14th October 2008

Well accepted in the United States[68], the duty of good faith is not recognised in Australia in relation to workers compensation claims despite recent attempts to establish the principle.[69] Essentially, this tort is grounded in the notion that injured workers are owed a duty of care by claims administrators such that claims will be administered in timely, fair manner in accordance with the weight of all available evidence rather than that which suits the administrator's needs. In the United States this tort has allowed workers otherwise ineligible for tort based work related injury claims the opportunity to pursue insurers for compensable injury caused by the additional harmful effects that follow rejection or maladministration of claims. Whilst this process ironically engages workers in further tort action in order to secure compensation it also has the effect of forcing administrators and insurers to review available evidence in a timely and equitable manner. Moreover, as legal practitioners can extract contingency fees for such additional litigation, the potential to add breach of good faith allegations to existing claims arises which, as a corollary, may encourage the lump sum settlement of claims by insurers.

Issues such a these suggest that a statutory form of this duty limited in both compensable payout amounts and equally litigation and other legal costs may be worthy of consideration as a useful means of ensuring fair, timely and appropriate consideration of compensation claims. In Australia, this development has not yet been taken although there are requirements that obligate insurers to pay interest on claims that have been delayed.

5. Towards a Therapeutic Workers Compensation Model in Australia

James and Brownlea established, through their study of Australian workers compensation claimants, that the level of injury impact is not always related to injury severity. That is to

[68]An instructive recent example is *Texas Mutual Co v Ruttinger* (On appeal from the 122nd District Court-Trail Court Cause 05-CV-0796 available at http://www.doyleraizner.com/CM/Custom/Ruttinger%20Opinion.pdf in which insurance investigators (loss adjusters) acted on unsubstantiated information and rumour to deny Ruttinger a workers compensation claim. Ruttinger later brought an action against the employer for breach of good faith and was awarded sizeable compensation for mental anguish following the unfair denial of the original claim.

[69]See however the recent case of *Garcia v CGU Workers Compensation Pty Ltd* (2006) 3 DCLR (NSW) 135

say, the level of dislocation, isolation and upset to ones way of life as a consequence of injury is not necessary measured by levels of impairment or loss of function.[70] They found that impact upon an injured worker increased where threats to employment security increased, compensation payments were delayed, when the diagnosis and prognosis of injury is unclear, or when social roles or personal independence is affected. Impact was reduced where employment was secure, the employer believed the claim was valid and when social support was strong. The work injury was often the final stressor – those who were more vulnerable were more stressed: those who were less vulnerable were less stressed by the incidence of injury.[71] They concluded, among other things that injury impact can be modified through the provision of instrumental, emotional and formal supports.[72] Roberts-Yates in research briefly noted above, observed the difficulties of injured workers progressing through the South Australian WorkCover system. She concluded that it was necessary for there to be a partnership between injured workers, employers and medical care providers in order maximise return to work outcomes. At the heart of these recommendations is the notion that the there should be a holistic approach to worker rehabilitation which recognises social/psychological issues. Kirsh and McKee reached similar conclusions following their research study in Ontario Canada.[73] In essence the combination of this research points to the adoption of a bio-psychosocial approach to workers injuries. It also confirms the Lippel thesis that whilst workers compensation systems may have been designed to provide benefits to workers in a therapeutic manner there continues to be evidence that the systems have anti-therapeutic effects. Wexler noted 'therapeutic jurisprudence focuses our attention on…humanizing the law and concerning itself with the human emotion, psychological side of the law'[74]

[70]James C, Brownlea A, Work-Related Injury: Managing the Impact (1995) 32 *Asian Pacific Journal of Human Resources* 80-96
[71]Ibid at 90-91.
[72]Ibid at 92.
[73]Kirsh B McKee P The needs and experiences of injured workers: A participatory research study (2003) 21 *Work* 221-231
[74]Wexler D B Therapeutic Jurisprudence: An Overview (1999) *Thomas Cooley Law Review Disabilities Law Symposium* 29 October available at http://www.law.arizona.edu/depts/upr-intj/intj-o.html last viewed 2 October 2008

