

Managing injured workers: Striking a balance between worker rehabilitation and safety and health obligations

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1.0 Introduction

The interface between worker rehabilitation and safety and health obligations is complex and laced with a significant number of seemingly incongruous duties and obligations. While acknowledging the difficulties encountered by mine operators and Site Senior Executives (**SSE**), the purpose of this paper is to highlight those areas which strategically lend themselves to more fruitful gains in managing injured workers.

There is an apparent conflict between the restraints placed upon the use of information available from the workers' compensation insurer and the obligations placed on a SSE with respect to the safety and health of mine workers. On one hand, the SSE may be in possession of reports or documents which make it clear that a worker is a risk to themselves or others. On the other hand, the SSE is restrained with respect to the use of that material in discharging their obligations relating to site safety and health.

It is the aim of this discussion to provide a pathway to solving how SSE's can use information relating to the health and safety of a worker in a manner in which the SSE is able to discharge the onerous obligations placed upon them by the *Coal Mining Safety and Health Act 1999* (**CMSH Act**) and the *Mining and Quarrying Safety and Health Act 1999* (**MQSH Act**) with respect to managing risk.

2.0 Relationship between the workers' compensation insurer and the employer – the legislative framework

No discussion of this area can be undertaken without an analysis of the legislative framework under which an insurer and a mining employer operate with respect to injured workers.

It is trite to say that the difficulties experienced by mine operators and SSEs in rehabilitating injured workers are significantly contributed to by the scheme of the various pieces of legislation impacting on the area of injury management.

It is beyond the scope of this paper to examine in detail all of the legislation that impacts on this complex area. Such legislation includes, but is not limited to, the *Workplace Relations Act 1996*, the *Anti-Discrimination Act 1991* (Qld) and the *Disability Discrimination Act 1992* (Cth). Rather, this paper will focus on the interface between the *Workers' Compensation and Rehabilitation Act 2003* and the CMSH Act and the MQSH Act and their respective Regulations.

Because the provisions of the CMSH Act and the MQSH Act are generally similar in nature, the relevant section of the CMSH Act will be referred to in the body of this paper and the corresponding section of the MQSH Act footnoted.

Workers' Compensation and Rehabilitation Act 2003

The *Workers' Compensation and Rehabilitation Act 2003* (**WCR Act**) allows the insurer to obtain medical information relevant to a worker's injury. This medical information is provided under an authority for use in the determination and management of a claim and the worker's rehabilitation.

Section 572A of the WCR Act limits the access and use of particular documents.

Section 572A – Access to particular documents for employment purposes prohibited

- (1) A person must not, for a purpose relating to employment of a worker by the person or another person:
- (a) obtain or attempt to obtain a workers' compensation document about the worker; or
 - (b) use or attempt to use a workers' compensation document about the worker.
- Maximum penalty – 100 penalty units.
- (2) However, subsection (1) does not apply to a workers' compensation document relating to the worker's capacity to work if the document is necessary to secure the worker's rehabilitation or early return to work under chapter 4.

'Employment' is broadly defined as 'any process for selecting a person for employment or for deciding whether the employment of a person is to continue'.¹

The WCR Act and its Regulations impose a number of obligations on an employer with respect to a worker's rehabilitation.² The practice of releasing relevant information about the injury sustained by a worker is likely to fall within the definition of rehabilitation as contemplated by the WCR Act. Provided the information is not used to make a decision about whether the employment of a worker is to continue, then its disclosure is unlikely to offend section 572A of the WCR Act.

Generally speaking, health and safety personnel may come into contact with medical evidence during the rehabilitation of a worker that identifies a risk of injury if the worker returns to normal duties. Further, it is not unusual for SSEs to be provided with information specific to a worker, particularly in circumstances in which a common law claim has been made.

The fact that personnel on site may be aware of issues that potentially impact on a worker's safety presents significant conflicts regarding the use of that information. This is of particular significance when regard is had to an SSE's obligations under the CSMH Act.

