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19 October 2017

Dr. Rhys Bollen
Acting Executive Director
Workers and Home Building Regulation
State Insurance Regulatory Authority

By email: policydesign@sira.nsw.gov.au

Dear Dr. Bollen,

Post-implementation review of the *Guidelines for claiming workers compensation*

Thank you for granting the NSW Business Chamber ("the Chamber") an extension of time to Friday 20 October 2017 for the making of submissions in relation to the above guidelines.

The NSW Business Chamber recently held a member survey and received detailed feedback about the claims management process that is currently in place for the NSW workers compensation system. In addition, the Chamber has received feedback from individual members.

The information received from our members has been incorporated into the Chamber's submission and has been arranged into a format that mirrors the numbering used in the guidelines.

PART A: HOW THE PROCESS WORKS

A1 Initial notification of an injury

Section 254 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act") provides for notice of injury being given to the injured worker's employer.

Subsection 254 (1): Failure to notify the employer prior to voluntarily leaving their employment

The Chamber notes that subsection (1) provides that, in order for compensation or work injury damages to be recoverable by an injured worker, notice of the injury must be given by the injured worker to the employer as soon as possible after the injury happened and "*before the worker has voluntarily left the employment in which the worker was at the time of the injury*".

The Chamber has received feedback from its members to the effect that this is not occurring in practice with a number of employers reporting that the first they became aware of a claim being made is well after an injured employee has left their employ.

The Chamber submits that measures need to be put into place by SIRA, whether it be in the guidelines or otherwise, that would ensure that the Nominal Insurer and its agents follow business processes that would satisfy stakeholders that insurers are abiding by the legislative requirements of subsection 254(1).

Subsection 254(2): Special circumstances

The guidelines do not provide for a mechanism by which the Nominal Insurer or its agents must be transparent to employers as to whether or not:

- special circumstances were brought to the Nominal Insurer's attention by the injured worker;
- the Nominal Insurer satisfied itself that those special circumstances existed;
- brought those special circumstances to the attention of the employer and sought verification from the employer;
- those special circumstances were taken into account by the Nominal Insurer or its agents when reaching it decision in relation to the claim; and
- if so, how those special circumstances affected the outcome of that decision-making process.

<table><tr><td>The Chamber submits that SIRA should put measures in place, either through the guidelines or otherwise, where special circumstances were brought to the Nominal Insurer's attention by the injured worker, that requires the Nominal Insurer to formally notify the injured worker's employer that:
• special circumstances were brought to the Nominal Insurer's attention by the injured worker;
• the Nominal Insurer satisfied itself that those special circumstances existed;
• it requires the employer to confirm whether or not it agrees that those special circumstances as described by the injured worker existed (and if not, seeking the employer's version of the events);

The Chamber submits that after having receives the employer's response to this notification, the Nominal Insurer should then formally advise the employer whether or not the special circumstances were taken into account when reaching it decision in relation to the claim and, if so, how those special circumstances affected the outcome of that decision-making process.</td></tr></table>

Subsections 255(2) & (6): the giving of notice

Subsection 255(2) of the 1998 Act provides that notice of injury may be given by the injured worker either orally or in writing.

Subsection 255 (6) of the 1998 Act provides that, if *"… the regulations so require … a notice of injury must be given in the manner, and contain the particulars, prescribed by the regulation."*

However, the regulations do not provide for the manner in which the notice of injury must be given, they only prescribe the manner in which the register of injuries must be kept (regulation 40, *Workers Compensation Regulations 2016*) and that failure to keep the register of injuries attracts a maximum penalty of 50 penalty units.

It is therefore possible that an injured worker will inform the Nominal Insurer that it gave notice of injury to the employer orally, when in fact no such notice was given, resulting in the employer being unknowingly in breach of section 256 and potentially liable for up to 50 penalty units.

The Chamber submits that an extra step should be incorporated into the process by which an injured worker notifies the employer and Nominal Insurer of his or her injury.

It could take the form of either, in the event that the worker informs the Nominal Insurer that it has given notice of injury orally, the Nominal Insurer being required to provide the employer with a written notice confirming that the injured worker has stated that it gave the employer his or her notice of injury orally; or alternatively, that subsection 255(2) be amended to require the injured worker to provide the employer with a written notice of injury (and prescribe the form of such notice by regulation).

Introducing either of these two requirements would avoid the above set of circumstances from occurring.

Subsection 255(3): Where there is more than one employer

Subsection 255(3) of the 1998 Act provides that, in the event that the injured worker has more than one employer, it is sufficient, for the purposes of complying with his or her obligation to give their employer notice of an injury, to provide notice to just one of those employers.

However, the subsection does not make it clear whether or not the employer to whom such notice has been given is the employer at whose workplace, the injury occurred.

> The Chamber submits that subsection 255(3) should be amended to make it clear that, in the event that an injured worker has more than one employer, the giving of notice as required by this subsection will only have been complied with if such notice has been given to the employer (or employers) at whose workplace the injury has allegedly occurred.

PART B: WHAT COMPENSATION MAY COVER

B1.1 Weekly payments

Calculating PIAWE

The current method of calculating an injured worker's pre-injury average weekly earnings, as provided for by section 44G of the *Workers Compensation Act 1987* ("the 1987 Act") excludes "loadings" from the calculation.

However, it does not distinguish between a casual loading (which is included in the worker's hourly rate to compensate a casual worker for not receiving a wage when away in circumstances that would allow a permanent part-time or full-time worker to be paid wages in the form of annual leave or sick leave).

The Chamber notes that for permanent workers (whether on a part-time or full-time basis), amounts paid to them as wages when taking annual leave or sick leave, are included in the PIAWE calculation.

> The Chamber submits that this situation needs to be rectified by amending section 44G of the 1987 Act to first of all, distinguish the casual loading from other types of ad hoc loadings and secondly, to clarify that the casual loading is taken into account when calculating the PIAWE of an injured worker who is employed as a casual worker as opposed to the other types of loadings, which are ad hoc in nature and are to be excluded from the calculation.

Calculating weekly payments

The guidelines provide that a "*worker's entitlement week may not correspond with the worker's payroll week, however workers should be paid in line with their payroll period. The insurer should calculate the worker's weekly payment and adjust it to their payroll week and where necessary inform the employer of the payments to be made*."

The Chamber has received feedback from its members that it is not possible to pay their injured workers in line with their usual payroll period and they have to manually keep a separate payroll record for their injured workers.

Due to the legislative provisions requiring the weekly payments to be calculated from the date of injury, this translates into an employer potentially having to maintain up to eight separate payroll systems – their usual payroll system and seven manual payroll systems for their injured workers (one for each "work day" of the week upon which an employee has been injured).

The Chamber submits that a better design for ensuring that injured workers can be paid in accordance with the employer's usual payroll system needs to be developed, preferably with the ability to obtain feedback about the design directly from members of the Chamber.

Weekly payments between weeks 14 and 130

Section 37 of the 1987 Act sets out the formula for calculating wages for period commencing from week 13 and concluding on week 130.

However, section 44C stipulates that, from week 53 onwards, overtime and shift allowances need to be excluded from this calculation.

The Chamber submits that the 1987 Act needs to be amended so that sections 37 and 44C are replaced by two sequential sections containing formulae for weeks 14 to 52 and weeks 53 to 130 respectively.

Thank you for the opportunity to contribute to this review. If you wish to discuss any aspect of this submission, please contact Elizabeth Greenwood, Policy Manager, Workers' Compensation, WHS and Regulation on (02) 9458 7078 or elizabeth.greenwood@nswbc.com.au.

Yours sincerely

Paul Orton
Director, Policy and Advocacy