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PROCEDURE AND EVIDENCE UNDER THE WORKERS COMPENSATION AND  
REHABILITATION ACT 1981

By

Robert Guthrie  
Lecturer  
School of Business Law  
Curtin University of Technology



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ABSTRACT

The resolution of dispute in workers compensation matters has undergone significant changes since March 1994.

The theme of those changes is informality in dispute proceedings. This paper considers the powers of the Conciliation and Review Officers, reflecting upon their freedom from the rules of evidence, but cautioning against moving too far away from the principles and rules of evidence which facilitate fairness in proceedings.

# PROCEDURE AND EVIDENCE UNDER THE WORKERS COMPENSATION AND REHABILITATION ACT 1981

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## **Introduction**

Effective from March 1994 the *Workers Compensation and Rehabilitation Act 1981* (the Act) requires that the resolution of workers compensation disputes in Western Australia be administered by The WorkCover Conciliation and Review Directorate (The Directorate). The Directorate apart from its purely administrative functions is a two tiered dispute resolution body, consisting in the first instance of Conciliation Officers, and in the second instance Review Officers. A third but separate tier deals with appeals from the Review Officer - the Compensation Magistrate.

## **Conciliation Officers**

Conciliation Officers have limited powers under the Act. They are required by the Act to act in a manner which is fair, economical, informal and cheap (see section 84P) and generally without regard for legal technicalities. Procedurally once a dispute has been notified to the Directorate (by the applicant completing the required application Form 1) the Conciliation Officer is required to act on the matter within 14 days. Experience shows that due to the volume of work (around 3000 - 4000 applications for conciliation per annum) and the relatively small number of Conciliation Officers, it is not possible to convene a conciliation conference within 14 days. Often the support staff of the Directorate will contact the parties to discuss the parties availability for conciliation. Sometimes the Conciliation Officer may contact either party by telephone, to see whether the matter cannot be settled without a conference or to see if some preliminary issue can be resolved.

If a conciliation conference is convened, neither party is entitled to be legally represented (see section 84Q) except in exceptional circumstances. The Conciliation Officer does not "hear" the matter nor take evidence. The parties are not put on oath. Witnesses are not necessarily required. The intention is to attempt to resolve the matter on an informal basis. Agreement is said to be the key to the process. Conciliation is by its nature intended to be "non-adversarial".

## Conciliation - The Unrepresented Worker

A number of considerations bear upon the topic of the "unrepresented worker". There is no doubt that the provision prohibiting legal representatives was enacted with an eye to reducing legal costs and reducing delays. <sup>1\*</sup>

The fact that neither side is entitled to be legally represented has the appearance of balance and fairness. This however ignores the inherent imbalance of power in workers compensation matters. An employer is entitled to be accompanied by an insurance claims officer. Some recent Compensation Magistrate decisions suggest this may not be of particular assistance. <sup>2</sup> The writer's view is that insurers generally have greater resources to investigate a claim, gather evidence, and obtain advice on legal issues than workers. Even workers who are members of unions find that the resources of the unions may not be the equal of the insurers. Some efforts are being made to improve the level of trade union advocacy in workers compensation matters. <sup>3</sup>

It will not be uncommon for the insurer to engage an insurance investigator. Given the fact that lawyers will not be involved at conciliation level, it is likely that the use of insurance investigators will increase, as claims officers attempt to obtain as much information as possible for the conciliation process.

### Disclosure of Documents at Conciliation

It seems generally accepted that there be a free exchange of documents by the parties at conciliation. Given that the Conciliation Officer is not bound by the rules of evidence, it seems to be encouraged that even documents which are privileged are exchanged. The concept of privilege is discussed in detail below. This raises a number of points.

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<sup>1</sup> A number of enquires in Western Australia have touched upon the costs/delay issues of workers compensation matters.

(a) Inquiry into Workers Compensation Dispute Resolution System [R Chapman] 1993.

(b) The Enquiry in Workers Compensation Dispute Resolution 1991 [The Guthrie Report].

<sup>2</sup> See *Mining & Industrial Metal Spray Pty Ltd v Smith* (unreported CM (WA) 99/94 12 December 1994 at page 10.)

<sup>3</sup> In November and December 1994 the writer commenced programs to assist trade union advocates in this area, with the assistance of the Trades and Labour Council of Western Australia.