Likewise, King suggests that the therapeutic approach can promote self determination, healing and well being amongst litigants. Under this more benevolent and compassionate approach an opportunity to *resolve the problems underlining* the legal problem such social/psychological issues suffered by workers following workplace injury can be addressed promoting a more comprehensive resolution to the legal dispute. In contrast, the traditional adversarial litigation approach often elevates conflict between parties and highlights inadequacies.[75] The therapeutic approach also seeks to imbed the law into social contexts to the benefit of all stakeholders involved in disputes with an emphasis on communication, empathy and direct engagement[76] while providing a vehicle for infusing an ethic of care into the judicial process.[77]

Essentially, this provides stakeholders such as workers in a workers compensation dispute with a voice by providing an opportunity to tell their side of the story in a supportive environment in addition to validation and respect by their inclusion in the decision making process. The therapeutic method's promotion of self-determination and healing can be utilised even in the typically arduous and coercive judicial environment[78] and will require a more inclusive and less impersonal attitude toward litigants.[79]

Wexler further observed that 'legal rules, legal procedures, and the roles of legal actors (such as lawyers, judges and often therapists) constitute social forces that like it or not, often produce therapeutic and anti-therapeutic consequences'.[80] The harmful effects of these social forces have been raised for example by members of the medical profession in the area of family law where disputes can be particularly stressful and emotional for

[75]King M S Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education (2006) *Journal of Judicial Administration* Vol 15 No 3 pp 129-141 at 129-131
[76]Anleu S & Mack K Australian Magistrates, Therapeutic Jurisprudence and Social Change (2006) *Transforming Legal Processes in Court and Beyond.* edited by Australian Institute of Judicial Administration, Perth: Australian Institute of Judicial Administration pp 173-183 at 173
[77]Casey P & Rottman D B Therapeutic Jurisprudence in the Courts (2000) *Behavioural Sciences and the Law* Vol 18 pp 445-457 at 451
[78] Note 75 above at 130
[79] Note 76 above at 175
[80]Wexler D B Therapeutic Jurisprudence in a Comparative Law Context, (1997) 15 *Behavioural Science Law* 233 at 233

claimants.[81] Therapeutic jurisprudence promotes the positive or curative effects of the law and aims to take advantage of the "teachable moment" where a more therapeutic outcome can be achieved through the use of a fair yet empathetic approach to dispute settlement.[82] Further, a reduction in anti-therapeutic consequences while bridging the gap between rights and care perspectives can potentially be achieved under the therapeutic approach without diminishing due process and other judicial values.[83]

Lippel also urged that;

> Those responsible for the design of these (workers compensation) systems should learn to factor in the therapeutic and anti-therapeutic consequences of insurer and employer behaviour in cost- benefit analysis of every aspect of the compensation scheme. The mental and physical health of claimants should be attributed value, not just when it costs the system money, but because of the social consequences of unfair or callous treatment of claimants going through the system.[84]

The essential message from this body of workers compensation research is that compensation systems have a capacity to do harm additional to that which has already been suffered. Beardwood and her colleagues referred to this as being a 'victim twice over'.[85] Interestingly medical care providers have long been familiar with the concept of harm reduction. The medical profession acknowledges the aphorism "Above all, do no harm".[86] This principle is laudable but in practice for doctors it is probably deficient as an over-arching guide. It is a defensive statement; to prevent harm, which is desirable. Its application depends on the circumstances. Avoiding harm may not meet the challenges of positively promoting improved health, curing disease and alleviating suffering. In medicine a doctor may have to balance the harms which flow from the administration of certain treatments, substances or therapies. If the rule is applied rigidly may not in fact allow a doctor to carry out their proper duties, as often the practice of medicine requires

