PARLIAMENTARY COMMITTEE ON OCCUPATIONAL SAFETY, REHABILITATION AND COMPENSATION

MENTAL HEALTH IN THE WORKPLACE

Kingston Room, Old Parliament House, Adelaide

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(OFFICIAL HANSARD REPORT)

PARLIAMENT OF SOUTH AUSTRALIA

WITNESS

MEMBERS:

Hon. S.W. Key MP (Presiding Member)
Hon. J.A. Darley MLC
Hon. J.S.L. Dawkins MLC
Hon. G.A. Kandelaars MLC
Ms N.F. Cook MP
Mr S.K. Knoll MP

WITNESS:

HARBORD, GRAHAM, Managing Director, Johnston Withers Lawyers

364 The PRESIDING MEMBER: Thank you for your attendance here today. The committee is a standing committee of the Parliament of South Australia, and its powers and functions are set out in the Parliamentary Committees Act 1991. Today's hearing is in relation to work-related mental health and prevention of suicide. I bring to your attention sections 28 and 31 of the Parliamentary Committees Act, which sets out the privileges, immunities and powers of this committee, and the protection afforded to witnesses. Section 26 of the Parliamentary Committees Act provides that members of the public may be present during the examination of witnesses (we haven't got any), unless the committee resolves otherwise, but may not be present during the deliberations of the committee.

The transcript of today's proceedings will be available to the public once you have had an opportunity to ensure that it is factually correct. If you could introduce yourself, particularly for Hansard and the fact that we have live streaming. That little red light means that you are potentially being broadcast through the parliamentary building. Over to you, and thank you very much for your attendance today.

Mr HARBORD: Thank you to the committee for inviting me. My name is Graham Harbord and I am the Managing Director of Johnston Withers. Our firm has been in existence for 70 years now this year. We represent, primarily, injured workers in relation to workers compensation claims. We act for various unions, including the AEA for ambulance officers, and the UFU for firefighters. I am a former conciliator and arbitrator as well with the Workers Compensation Tribunal. My other areas of practice are employment and native title.

At the outset, I should say that in my view, and I think in the view of the other workers compensation practitioners in our firm, the Return to Work Act treats workers suffering from psychiatric injuries very differently from those who have had a physical injury. In fact, we would say that the legislation clearly discriminates against workers suffering from a mental condition. Effectively, the legislation demeans such workers by according those with a psychiatric injury much less by way of benefits under the workers compensation scheme compared with those suffering a physical injury. In our view, the only logic in this is as a cost-cutting measure at the expense of those workers who are suffering mental-health problems.

In terms of medical science, the Act sets up an illogical distinction between physical and mental injuries. It assumes you can neatly delineate between physical and mental conditions. In reality, a physical injury and resultant pain can have a very severe impact on a person's mental condition. Current neurobiology also demonstrates that mental injuries themselves can change neurological pathways, and lead to physical injuries.

Studies have been, for instance, on soldiers prior to and post deployment, and have shown the interrelationship of physical and mental injuries on their condition. I don't profess to be a medical expert, but we have eminent experts in South Australia, such as Professor Sandy McFarlane, who has done much study in this area, and I would suggest to the committee that if they wish to explore this matter further, it might in fact invite him to attend.

I will now turn to more specific provisions of the Return to Work Act to highlight the different treatment of workers with physical and mental injuries. Section 4 of the act sets up a number of definitions. It defines the concept of mental harm as meaning impairment of a person's mental condition; psychiatric injury means pure mental harm; pure mental harm is defined as meaning mental harm other than consequential mental harm; and consequential mental harm means mental harm that is a consequence of bodily injury to the person suffering the mental harm. You have to step your way through some of these definitions to understand later provisions in the Act.

This concept of pure mental harm seems to have been borrowed from the State's Civil Liability Act such that it applies, for instance, to motor vehicle accidents where a person who suffers pure mental harm might only be entitled to damages if that person was actually at the scene and witnessed the accident. The concept of pure mental harm is used very differently in the Return to Work Act.

Section 7 of the Return to Work Act provides that an injury is compensable if it derives from or arises from employment, and that is the key concept at the heart of the legislation. But here at the start begins the distinction between psychiatric and physical injury. For an injury other than a psychiatric injury, employment now must be: 'a significant contributing cause.' In the case of a psychiatric injury, however, employment must be: 'the significant contributing cause.' This is in contrast to the former legislation which provides that employment must have been a substantial cause.