¹ WCR Act section 572A(3)

² see for example Parts 3 and 4 of the WCR Act and Part 6 of the *Workers' Compensation and Rehabilitation Regulation 2003*.

Coal Mining Safety and Health Act 1999

The objects of the CMSH Act are to protect the safety and health of persons at coal mines and persons who may be affected by coal mining operations and to require that the risk of injury or illness to any person resulting from coal mining operations be at an acceptable level.

Section 29³ of the CMSH Act provides that for the risk from coal mining operations to be at an acceptable level, the operations must be carried out so that the level of risk from the operations is within acceptable limits and as low as reasonably achievable. Section 30⁴ sets out how the objective of an acceptable level of risk is achieved.

Section 30 – How an acceptable level of risk is achieved

- (1) To achieve an acceptable level of risk, this Act requires that management and operating systems must be put in place for each coal mine.
- (2) This Act provides that the systems must incorporate risk management elements and practices appropriate for each coal mine to:
 - (a) identify, analyse, and assess risk; and
 - (b) avoid or remove unacceptable risk; and
 - (c) monitor levels of risk and the adverse consequences of retained residual risk; and
 - (d) investigate and analyse the causes of serious accidents and high potential incidents with a view to preventing their recurrence; and
 - (e) review the effectiveness of risk control measures, and take appropriate corrective and preventative action; and
 - (f) mitigate the potential adverse effects arising from residual risk.
- (3) Also, the way an acceptable level of risk of injury or illness may be achieved may be prescribed under a regulation.

Chapter 2, Part 2⁵ of the Coal Mining Safety and Health Regulation 2001 (**CMSH Regulations**) deals with safety and health management systems. Section 42⁶ of the CMSH Regulations deals with a coal mine's Safety and Health Management System (**SHMS**). The SSE has an obligation under section 42(a) of the CMSH Act to ensure that the risk to persons from coal mining operations is at an acceptable level and under section 42(c) of the CMSH Act to develop and implement a SHMS for the mine. The SHMS must provide for controlling risks at the mine associated with personal fatigue, other physical and psychological impairment and the improper use of drugs.

³ Section 26 of MQSH Act

⁴ Section 27 of MQSH Act

⁵ Chapter 2, Part 2 of MQSH Act

⁶ Section 131 of MQSH Regulations

With regard to 'other physical or psychological impairment', section 42(3) of the CSMH Regulations provides that the SHMS must provide for protocols for persons at the mine. The SSE must consult with a cross-section of workers at the mine with regard to the fitness provisions in the protocols.

Regulation 42 – Safety and health management system for personal fatigue and other physical and psychological impairment, and drugs

- (1) A coal mine's safety and health management system must provide for controlling risks at the mine associated with the following:
 - (a) personal fatigue;
 - (b) other physical or psychological impairment;
Example of other physical or psychological impairment — an impairment caused by stress or illness
 - (c) the improper use of drugs.
 - ...
- (3) The system must provide for protocols for other physical and psychological impairment for persons at the mine.
- (4) The system must provide for the following about drug consumption or ingestion for persons at the mine —
 - (a) an education program;
 - (b) an employee assistance program;
 - (c) an obligation of a person to notify the site senior executive for the mine of the person's current use of medication that could impair the person's ability to carry out the person's duties at the mine;
 - (d) an obligation of the site senior executive to keep a record of a notification given to the site senior executive under paragraph (c);
 - (e) the following assessments to decide a person's fitness for work:
 - (i) voluntary self-testing;
 - (ii) random testing before starting, or during, work;
 - (iii) testing the person if someone else reasonably suspects the person's ability to carry out the person's duties at the mine is impaired because the person is under the influence of drugs.
- (5) The site senior executive must consult with a cross-section of workers at the mine in developing the fitness provisions.
- (6) In developing the fitness provisions, the site senior executive must comply with section 10, other than section 10(1)(a) and(d)(ii)(C), as if a reference in the section to a standard operating procedure were a reference to the fitness provisions.
- (6A) If the fitness provisions provide for the assessment of workers for a matter mentioned in subsection (1)(a) or (b), the site senior executive must establish the criteria for the assessment in agreement with a majority of workers at the mine.
- ...
- (8) In this section **fitness provisions** means the part of the safety and health management system that provides for the things mentioned in subsections (2) to (4).