[81]Note 75 above at 132
[82]Birgden A Therapeutic Jurisprudence and Responsivity: Finding the Will and Way in Offender Rehabilitation (2004) *Psychology, Crime & Law* Vol 10 No 3 pp 283-295 at 287
[83] Note 82 above at 447
[84]Lippel K Therapeutic and Anti-Therapeutic Consequences of Workers' Compensation (1999) *International Journal of Law and Psychiatry* Vol 22 No 5-6 pp521-546 at 542
[85]Beardwood B A, Kirsh B Clark N J Victims Twice Over: Perceptions and Experiences of Injured Workers (2005) 15 *Qualitative Health Research* 30 at 31
[86]This principle is often attributed to Hippocrates, but this does note appear to be correct

the balancing of potential gains against possible harm.[87] That said; this paper proposes the application of the principle, *Above all, do no harm,* to the administration of workers compensation claims has considerable resonance and is consistent with, and translates the general intention of therapeutic jurisprudence for application to personal injuries matters. In essence this means that the concept of harm prevention which is well known in the area of occupational health and safety should also be applied to workers compensation.

To develop this theme in more detail it useful to look at the purposes of workers compensation legislation in Australia. The common themes as set out in the legislation usually include statements to the effect that the purpose of the legislation is inter alia;

a) To make provision for compensation for injured workers
b) To promote rehabilitation of workers
c) To promote safety measures
d) To hear and determine disputes in a fair, just, economical, informal and quick manner.

South Australia includes two interesting features. First, it contains a statement that the workers rehabilitation and compensation scheme is to achieve a reasonable balance between the interests of employers' and the interests of workers. Second the South Australian provisions require that the objects of the Act should be interpreted without bias towards the interests of employers or workers. These objects seem to be a legislative variation to the principles enunciated by the Australian High Court in series of cases to the effect that where alternative interpretations are available the interpretation most beneficial to the worker is to be preferred.

If the concept of *Do No Harm* is imbedded into the objects of the workers compensation legislation it acts as an aid to interpretation of the entire scheme. It can be applied specifically in respect of two existing objects namely the object of rehabilitation and dispute resolution. In many systems informal dispute resolution processes have adopted to reduce the delays and negative effects of the traditional adversarial litigation model such as stress related health issues and financial strain following often inappropriate[88] and

[87]Smith C M, Origin and Uses of *Primum Non Nocere* – Above All, Do No Harm! (2005) 45 *Journal of Clinical Pharmacology* 371-377

[88]Coaching by lawyers to report symptoms is an obvious example in this context. See Harris I, Mulford J, Solomon M, van Gelder J M & Young J (2005) Association Between Compensation Status and Outcome

lengthy litigation. Often, claimants engage in litigation without a thorough awareness of the impact of litigation on relationships, legal costs and well being that typically leaves them with reduced lifestyles and fewer resources with which to cope. Frequently, these negative effects are prolonged until settlement by which time physical and social/psychological issues are not easily reversed. Consequently, claimants under the traditional adversarial litigation model habitually experience protracted recovery from workplace injury compared to those dealt with through informal dispute resolution processes.[89]

However, whilst this trend toward informal dispute resolution is generally positive, an underlying requirement to prevent workers becoming 'victims twice over' safeguards against delays, adjournments, reduces medico-legal reviews and failures to disclose evidence which prevent adjudication of claims. Likewise, if this principle is imbedded into the rehabilitation regime it encourages early intervention, partnerships in injury management and respect for the dignity of injured workers.

As part of the regime of do no harm initiatives workers compensation schemes in Australia should legislate to provide for good faith claims administration. This could be done by specific provisions in the workers compensation disputes procedures or as licence conditions for insures and self-insurers. Providing a statutory duty of good faith or the codification of those principles does not prevent an insurer from arguing that a claim should be declined on the grounds that it has a genuine reason for declining the claim.[90] Good faith issues could also be investigated by a workers compensation Ombudsman to reduce unnecessary litigation. The Ombudsman would have power to review insurer files and make recommendations or award addition compensation if

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After Surgery: A Meta Analysis in *Journal of the American Medical Association* Vol 293 No 13 1644-1652 at 1651