Firstly unrepresented workers are less likely to understand the concept of privilege and are likely to surrender documents which may be adverse to their interest.<sup>4</sup> Preliminary letters of advice from lawyers and trade unions may be delivered up, which would normally be covered by the rules of privilege. At the same time, it seems that insurers have also made available investigators reports either because the document is not privileged, or because there is no appreciation of the fact the document may be privileged. Perhaps the insurers are prepared to discover the investigators reports out of a desire to comply with the spirit of conciliation.<sup>5</sup>

### **Agreement at Conciliation**

If the parties agree to settle at conciliation, a certificate of the agreement is made and kept on the Conciliation Officers file. There are some doubts as to whether such an agreement is enforceable.<sup>6</sup>

If the parties do not agree, the matter may be referred to a Review Officer, or if the Conciliation Officer considers it appropriate, orders can be made for up to 10 weeks weekly payments and approximately \$2000 in medical expenses.

The proceedings before the Conciliation Officer are not recorded, but the Conciliation Officer does make a note of the proceedings. These notes and other documents on file can later be viewed by the parties. The writers experience is that the Conciliation Officer's file, may contain documents, which would have been unlikely to have ever been placed on any court file. This may be an advantage for the Conciliation Officer to get the broadest picture. It does seem consistent with the inquisitorial model of dispute resolution. The downside is that the Conciliation Officer may unwittingly be given documents by unrepresented parties which do not accurately reflect the situation.

Despite the lack of formality of the proceedings, there seems little doubt that the Conciliation Officer is bound to act fairly. The temptation for a Conciliation Officers to assist the parties on the basis of a perceived weakness in presentation, may sometimes be irresistible. As a matter of logic, insurance claims officer must acquire a level of expertise in this area, given the strong possibility of regular attendances at

<sup>4</sup> The writer has received instructions from a number of workers following conciliation, noting that documents not normally discovered have been provided to the employer/insurers.

<sup>5</sup> In the case of the State Government Insurance Commission, the Freedom of Information Act 1992 may compel the insurer to deliver up all documents relevant to a decision, thus exposing the SGIC file to more extensive discovery.

<sup>6</sup> See *United Construction Pty Ltd v Gajic* (unreported CM (WA) 50/94 19 September 1994)

the Directorate. If this is so, a Conciliation Officer would need to be vigilant to maintain fairness where there is an imbalance in expertise.

### **Review Officers - Procedure and Evidence**

Review Officers are not limited in their power to make orders for payments under the Act. In addition to the powers conferred upon the Conciliation Officers, the Review Officers have more formal procedural powers. Review Officers are able, for example, to administer an oath or affirmation (see section 84ZB).

### **Oaths and the Review Officers**

"The early rules were basically designed to prevent all sorts of "unreliable" people from testifying. For example, the oath used to be a necessary precondition to testifying. An atheist or a person who did not believe in a religion, which offered divine sanctions for observance or breach of an oath to tell the truth, could not take the oath.

Now days, of course, religious objections are irrelevant, in the sense that a person who does not wish to swear an oath can always affirm. It is not necessary for a witness to have any particular religious conviction or belief, or even an awareness of the possibility of divine intervention, to establish an oath to be taken. A judge who has doubts about the competency of a witness may investigate the witness's understanding the importance of telling the truth. Not only is there no need, at least with adult witness to prove a theological appreciation, but is also undesirable for a judge to examine the witnesses theological knowledge..... Legalistically, there is no difference between a sworn oath and an affirmation."<sup>7</sup>

In what way is an Review Officer concerned with the administration of oaths and affirmations. A number of issues arise out of section 84ZB.

### **When Should an Oath or Affirmation be Administered?**

The clue to this question is given in the above quoted passage. Whenever an Conciliation or Review Officer has doubts about the competency of a witness to understand the importance of telling the truth, then the Review Officer should consider administering an oath or affirmation. This is most likely to occur when an

<sup>7</sup> M. Aronson, J. Hunter, M. Weinberg. *Litigation - Evidence and Procedure*. 4th Edition. Butterworth Publishers [1988] 636.

workers compensation dispute involves an issue dealing with, in part at least, the credibility of certain witnesses. It usually does not arise where a person is asked to give expert evidence, but is most likely to arise when there is a dispute as to the facts surrounding a particular case. When those facts are in dispute, the credibility of a witness may be important. It is important therefore that the witness understands that it is important to tell the truth. A Review Officer may not have the advantage of the solemnity of the court room surrounds but in some cases administering the oath or affirmation may bring across to the witness the importance of the procedure in which they involved. This may be so, whether the witness is giving evidence as to facts and circumstances surrounding a particular event, or whether they are producing relevant documents or exhibits for the hearing.<sup>8</sup>