Section 10⁷ of the CSMH Regulations provides for how the SSE must consult with a cross section of workers at the mine when establishing standard operating procedures for the mine.

The coal mine workers in turn have obligations pursuant to section 39⁸ of the CSMH Act to comply with the CSMH Act and procedures applying to the worker as part of a SHMS for the mine. If a coal mine worker or another person has information that other persons need to know to fulfil their obligations or duties under the CSMH Act, or to protect themselves from the risk of injury or illness, the person must give the information to the other persons.

An immediate conflict is apparent. How are the restrictions contained within the WCR Act reconciled with the obligations imposed on the SSE by the CSMH Act? In other words, if a SSE is prohibited from using reports and documents secured as part of a workers' compensation claim (the use of which must be confined to rehabilitation) to manage the risk that an injured worker poses to themselves or others, how can the SSE discharge their obligations with respect to the management of such risk under the CSMH Act?

3.0 Does the CSMH Act provide a solution?

The CSMH Regulations on their face provide a solution:

Section 46⁹ - Health assessment

- (1) The employer must ensure a health assessment is carried out for each person who is to be employed, or is employed, by the employer as a coal mine worker.
- (2) The assessment must be carried out:
 - (a) in accordance with the instructions, and covering the matters, in the approved form; and
 - (b) by, or under the supervision of, the nominated medical adviser.
- (3) The assessment may include matters not covered in the approved form if, having regard to a risk assessment carried out for a task for which the person is to be employed, or is employed, the nominated medical adviser considers the person needs to be assessed in relation to the additional matters to achieve an acceptable level of risk.
- (4) The assessment must be carried out:
 - (a) before the person is employed as a coal mine worker; and
 - (b) if the nominated medical adviser decides the assessment is necessary after being given a notice under section 49(3)—periodically, as decided by the nominated medical adviser; and
 - (c) otherwise, periodically, as necessary, but at least once every 5 years. (author's emphasis)

⁷ Section 56 of MQSH Act

⁸ Section 44 of MQSH Act

⁹ Section 131 of MQSH Regulations

Section 49¹⁰ - Monitoring for workers' exposure to hazards

- (1) A coal mine's safety and health management system must provide for periodic monitoring of the level of risk from hazards at the mine that are likely to create an unacceptable level of risk.
- (2) The system must also provide for notice of any appreciable increase in the level of risk to a coal mine worker at the mine to be given to the worker's employer.
- (3) An employer who is given a notice under subsection (2) must give a copy of the notice to the employer's nominated medical adviser.
- (4) An employer must ensure that, if a coal mine worker employed by the employer is exposed to a hazard at a coal mine that may increase the level of risk to the worker, the worker's exposure to the hazard is periodically monitored to assess the level of risk to the worker. (author's emphasis)
- (5) In this section — **risk** means a risk likely to affect a person's health.

However, the courts have preferred a very narrow interpretation of the use of the powers contained in sections 46(4)(c) and 49 of the CSMH Regulations.¹¹

In *CFMEU v North Goonyella Coal Mines Ltd*¹² Commissioner Bacon of the Australian Industrial Relations Commission held that section 46(4)(c) of the CSMH Regulations gives no power in and of itself to an SSE to direct an employee to attend a Nominated Medical Adviser for a health assessment.