There have been no cases yet on this new provision, and it is unclear how this change of wording will impact on actual situations. In my view, it is likely to at least lead to increased disputes about the very meaning of these terms.

The change seems to have been prompted by a Supreme Court decision some years ago now of IMVS v Auld, where the court pointed out that employment did not need to be the sole or major cause under the former legislation for an injury to be compensable. Now, whether the new legislation will be interpreted as requiring employment to be the major cause is yet to be seen—that word is not actually used, so we will really await any decisions on that.

Section 21 of the Return to Work Act is a key provision, where the distinction between physical and psychological injury will have an important impact. This is the section that defines a seriously injured worker. Such a person must be assessed as having a permanent whole person impairment of 30 per cent or more. A seriously injured worker will be entitled to continuing weekly payments after the two-year cut off date, and to continuing medical expenses by way of reimbursement.

Section 21(8) sets out certain criteria in relation to the assessment of that 30 per cent threshold, which is relevant to a mental injury, and it provides that: first, impairment from a physical injury is to be assessed separately from a psychiatric injury; secondly, no regard is to be had to consequential mental harm; thirdly, in assessing the degree of whole person impairment from physical injury, no regard is to be had from a psychiatric injury or consequential mental harm; and, fourthly, the 30 per cent threshold is not met unless the whole person impairment from the physical injury is at least 30 per cent, or separately the whole person impairment from the psychiatric injury is at least 30 per cent, so you cannot combine the two.

So, if a person suffers a severe physical injury but gets to, let's say, 25 or 26 per cent assessment of whole person impairment, suffers a separate psychiatric injury, gets to about the same, they will not be deemed to be a seriously injured worker, despite obviously having a very debilitating condition, at which level you would expect them not to be able to continue in the workplace.

Section 22 of the Return to Work Act provides that any assessment of permanent impairment must be made in accordance with the Impairment Assessment Guidelines. That assessment must be made by an accredited specialist. Recently we have been having a dispute with ReturntoWorkSA because they have been saying that a treating specialist is not permitted to do such an assessment. Our view is that there is nothing in the Act that says that, or indeed in the Guidelines. We say in fact that a treating specialist is in the best position to be able to properly assess whole person impairment because they know more than any others, in the case of a mental injury, the

history of a person, the causation, they have spent some time, and they have been able to assess and examine symptoms as they have developed over time.

Obviously in relation to a physical injury the treating specialist might be someone who is actually a surgeon, has actually gone inside the knee, for instance, and seen what is there. So it appears that ReturntoWorkSA has a view that a treating specialist would be biased. We strongly dispute this and, in fact, in my experience particularly working for injured workers, many so-called independent medical experts, I would say, are biased from time to time in acting for insurers, but that's just my personal prejudice.

The Return-to-Work Assessment Guidelines are very complicated and one has to refer to them and then refer to the American Medical Association Guidelines, the AMA guides. Prior to the current legislation, the Guidelines did not have any section for psychiatric injuries because the Guidelines were primarily used for assessment for noneconomic loss claims and the former Act, as does the current Act, excludes psychiatric injuries from any assessment or entitlement of an injured worker to noneconomic loss.

However, because it's now important to assess whether a person reaches the 30 per cent threshold and thereby becomes deemed to be a seriously injured worker, for the first time the Guidelines now have a section dealing with psychiatric injuries. Those Guidelines refer in turn to a document called the Guide to the Evaluation of Psychiatric Impairment for Clinicians (GEPIC). Again, the acronym is GEPIC. These are Guidelines that have been developed in Victoria and have been used in that jurisdiction—again, these are very complex. There is a range of criteria that a psychiatrist will need to assess in their examination and in giving their opinion about the 30 per cent threshold.

Our firm has not been involved in any such assessment to date. We anticipate that we will have a flurry of these, however, later in the year as the first two-year date approaches. However, in discussions with various psychiatrists, the opinion is that very few people with a psychiatric injury will achieve the 30 per cent threshold.

The views that I've heard from psychiatrists is that a person will need to be very severely impaired. For instance, they will have to maybe have difficulty leaving the home; need support such as in activities of daily living such as perhaps in self-cleaning; be very anxious and depressed; and may be quite socially isolated. So the opinion of various psychiatrists that I've spoken to is that it would be at a very debilitating level before a person with a psychiatric injury reached that 30 per cent threshold.