Attached to this paper are examples of various oaths which may be used where the witness is of a particular religious persuasion. The thrust of those oaths is that the intention is to impress upon the witness the need to tell the truth. This can just as easily be done by way of an oath or an affirmation. There is no reason why an affirmation cannot be used as a matter of practice, in fact this has the convenience that it is not necessary to ask a person whether they want to swear the oath or an affirmation. It is more common for a person to decline to swear an oath and to insist upon taking an affirmation. Only occasionally has the writer been in the position where a witness has demanded to take an oath.<sup>9</sup> The oath has the advantage that it is so well known to most people who are acquainted with the exploits of "Rumpole" and "L.A. Law". The affirmation has a disadvantage that it is sometimes difficult for the witnesses to get their tongues around the words solemnly and sincerely.

One point should be noted that if there is cause to use an interpreter (where the witness is non-English speaking) then the interpreter should be sworn before the witness and an oath be administered to the interpreter to the effect that the interpreter will truly interpret the evidence about to be given. When interpreter's oath has been administered, it is usual to ask the interpreter to translate the fact that the interpreter has taken an oath, to the witness and explain to the witness the oath which the interpreter has taken. Then it is necessary for the interpreter to translate the oath taken by the witness to the witness and to satisfy the Tribunal or relevant

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<sup>8</sup> But note that there are real doubts about credibility of witnesses. See "*Oral v Written Evidence*" : The myth of the impressive witness (1983) 57 ALJ 679

<sup>9</sup> This is the writer's experience as Chairman of the Commercial Tribunal of Western Australia between 1990-1994. Note that oaths or affirmations are not used at the Social Security Appeals Tribunal which has a similar legislative directive to act in a manner which is fair, just, informal, quick and economical.

officer that the witness has understood the nature of the oath which the witness has taken.

### **When should the Review Officer allow evidence to be given in writing?**

Section 84ZA(4) allows the Review Officer to take evidence in writing and there may be good reason why it should be done this way. In some cases the facts are not in dispute and the parties can place before a Review Officer an agreed statement of facts. In these cases the parties ask the Review Officer to determine certain rights and entitlements under the Act or to weigh the effect of certain reports and expert evidence which may also be in writing. Sometimes it may be appropriate rather than to hear opening or closing statements by the parties, to allow the parties simply to make submissions in writing. This can be useful, as it may save time and reduce the expense to the parties involved. When the submissions and papers have been read, there is nothing wrong with the Review Officer seeking further clarification if need be. The disadvantage in obtaining evidence in writing is that it does not allow the Review Officer to assess a witness's credibility or demeanour. Where there is some dispute as to the facts or circumstances, it would be unwise to ask for submissions or evidence to be given in writing.

### **The Rules of Evidence and Review Officers**

Sections 84P and 84ZD of the Act provide that the Conciliation and Review Officers are not bound by the rules of evidence and may inform themselves in relation to any matter in such manner as they see fit. In relation to the Review Officer, section 84ZD should be read together with section 84ZA(2). That section provides,

“The review officer is to act fairly, economically, informally and quickly in resolving the dispute whether by bringing the parties to agreement or otherwise”.

Section 84ZA(2) in effect requires the Review Officer to act in accordance with equity and good faith. This is not a dissimilar phrase to that which is employed in a number of tribunals.

For example, the recently abolished Western Australian Worker's Compensation Board was, (by the repealed Section 118 of the Act) required to act according to "equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms and is not bound by legal precedent or its own decisions

or rulings in any other matter, not by any rules of evidence but may inform its or his mind on any matter". Similar words now appear in section 116 of the Act which relate to the Compensation Magistrate.

A similar direction is given to the Industrial Relations Commission of Western Australia under section 26 of the *Industrial Relations Act 1979 (W.A.)* but it is interesting to note that some Commonwealth Tribunals put the direction much more simply by requiring the Tribunal to act in a manner which is fair, just, economical, informal and quick.<sup>10</sup> What generally comes out of phrases of this kind is that notwithstanding that the tribunal or Conciliation or Review Officer is not bound by the rules of evidence and may inform himself/herself in such manner as they think fit, the courts have generally held that those decision makers are bound by the rules of natural justice. In *Pearce v Lakeview and Star Ltd*<sup>11</sup> the Western Australian Supreme Court directed that the Workers Compensation Board should act judicially and in accordance with natural justice.