[89]See Compensable Injuries and Health Outcomes *The Australasian Faculty of Occupational Medicine* (2001) The Royal Australasian College Of Physicians Health Policy Unit 1-40 and Cassidy J D, Carrol L J, Cote P, Lemstra M, Berglund & A Nygren A (2000) Effect of Eliminating Compensation For Pain and Suffering on the Outcome of Insurance Claims for Whiplash Injury in *The New England Journal of Medicine* Vol 342 No 16 1179-1186 at 1184

[90]*Covia v Robinson* 507 N.W. 2d 411 (Iowa 1993) and *Gilbert v USF Holland Inc* (637 N.W. 2d 194 (Iowa 2001) applied in *Belger v United Parcel Service and Liberty Mutual Insurance* located at http://www2.iwd.state.ia.us/dwc/wcdecisions.nsf/9feb668853f5a87f86256e7d005c4b09/8d1893eaf4293a3186257323005a9fe1!OpenDocument last viewed 14th October 2008.

necessary to inculcate a respect for the dignity of claimants into the administration of claims. A code which requires all claims officers to provide clarity in decision making and invite the claimant to speak to them and provide additional information are important steps.

An alternative to this approach is to allow claims for disability arising out of the compensation process. Strunin and Boden found significant stress arose from delays in payments, insurer reluctance to pay for medical treatment, poor information transfer to injured workers which engendered an overall demeaning experience for injured workers.[91] Currently all Australian jurisdictions prevent stress claims of this kind; in fact the current Australia stress claims regime prevents workers from claiming stress related conditions consequent upon reasonable management actions.[92] Allowing workers to claim for disability which can be attributed to insurer maladministration provides a disincentive for delayed claims management but would be a controversial step given that it goes against established Australian precedent.

Admittedly allowing claims for disability arising from maladministration of claims is a contentious proposal. On the other hand, provisional liability procedures have now been put in place in New South Wales and South Australia which requires employer/insurers to act in a timely manner to assess claims with a default mechanism which provides for applications to be paid where the employer/insurer is unable to show good cause for the claim to be declined. [93] In New South Wales there is evidence that this has resulted in quicker and more effective claims management. This reversal of onus of proof rebalances the power imbalances usually present as between first time participants such as workers and insurers who are frequent users of the system.

As part of the program to prevent further harm to worker the frequency of medico-legal examinations has to be reduced. In Western Australia regulations now provide a limit of three medico-legal examinations. Medical panels are also used to assess claims where causation and incapacity are in issue.

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[91]Strunin L and Boden L The Workers' Compensation System: Worker Friend or Foe? (2004) 45 *American Journal of Industrial Medicine* 338-345 at 342 - 44

[92]Guthrie R The Australian legal framework for stress claims (2007) 14 *Journal of Law and Medicine* (4) 528-550

[93]Back on the Job p 123-124

Further as the evidence to the Standing Committee suggests surveillance of workers should be limited to clear cases or fraud and not used routinely as a means of intimidation. In addition surveillance reports should not attract legal professional privilege where they have been the subject of consideration by medical practitioners in a medico-legal setting. Consistent with these principles are legislative provisions to provide workers with all relevant documentation used by first line decision makers on their files even prior to litigation, and acceptance by the parties that full and frank exchange of documents during litigation is best practice. At the heart of these few suggestions is a move aware from the default position entrenched in the workers compensation mindset which stigmatizes workers as frauds and focuses on returning workers to meaningful durable employment.

6. Legislating to Reduce Harm to the Harmed

In light of the discussion above and mindful of the anti-therapeutic effects of workers compensation processing under current regimes, an exploration of innovative legislative change grounded in therapeutic and non-adversarial dispute resolution practices has considerable appeal. Given the broad range of interest groups and stake holders in workers compensation disputes, a useful starting point in legislating to reduce harm to workers would be to introduce objectives into legislation that establish appropriate objectives which seek to minimize the traditional adversarial approach to workers compensation disputes. Ideally, this objective would be stated in both the objects of the legislation and repeated in specific dispute resolution provisions of the legislation.

Beyond a general statement of non-adversarial objectives, specific legislative provisions that attempt to reduce the adversarial nature of workers compensation disputes should be established.