I might just illustrate some of the examples of the illogical way in which the Act distinguishes between mental and physical injuries and how they might play out in real-life situations. A first case example would involve an ambulance officer who attends an incident with a fellow paramedic and they attend a patient who is high on ice. Unfortunately, this is becoming a more frequent occurrence with paramedics. The first paramedic gets attacked by that patient and is stabbed, and suffers physical injuries and is incapacitated for work. He subsequently suffers an adjustment disorder from the pain resulting from the injuries, and depression. In that case, all of that mental condition would be considered to be consequential mental harm and, therefore, not taken into account for the purposes of the 30 per cent threshold test.

Then his colleague witnesses the attack and suffers no physical injury but does suffer severe PTSD as a result. That would be assessed as pure mental harm and would be capable of being assessed for the 30 per cent threshold. That second paramedic may well have an entitlement to continuing weekly payments, whereas the first paramedic, if the physical injuries aren't severe enough to reach the 30 per cent threshold, has no entitlement to continuing weekly payments after the two-year cut-off date.

Another variation of that scenario might be two police officers who attend a bank robbery. The first officer gets shot and suffers significant physical injury. He then suffers consequential mental harm, depression and anxiety, in particular, from what happened in the attack. None of that consequential mental harm is assessable for the 30 per cent threshold. The second officer, again, however, suffers severe anxiety as a result of what happened and considering it could happen to him in the future. That's pure mental harm and can be assessed under the 30 per cent criteria. In our view, that is illogical.

365 The PRESIDING MEMBER: I guess that analogy also could be for people who work in bottle shop drive-ins, in the retail sector and in the health sector?

Mr HARBORD: Exactly, yes.

366 The PRESIDING MEMBER: So the case studies that you are painting could be attributed to other employment as well?

Mr HARBORD: Yes, definitely. Our concern, in particular working for paramedics and firefighters, is that the way in which the legislation, the Return to Work Act, operates might mean that, let's say, a paramedic who does suffer a significant mental condition but may not meet that 30 per cent threshold may, in fact, be forced to disguise their condition somewhat and try to continue working. That could have an impact on their colleagues and, indeed, the general public. They are forced to work because otherwise they are off the system and on the streets and they've got no further income—particularly, let's say, paramedics, who are highly trained and, often, that has been their only career since they left school.

Just referring to, for instance, paramedics and police officers, there was a study done—I'm not sure if you are aware of this study—by Safe Work Australia in April 2013 which reported on the incidence of accepted workers compensation claims for mental stress in Australia. That put police officers and paramedics very high up—in fact, police officers came in second and ambulance officers third in the male category—for mental stress claims in Australia.

Another aspect of the new Return to Work Act is the concept, which is a new concept, of economic loss. That was introduced for those who are assessed as having a whole-person impairment assessment between 5 and 29 per cent. In other words, it's for those who get over that 5 per cent threshold but who would not be entitled to ongoing weekly payments after the two-year cut-off date. As I understand it, this was inserted into the legislation to part compensate those who would suffer from having their payments cut off after two years.

But, again, this concept and how it is measured for economic loss does not apply to workers suffering a psychiatric injury, and consequential mental harm is not to be included in any such assessment.

Despite the fact that workers suffering a mental injury are just as likely to have their payments cut off after that two years, they do not at least get some part compensation through the economic loss provision. Again, in my view, that is illogical. That concludes my oral presentation. I am happy to answer any questions about that.

367 The PRESIDING MEMBER: Before I ask other members to ask questions, I wanted to know whether you could perhaps flesh out a little bit more with regard to medical support, because certainly constituents who come and see me are in some cases more worried about the fact that they will have to fund their own psychological and medical support, medication or different therapies that have been suggested to assist them with their mental health or psychological problem. They have come to the understanding that they will probably have to try to apply for a disability pension in lieu of no wages, but they are really concerned about what access they will have to the services they had while they had been covered by the authority.

Mr HARBORD: Under the Return to Work Act, the entitlement for reimbursement of medical expenses will cease 12 months after the entitlement to weekly payments ceases. So, yes, unless those people can access Medicare—and obviously there will be some entitlement under Medicare, but that's limited—they will not be able to be treated, unless of course they pay it out of their own pocket.

The situation with private health schemes is a little unclear about this. One would expect private health schemes to pick up those expenses, but in the past private health schemes have said, 'Well, if you've got a workers compensation claim then we don't pay for that.' When a person is actually off the scheme, it may depend from private scheme to private scheme as to whether they will pick up some of those expenses.

368 The PRESIDING MEMBER: Also being able to afford to pay the private health scheme fees is another issue that's been raised with me.

Mr HARBORD: Exactly.