#### What is Natural Justice?

In 1960 in a decision of the Privy Council it was said that natural justice was, "the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and thirdly of course that the tribunal should act in good faith. I do not think that there is really anything more."<sup>12</sup>

In another English decision well known to Australian lawyers, *Ridge v Baldwin*, it was observed by Lord Hodson that there were three features of natural justice -

- "(1) the right to be heard by an unbiased tribunal;
- (2) the right to have notice of charges of misconduct;
- (3) the right to be heard in answer to those charges."<sup>13</sup>

The courts in those cases were speaking of matters involving disciplinary tribunals where it is necessary for the person charged with misconduct to be aware of the charges made against them and to be given the opportunity to put their case.

<sup>10</sup> See the Immigration Review Tribunal and the Social Security Appeals Tribunal. This form of words is now inserted into Section 4 of the Act.

<sup>11</sup> [1969] WAR 84

<sup>12</sup> *University of Ceylon v Fernando* [1960] 1 WLR 223 at 232.

<sup>13</sup> *Ridge v Baldwin* [1964] AC 40 at 132.



Nevertheless those principles apply to workers compensation disputes and could be summarised as follows:

1. The applicant should set out precisely the nature of the claims it makes against the respondent to an workers compensation dispute and if there are any counter claims by the respondent against the applicant, then these should likewise be set out clearly.
2. Both parties should have the opportunity to answer any claims made against them by the other party, whether this be given in the nature of giving oral evidence or evidence in writing.
3. That the Review Officer appointed to hear the matter should act in good faith - meaning that the Review Officer should be free from bias with a mind that is reasonably open to material placed before him/her.
4. Each party has a right to be represented.
5. There should be disclosure of material evidence to all parties.
6. The Review Officer should give reasons for a decision.

Section 84ZD says specifically that a Review Officer is not bound by the rules of evidence. Even though a Review Officer is not bound by the rules of evidence, the Review Officer is bound to act in accordance with natural justice. It is important for the Review officer to understand some principles of evidence, in order that they do not breach the principles of natural justice, which are encapsulated in some of the rules of evidence.

A recent report of the Legislative Council of Western Australia Standing Committee on legislation in relation to the *Workers Compensation and Rehabilitation Amendment Act 1993* recommended that Review Officers have appropriate training in the processes of dispute resolution and the laws of evidence. This recommendation was made principally because it is not a requirement that a Review Officer be legally qualified. The Committee said;

“it goes without saying that the rules of natural justice will apply to disputes before Conciliation and Review Officers. However, one should be cognisant of the philosophy pertaining to conciliation as opposed to formal adversarial dispute resolution. Although the philosophy pertaining to conciliation is not directed towards legal dispute resolution it is, by its very nature, a mechanism designed to ascertain facts surrounding the injury to a worker. That is, the determination and substantiation of facts will necessitate observance of rules pertaining to

natural justice. Accordingly, the rules of evidence must be adhered to if natural justice is to be observed and not infringed.

The determination of facts is a crucial legal question, not so much in relation to the facts themselves but the method of ascertaining those facts. How can a Conciliation or Review Officer be sure they have not breached a rule of evidence, or for that matter the rules of natural justice, if they are unfamiliar with the complex laws pertaining to the admissibility of evidence? For example, disputes as to the circumstances surrounding the occurrence of an accident will inevitably involve hearsay evidence, such evidence being crucial to the determination and resolution dispute. In many cases it is inescapable in the assessment of hearsay evidence that character evidence will be adduced to test the credibility of witness hearsay evidence. Given the fact that the Review Officer is not required to be legally trained or qualified, there is enormous potential for such officer, and to a much lesser extent a Conciliation Officer, to make an incorrect decision based on his/her determination of the evidence.

Evidentiary questions will, in many instances, necessarily involve questions of law pertaining to the assessment of such evidence. Although the Review Officer is empowered, in circumstances where a question of law is raised or is likely to be raised or argued, to permit legal representation of parties to the dispute, the Review Officer must still assess the evidence and make a determination on the facts. If such Review Officer is confronted with two opposing legal interpretations relating to the admissibility of evidence and is unable to make a determination due to his/her inadequate knowledge of the law, then the matter must invariably be referred to the Compensation Magistrate's Court. However, in circumstances where the officer is not skilled in the law, particularly in the laws of evidence and administrative law.

The substantial basis for opposition to the appointment of lay members as Conciliation or Review Officers is that the legislation requires them to act judicially. Accordingly, it has been contended that it is inappropriate for them to be given such powers.