Section 49 of the CSMH Regulations provides for the monitoring of workers' exposure to hazards at a mine. The effect of section 49 is to provide for a system whereby any appreciable increase in the level of risk to a coal mine worker must be notified to the NMA. This provision has been considered by the Queensland Supreme Court in *McPherson v Rio Tinto Coal Australia Pty Limited*.¹³ The court held in that case that an "appreciable increase in the level of risk to a coal mine worker" within the meaning of section 49(2) of the Regulations does not mean an increase in the level of risk to a worker which arose only from a change in the worker's own health.

That said, section 39(1)(b) of the CSMH Act arguably creates a positive obligation on a worker to give information to an SSE that the SSE needs to know to fulfil his or her obligations or duties under the CSMH Act or to protect that worker from the risk of injury or illness.

Section 39 - Obligations of persons generally

- (1) A coal mine worker or other person at a coal mine or a person who may affect the safety and health of others at a coal mine or as a result of coal mining operations has the following obligations:
 - (a) to comply with this Act and procedures applying to the worker or person that are part of a safety and health management system for the mine;

¹⁰ Section 136 of MQSH Regulations

¹¹ [2005] QSC 120 McMurdo J

¹² PR943615

¹³ [2005] QSC 120

- (b) if the coal mine worker or other person has information that other persons need to know to fulfil their obligations or duties under this Act, or to protect themselves from the risk of injury or illness, to give the information to the other persons; (author's emphasis)
 - (c) to take any other reasonable and necessary course of action to ensure anyone is not exposed to an unacceptable level of risk.
- (2) A coal mine worker or other person at a coal mine has the following additional obligations:
- (a) to work or carry out the worker's or person's activities in a way that does not expose the worker or person or someone else to an unacceptable level of risk;
 - (b) to ensure, to the extent of the responsibilities and duties allocated to the worker or person, that the work and activities under the worker's or person's control, supervision, or leadership is conducted in a way that does not expose the worker or person or someone else to an unacceptable level of risk;
 - (c) to the extent of the worker's or person's involvement, to participate in and conform to the risk management practices of the mine;
 - (d) to comply with instructions given for safety and health of persons by the coal mine operator or site senior executive for the mine or a supervisor at the mine;
 - (e) to work at the coal mine only if the worker or person is in a fit condition to carry out the work without affecting the safety and health of others;
 - (f) not to do anything wilfully or recklessly that might adversely affect the safety and health of someone else at the mine.

Section 39(1)(b) places an obligation on a worker to disclose information regarding his or her current medical condition to the SSE. Any failure by a worker to disclose material known to that worker which the SSE needs to know to fulfil his or her obligations to protect the worker from the risk of further injury is a breach of the CSMH Act. It should be noted that such a breach is a criminal offence which under section 34(e) of the CSMH Act attracts a maximum penalty of \$37,500.00 or 6 months imprisonment.

While employers have a common law duty to take reasonable care to ensure that employees are not injured, a related question is whether an employer has a right to direct a worker to undergo a medical examination. This question is of importance when one considers that an employer has a clear duty to take into account the particular vulnerabilities of its workers.¹⁴

In *Edwards v North Goonyella Coal Mines Pty Limited*¹⁵ Atkinson J refused to imply into the contract of employment a term giving a general right to the employer to require an employee to undertake further medical tests as the Act and the Regulations set out a comprehensive regime for those matters.

Accordingly, the common law does not give an SSE power to direct a worker to undergo a medical examination following a worker being declared fit for duty following an injury claim.

¹⁴ *Blackman v Commonwealth* (1978) 20 ACTR 33; *Finn v The Roman Catholic Trust Corporations for the Diocese of Townsville* [1997] 1 Qd R 29.

¹⁵ [2005] QSC 242

The effect of the courts' interpretation of the CSMH Act and CSMH Regulations is to confine the ability of an SSE to direct a coal mine worker to undergo a health assessment. Essentially, an SSE can only direct a coal mine worker to undergo a health assessment in the very limited circumstances contemplated by the Act and Regulations.