Unsurprisingly, the most contentious area of disputation in relation to workers compensation matters is work related stress. As a result, employers and insurers typically contest a matter where causation and credibility issues are contested which often has the effect of further aggravation and extension of a workers illness. As a corollary, this absence from the workplace increases the financial burden of all parties irrespective of

whether the claim is ultimately approved. It follows that quick resolution of such claims is appropriate.

An innovative and hitherto unexplored approach is the case conference method that is routinely adopted by health care providers for example in situations where medical practitioners meet with other health care professionals to discuss and streamline the most strategic approach to a workers health care. It is suggested that a similar approach be adopted within the workers compensation arena. First, by adopting a health care approach to work related stress claims, the dispute resolution process would require that any disputed work related stress claim be listed for case conferencing at the earliest practicable time. At present, conciliation and mediation processes do not involve healthcare professionals. By way of contrast, a workers compensation case conference would require the attendance of the worker's medical care providers, employers and associated service providers such as vocational rehabilitation experts. Such a conference would not necessarily solve the problem but rather provide a comprehensive overview of a workers health, potential health care costs and the potential for litigation to aggravate the workers health condition. Medical practitioners would attend not for the purpose of giving evidence but instead to advise on the workers health status. This information would be privileged to the extent that it could not be later used in arbitration proceedings except in so far as medical opinions that have been expressed could later appear in medical reports which are not prejudicial to the worker. Case conferences could be followed either immediately or shortly thereafter by normal conciliation processes if required.

In addition to innovations in the area of dispute resolution, consideration should also be given to specific provisions that provide incentives for workers to return to work. It is current practice for workers compensation legislation to be premised in a three pronged approach. Initially, medical attention is provided to injured workers to enable the treatment of physical and mental injury. Secondly, a range of other services are provided to workers that assist in the return to work under Australian legislation including counseling, work trials, retraining and work hardening. These two methodologies can neatly be classified as positive incentives for the workers return to work. Thirdly,

disincentives in the form of reduced weekly wages where workers have remained off work for extended periods (post 26 weeks) are also a feature of the legislation in all jurisdictions. There is little evidence to suggest, however, that this particular punitive measure has any significant effect on increasing return to work rates.

The recommended approach instead provides financial incentives for the worker upon their return to work. In circumstances where workers are able to return to work within reasonable time period bonus payments could be made in recognition of the workers endeavor. At first sight this approach would seem to add to the employer and insurers financial burden, most workers are not paid their full average weekly earnings following accident or injury and indeed often suffer losses because they make a workers compensation claim. Bonus payments to workers who return to work in a timely fashion in concert with appropriate medical and rehabilitative care enhances a non-adversarial approach to workers compensation. Likewise, insurance premium reductions should be available to employers who can establish that they have appropriate return to work systems in place.

Finally, a concerted effort beyond the normal treatment regimes should be made to promote the return to work generally. Historically, there has been a marked tendency to stigmatise workers who make workers compensation claims without any public recognition of the fact that in the main, workers make valid, justified claims. Moreover, in general, 80% of workers do in fact return to work in a timely fashion while the remaining 20% who have a more delayed work return is typically represented by workers who have suffered severe injuries. In addition there have been some attempts to champion the cause of those workers that return to work after sustaining serious injury such as in South Australia where the WorkCover website includes video footage of workers who have received serious injury yet have managed to return to active duties despite their disabilities. These particular workers are not subject to the kind of stigmas that attach to workers whose injuries are rather less apparent because dramatic injuries such as amputations and scouring present objective and verifiable evidence of disability and attract a good deal of sympathy as a result. Conversely, injuries such as neck and back injury along with work related stress claims are hard to diagnose and don’t present

and so-called sign of injury. A non-adversarial approach would embrace the notion that workers who suffer these categories of injury should also be championed and congratulated for their work efforts. The process could be enhanced by educating management and particularly co-workers who may feel they are carrying an extra burden because a work mate can no longer perform full pre-injury duties.