It has been suggested that the proper selection and training is the most fundamental safeguard against administrative inefficiency and abuse. In other words, if the Conciliation and Review Officers are legally trained or

qualified there is less likelihood of there being an administrative appeal against their decision. While both Conciliation and Review Officers should receive training at an appropriate level, it is apparent that the problem may become more acute at the Review Officer level".<sup>14</sup>

### **Is the respondent able to make out the claim against it?**

The new informal procedures for the filing of a conciliation request do not require the applicant to detail the specific matters in dispute. The design of the form is intended to allow an applicant to complete the form without legal assistance. The design of the form presumes that the 'worker applicant' will have the claim details to hand (the insurers claim number etc). In addition, the form requires a brief statement as to the circumstances of the dispute. In some cases the respondent may not have a clear picture of the applicants case. In most cases the employer respondent will not be prejudiced, because the employer/insurer is in possession of most of the relevant documentation. The propensity for confusion increases where the employer is the applicant and does not specify the grounds of the application clearly in the conciliation request. For example an application for a refund of weekly payments overpaid generally requires specific detail as to the amount claimed and when the payments were incorrectly paid. Similar situations may occur where the worker is served with a notice under section 61 or an application under section 60 or 62 of the Act. In all of these types of applications, the review officer would have to maintain (especially in the case of section 61 applications), a strict procedures for the hearing of these application. This strict procedure was laid down in the cases of *Heat Containment Industries v Kimberely*<sup>15</sup> and *GlenCraig Villages*.<sup>16</sup> The *GlenCraig Villages* case is essentially a case dealing with procedural fairness and the requirement that the abolished Workers Compensation Board, and now the Review Officers, test any conflicting evidence by hearing the evidence orally. A failure not to do so, may amount to a breach of natural justice and be the basis of an appeal to the Compensation Magistrate.

The point being made, is that the design of application forms can be important in ensuring that there is natural justice. No doubt legal practitioners who complete the conciliation forms on behalf of applicants will attach further particulars to the form. For example, the conciliation claim form makes it difficult to give details of a gradual

<sup>14</sup> The twenty-ninth Report of the Standing Committee on Legislation in relation to the *Workers Compensation and Rehabilitation Amendment Act 1993*. Page 15-16.

<sup>15</sup> (1990) 2WAR 47.

<sup>16</sup> *GlenCraig Villages Pty Ltd v Donaghy* (1992) WAR 122.



onset condition, because the form refers only to "date of injury". This is an irritating oversight, which has been perpetuated in the claim forms designed for the purpose of giving a notice of a claim under section 84I.

The form which is used for the request for review, is less explicit than the conciliation request form. It is possible to complete the relevant particulars of the review request, by simply stating that the conciliation officer was wrong, without suggesting why. Again the intention of the legislation is to allow these forms to be completed without the assistance of lawyers. Ironically, at the Review Officer level there is likely to be a greater input by the legal profession, as representation is allowed at this level, where there is an issue of law to be determined.

If the parties are unrepresented at review and the "paper work" continues to lack detail, the Review Officer is forced to clarify the issues. In most cases this leads to the need for a preliminary review, to discuss the procedures at review. This procedure possibly amounts to a doubling up of appearances, given that a conciliation has already taken place.

In South Australia, the two tiered model has been disbanded with Review Officers doing the initial conciliation and later reviews. A recommendation that Conciliation Officers be removed has recently been made in Western Australia.<sup>17</sup> This would place even greater pressures on the Review Officers to ensure the material this is before them is properly considered.

#### **Will the Review Officer act fairly? - The Unrepresented Worker**

A heavy burden rests on the Review Officer to ensure that an unrepresented applicant worker is not disadvantaged. The Act provides for the services of an interpreter to be utilised in the case of the non-english speaking applicant. This does not overcome the problems that will confront most 'worker applicants' who will be engaged in personal injuries litigation for the first time. The situation over the past 10 years in particular, has been that workers have used the services of lawyers heavily, when seeking workers compensation advise. This may have been reflected somewhat in the increase in legal costs over that period (the costs issue was said to be the stimulus for some of the changes in the representation criteria). Unions have largely vacated the arena, and there is support for the view that employers are also

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<sup>17</sup> The twenty ninth Report of the Standing Committee on legislation in relation to the *Workers Compensation and Rehabilitation Amendment Act 1993* page 13.

not well informed in relation to these matters.<sup>18</sup> A worker suffering injury for the first time is unlikely to understand his/her entitlements. A consideration of the statistics also suggests that there will be certain groups in the community who will be especially at risk. Women occupy a higher percentage of the part-time and casual jobs and are less likely to be unionised than men.<sup>19</sup> Women are also more likely to be engaged in outwork with less access to advice and support.<sup>20</sup> Migrant women are especially over represented in the part-time/casual out work style of work.<sup>21</sup>

Women spend more time off work, once injured, than men.<sup>22</sup> The main reason for this is probably that because of the greater part-time element to their employment, they are less likely to be able to access to successful rehabilitation programs, because the best means of rehabilitation (return to work) is generally less available to part-time workers.