4.0 The legislative tension between the insurer and the employer

Reconciling the prohibitions contained in the WCR Act with the obligations imposed by the CSMH Act and MQSH Act is a difficult exercise. A number of hurdles must be overcome:

- » Can an employer prevent a worker from returning to work solely because of the risk of further injury?
- » How does the SSE discharge his or her obligations when managing an injured worker?
- » What should the insurer do if a mine worker has been declared medically fit for work yet has an underlying medical issue that is likely to adversely impact upon the mine worker's long term health?

In order for an SSE to discharge his or her obligations under the CSMH Act, the SSE must ensure, at the very least, that a worker returning to duty following a significant injury is subjected to a health assessment under the CSMH Regulations before the worker resumes duties. Such a review would ultimately allow the SSE to make a decision regarding a worker's longer term employability in accordance with the CSMH Act.

However, the scheme created by the CSMH Act makes it difficult for a SSE to put in place steps for the appropriate identification and rehabilitation of an injured worker returning to the workforce.

Accordingly, it is necessary for the SSE to incorporate a process for the identification and assessment of workers at risk into the site's SHMS. Section 42 of the Regulations then allows the SSE to direct a worker to undergo a health assessment, provided it is done in accordance with the requirements of section 42.

It is the clear intention of the legislative scheme of the S&H Act that the SSE include in the mine's Health and Safety Management System the requirements of Regulation 42 and that the risks concerning the day to day fitness for work of mine workers in relation to personal fatigue, other physical and psychological impairment and the improper use of drugs shall be dealt with in accordance with the mine's Safety and Health Management System.¹⁶

Of course, the SMHS must be developed in consultation and agreement with a cross-section of workers at the mine.¹⁷ Whether that can be realistically achieved is another matter.

¹⁶ *CFMEU v North Goonyella Coal Mines Ltd* per Bacon C

¹⁷ section 42(6A) CSMHA

The position with respect to contractors however is different. In *Mcmahon Contractors Pty Ltd v Construction, Forestry, Mining and Energy Union*¹⁸ the Full Bench of the Australian Industrial Relations Commission considered the obligations of a contractor under the CSMH Act. The AIRC held that section 42 of the CSMH Regulations only prescribes a way for an SSE to discharge his or her obligations with respect to the control of risks. The Commission held that section 42 cannot reasonably be seen as prescribing a way in which other persons are to discharge their obligations to achieve an acceptable level of risk.

5.0 Strategies

It is overwhelmingly clear that the courts' interpretation of the CSMH Act and the CSMH Regulations create significant hurdles for SSEs to overcome in order to be able to discharge their health and safety obligations created by that legislation. Further, the scheme of the Act and Regulations creates a significant tension between the obligations of the SSE, and the imperatives of the relevant workers' compensation insurer.

As an initial step, consideration should be given to putting in place a system whereby a worker, on his or her return to work, is put on notice as to the worker's obligations under section 39 of the CSMH Act and inviting the worker to disclose any information or documents that will assist the SSE in discharging their obligations under the CSMH Act.

Further, consideration can be given to using section 39 of the CSMH Act to secure relevant material from the workers' compensation insurer on the basis that the insurer may have obligations as a person who may affect the safety and health of others at a coal mine.

If that information is forthcoming, then the mine's SHMS should provide a workable system for the identification and assessment of workers at risk. The SHMS should, in the circumstances contemplated, provide the SSE with the power to direct a worker to undergo a health assessment by a nominated medical adviser pursuant to section 46 of the CSMH Regulations¹⁹. Of course, achieving a workable SHMS in this regard will require the support of a majority of the workers at the mine – and therein lies the problem.

¹⁸ PR963322

¹⁹ It is important that the Nominated Medical Adviser be in possession of an up to date risk assessment for all duties to be undertaken by the worker

Further information

This publication is not legal advice. It is not intended to be comprehensive. You should seek specific professional advice before acting on the basis of anything in this publication. For further information please contact:

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