369 The Hon. J.S.L. DAWKINS: Thank you, Mr Harbord, for your presentation. I suppose my question will go a bit beyond the Act as it stands, because obviously in your work you deal not only with your clients but, in many senses, you would be aware of the impacts on their work colleagues and their families.

Mr HARBORD: Yes.

370 The Hon. J.S.L. DAWKINS: In the longstanding work I have done in suicide prevention, I am very well aware that one of the greatest levels of threat of further suicide is family members.

Mr HARBORD: Yes.

371 The Hon. J.S.L. DAWKINS: I am also working at the moment with a constituent who is a partner of a police officer who is doing more work to establish a group of support for the partners of police who have to deal with these issues when they are brought home. I wonder whether you can inform the committee of your experiences in that particular area, because that's obviously something that doesn't come under the Act, but it's certainly an issue that I am very concerned about.

Mr HARBORD: There's no doubt that suffering an injury at work, whether it's physical or mental, can have a substantial impact on the family. In terms of mental injuries in particular, when I see a client often the partner comes along as well, because quite often the partner is giving a bit more of a reality check on what is happening. In my experience, the worker who is suffering a mental condition often underplays that, whereas it's the partner who sees what is actually happening to that person, how they have changed over time, how that's affecting the family life, the children and their whole social life.

Some say if you have a physical injury, it's clear, it's visible, you can deal with that. You still go out and socialise; you still attend your children's netball functions, etc., whereas if there's a mental injury, you often find the husband becomes quite isolated. that's in the case of a male, and his wife or partner then actually has to take a lot more of the burden of attending those social functions. Suddenly, they're cut off from their friends, so that can have quite a debilitating impact on the partner and even the children as well.

372 The Hon. J.S.L. DAWKINS: Just as a follow-up, I think we've had this evidence before that, as you say, perhaps the person who has had a physical injury at work and then attends those social or community functions, and they have got a broken arm or a broken leg or some other physical thing, they get a lot of sympathy, but that doesn't necessarily happen if the person has had some mental illness as a result. Would you agree with that?

Mr HARBORD: Yes, I would agree with that. I think there is still a general stigma in the community in relation to people suffering mental injuries; psychiatric conditions. It's difficult, because those conditions can fluctuate for a start. One day, a person can be operating quite well and then the next day they're not at all. That's difficult for friends to understand what's happening, and just generally you see a change in personality happening; so that person who was once your friend is now quite a different person and difficult to relate. So, there's a lot of more complex problems concerning people suffering mental injuries as against physical where it's clearly diagnosable and even if it's a permanent injury, at least you know what it is and you can seek to compensate for that.

373 Mr KNOLL: When it comes to the Return to Work Act, where you suffer consequential mental harm within the two-year period, are any medical expenses that arise as part of consequential medical harm covered?

Mr HARBORD: Yes.

374 Mr KNOLL: Obviously, you go off and get treatment for a physical injury, but for consequential mental harm you still get—

Mr HARBORD: You'll still get reimbursement of medical expenses, yes. A sequelae of a physical injury still can be reimbursed.

375 Mr KNOLL: So, the issues arise when it comes to the whole person permanent calculations towards the end of the two-year period.

Mr HARBORD: That's correct, yes.

376 Mr KNOLL: Just one other question: we've had a look at this as a committee before, and I suppose we had lay people looking at what is otherwise, I suppose, a complex assessment the GEPIC assessment.

Mr HARBORD: Yes.

377 Mr KNOLL: I suppose one of the things that I found was the seeming, random nature of the outcomes based on the examples we had presented to us.

Mr HARBORD: Yes.

378 Mr KNOLL: Do you think that the GEPIC is a good way to get consistent outcomes?

Mr HARBORD: No, I think that the whole rationale, as I understand, behind the Guidelines, behind the AMA Guidelines, behind GEPIC, is to try and have some so-called objective measurement. It does go part way towards that, but no I don't think it's a successful tool at the end of the day.

As I understand it, and I'm not an expert in the Victorian situation, but I think that in Victoria, psychiatrists can actually provide a report that you'd have your GEPIC criteria but then provide a narrative around that which might actually expand on that and say: well look, although strictly this person doesn't get to this because of these reasons, they may actually fall over the whatever—the threshold. But I think the problem is that GEPIC, at least in this state, is still in its early days, and we'll need to see how it plays out.

379 The PRESIDING MEMBER: Any other questions? If not, thank you for your excellent presentation this morning. We really appreciate what you have had to say and learnt a lot from your experience in this area.

Mr HARBORD: Thank you very much for inviting me.

THE WITNESS WITHDREW