Women therefore seem amongst a vulnerable group of unrepresented workers. The same could be said of young workers, who with less experience of employment matters, less union attachment and financial resources, are likely to find the dispute resolution process mystifying.

How does the Review Officer react to inequities in bargaining, negotiating and advocacy powers? Natural justice requires that there be no attempts to redress any imbalance. To do so would give rise to an allegation of bias.

Superior courts have frequently warned of nature of bias. In *R v Conciliation and Arbitration Commission ; ex parte Angliss*<sup>23</sup>, the High Court said:

“Those requirements of justice are not infringed by a mere lack of nicety, but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it *may not bring* to the resolution of the questions arising before the tribunal fair and unprejudiced minds.”

18 See Guthrie Report - pages 79-81.

19 “Women in Australia” Australian Bureau of Statistics ABS Catalogue 4113.0 1993 Page 124.

20 Ibid Page 136

21 Ibid Page 122

22 “State of the Work Environment” Dept of Occupational Health Safety and Welfare Workcover WA. No. 20 March 1995 page 25.

23 (1969) 122 CLR 546 at p 553-4.

Where the parties are unrepresented and one party has a superior bargaining position, there may be a reasonable apprehension of bias if the Review Officer "steps into the ring", and attempts to assist a party to the dispute.

### **The Disclosure of Material**

As previously mentioned some problems are evident in relation to the "over discovery" of material at conciliation level. The difficulty that arises at review, may be that an unrepresented party (usually the worker) has no notion of what documents he/she is entitled to see or obtain. If the notions of relevance and admissibility are generally too esoteric for the lay person, how then are they to know what they should seek out, much less than know that they can require copies of documents on their opponents file. Short of the Review Officer examining the parties files, it is very likely that matters could come to review with either irrelevant/privileged documents being exchanged, and relevant documents only becoming available on the day of hearing.

Although the preliminary review is clearly designed to alleviate this possibility, it is hard to see it being eliminated where legal representation is limited and Review Officers are not legally qualified.

### **The Right to Representation**

Some cases <sup>24</sup> suggest the right to be represented constitutes a principle of nature justice. Clearly the Act now contains a statutory modification of that principle. Other jurisdictions have similar limits, notably industrial jurisdictions.

A recent decision of the Compensation Magistrate suggests the right to engage legal representation will be strictly limited on an "all in or all out" basis. In that particular case the worker was proceeding with a claim for compensation alleging that the disability arose out of stress in the course of the employment. "Stress" claims are now treated differently to other disability claims, as a consequence of amendments to the definition of disability under Section 5. In general terms, no "stress" claim can proceed where the claim relates to stress arising from so called industrial relations issues such as dismissal, discipline, transfer and lack of promotion. It follows that in some instances, a preliminary issue may have to be determined, that is the origins of the stress. A second preliminary issue arises, where it is determined that the stress

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<sup>24</sup> Especially in criminal cases see *Dietrich v R* (1992) 23 ALR 385.

arises from those industrial relations issues and not from "actual work". If the disability is related to stress from industrial relations issues, then the Review Officer has to determine whether the industrial relations issues have not been resolved in a manner which was harsh or unreasonable. If the finding is that the dismissal (for example) was harsh or unreasonable, then the worker will not be prevented from proceeding with a claim. These matters, it is submitted, are at a minimum, mixed questions of law and fact.

Where the stress relates to actual work activity or to a particularly stressful incident (a robbery, the viewing of some traumatic accident for example), then questions of law may not be an issue.

So in *Mining and Industrial Metal Spray Pty Ltd v Smith*, the Compensation Magistrate took the view that not all stress claims would involve questions of law.<sup>25</sup> It follows that if no question of law exists, neither side has an automatic right to legal representation. What is a little surprising, is that in *Mining and Industrial Metal Spray Pty Ltd v Smith*, the worker who was originally legally represented decided to proceed with the case unassisted. The issue was whether the insurers would retain their counsel. The Compensation Magistrate found that as there was no issue of law to be decided, the only way that legal representation could be allowed for the insurers, was if the worker retained her lawyer. As she had chosen to proceed without a lawyer, the insurers therefore had to proceed without legal representation. The decision must be of considerable interest to the legal profession which presumably sees another avenue of access to the dispute resolution system closed off.

### **Is the Review Officer Required to Record the Proceedings?**

It seems that there is no obligation upon tribunals (as opposed to courts) to record evidence and this would certainly be the case in relation to a person acting as an Conciliation or Review Officer. A Review Officer may of course take notes, and if desired a transcript of the evidence could be retained, but there would be no obligation to do so.

Section 84ZN of the Act allows the Compensation Magistrate certain powers to deal with appeals from an award made by a review officer. Under section 84ZN the Compensation Magistrate deals with an appeal as to any question of law arising out of an award. This suggests that in making an award, sufficient reasons should be

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<sup>25</sup> (unreported CM(WA) 99/94 12 December 1994).

given to support the award. This is clear from section 84ZI of the Act, which requires the Review Officer to give his/her reasons in writing. Where a question of law is decided which is unsupported by evidence, then there may be the grounds for appeal. Therefore it follows, that in making a decision on a question of law, that sufficient record of the facts supporting those matters should be kept and should therefore be detailed in the decision itself.<sup>26</sup>

The Compensation Magistrate has recently found in a number of cases, that in order for an appeal from a Review Officer to succeed, there must be demonstrated that the Review Officer was wrong in law, not merely that the Compensation Magistrate would have made a different decision.<sup>27</sup>

Because of the restrictions on the right of appeal to the Compensation Magistrate, and because rights of representation to the Compensation Magistrate are unrestricted, it is submitted that some creativity in appeals will be experienced. Linked to this are the impediment to "Stress Claims". Evidence for other States suggests that the number of stress claims will not decline markedly, but rather vigorous efforts will be made to side step the obstacles.<sup>28</sup>

A recommendation has been made, that the right of appeal to the Compensation Magistrate include an appeal on questions of fact.<sup>29</sup> This would certainly require all Review Hearings to be transcribed.

If the dispute resolution system were to be modified so as to do away with a Conciliation Officer, then an expanded right of appeal seems appropriate. In South Australia however, where the Review Officer is central to dispute resolution, the right of appeal continues to be on a question of law.

### **Onus of Proof?**

In civil proceedings the onus of proof is upon the person who asserts a particular right or claim. This is the case in any workers compensation dispute proceeding. The burden of proving certain facts and circumstances rests upon the party who relies upon those matters, in order to succeed with their claim.

<sup>26</sup> See *Westralian Farmer Co-operative Ltd v Bunce* (unreported SC(WA) 31 May 1989)

<sup>27</sup> *Dixon v Bunnings Ltd Manjimup* (unreported CM(WA) 46/94 27 September 1994) relying on decision in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139.

<sup>28</sup> Personal communication between the writer and Director of Review South Australia.

<sup>29</sup> See footnote 13 - Report page 17.



Where an Review Officer places the onus of proof upon the wrong party, this may be a breach of natural justice and may give grounds for appeal. It is therefore necessary to establish as early as possible, what matters need to be proved, and upon whom the onus of proving those matters lies. In some disputes, particularly where a counter claim is being made, the respondent may have the onus of proving certain matters relating to that counter claim. This would be so, for example in cases where the employer seeks a refund of payments made, or where an allegation of wilful misconduct is made by an employer. The Review Officer has to distinguish between proven facts and speculation <sup>30</sup>

### Standard of Proof

In civil matters, the standard of proof is on the balance of probability. This standard requires the Review Officer to weigh the evidence and to establish whether the evidence taken on balance proves the matters asserted by the person who makes the claim. It may be that there is some doubt on some issues, but it need not be that the applicant (or respondent making the counter claim) need establish the matter beyond reasonable doubt. To set the standard or proof too high or too low could be a breach of the rules of natural justice. To require a party to prove a matter beyond reasonable doubt in an workers compensation dispute, would be an unnecessarily high standard of proof, but to allow a party to succeed where they have not been able to establish their case on balance of probabilities, would do an injustice to the other side.

A matter touching on the standard of proof was *Crake v WA Fire Brigade* where the Compensation Magistrate dealt with a referral by a Conciliation Officer of a matter to the Medical Panel constituted under section 145 of Act. <sup>31</sup> The Conciliation Officer considered that a "serious conflict of medical evidence" was required before a matter could be referred to the Medical Panel. This was held to be a requirement not contemplated by the Act. A simple conflict was all that was required.

Some offences are created under the Act. Those that relate to fraud by a worker, or breaches of the Act by the employer, are criminal in their nature, and it follows that the standard of proof in those matters is beyond reasonable doubt. (See for example section 188).

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<sup>30</sup> *Caswell v Powell Duffryn Assoc Collieries Ltd* (1940) AC 152.

<sup>31</sup> (Unreported CM(WA) 39/94 10 January 1995).

### **Is it Necessary to Have a Court-style Hearing?**

There is every indication from the Act itself, that it is not necessary for the Conciliation or Review Officer to establish a court style hearing, and it is well established that conciliations and reviews are intended to be informal. It would be contrary to the theme of the Act to hear matters on a style similar to that of a court. Sections 84ZB and 84ZE are consistent with this theme, in minimising legal representation and promoting informality. Notwithstanding this section 84ZB of the Act allows the parties to obtain subpoenas for witnesses to attend at a review. This section tends to imply some court-like formality, but in essence section 84ZB facilitates the attendance of witnesses, rather than dictating any particular procedure for hearing evidence.

Whether evidence should be taken orally or in writing is a matter for the Review Officer to decide but there should be some consistency. For example the Review Officer should not take evidence orally from the applicant, but then take it in a written form from the respondent. That method may imply some bias and would therefore be a breach of natural justice. Whatever the method adopted, consistency would be necessary. It is important to remember that where oral evidence is the method of procedure, then it naturally follows that in allowing a party to investigate and establish the case against it, cross examination of witnesses should be allowed.

Cross examination includes the ability of one party to put propositions to a witness, to lead the witness, to insinuate as to certain matters and generally test the witness. The person who calls the witness to give evidence is not allowed to cross examine. It is only allowed, if that person wishes to challenge the evidence of that witness, that is the opposing party. In many ways this is seen as the essence of court procedures. Nevertheless it follows that if oral evidence is the procedure adopted, then cross examination of witnesses should be allowed in workers compensation dispute procedure.

There seems to be no reason why evidence should not be taken by telephone. This practice has been used in the Commonwealth Administrative Appeals Tribunal since its' inception. The Compensation Magistrate has recently noted some draw-backs in relation to the procedure, but has effectively left it to the Review Officer to determine whether it is appropriate to hear evidence by telephone. It is conceivable that taking evidence by telephone could amount to a denial of natural justice and lead to an

appeal. This would be so where the cross examination of the "telephone witness" was made so difficult or futile, as to amount to no cross examination at all.<sup>32</sup>

Incidentally, the phrase "cross examination" does not sit easily with the notion of review, and does not seem to be part of the review jargon. Despite this, the ability to "counter question" seems vital to the process of resolving a disputed matter.

### Specific Evidentiary Matters

Because the Act says that the Review Officer is not bound by the rules of evidence, this allows the Review Officer a number of freedoms which a court will not otherwise have. Nevertheless, a Conciliation or Review Officer may fall into a legal error, by rejecting relevant or material evidence or by allowing irrelevant evidence to be heard. Alternatively, to do so, may give rise to a breach of the rules of natural justice.

#### (i) Relevance

In considering the evidence before the Review Officer it is important that the Review Officer must allow or reject evidence on a rational and fair basis. Relevant material must not be disregarded on an arbitrary basis and irrelevant material should not be acted upon. The statutory freedom in section 84ZD allowing the Review Officer to hear the matter as he or she thinks fit, does not allow for the arbitrary reception or rejection of evidence.

Evidence can be rejected if it is irrelevant, therefore it is necessary to decide what is relevant. Relevance has been defined as:

"it is a fundamental rule that evidence of a fact will be characterised as irrelevant ..... unless that fact, taken alone or in conjunction ..... and having regard to the common course of events, tends to prove a fact ..... in issue ..... The common course of events forms the silent major premise in all such reasoning."<sup>33</sup>

This statement may not assist a Review Officer a great deal. One legal dictionary defines relevance as:

<sup>32</sup> See *SGIC & Cromack v Darrington* (unreported CM(WA) 97/94 25 January 1995).

<sup>33</sup> In the matter of a petition by Frits van Beelen [1974] 9 SASR 163 at page 193.



"a fact so connected, directly or indirectly, with a fact in issue in an action or other proceeding that it tends to prove or disprove that fact in issue."<sup>34</sup>

It follows that Review Officers should keep to the point and only allow evidence which goes to proving the matters before him or her to be heard. A refusal to admit evidence which should be admitted, amounts to a denial of natural justice.<sup>35</sup>

(ii) Presence of Parties

Sometimes it may be necessary for an Conciliation or Review Officer to make investigations of matters which have not been the subject of evidence before the Conciliation or Review Officer. When such investigations are made, the parties in the proceedings should be made aware of those investigations and if any reports or details arise out of the investigations, then they should be disclosed to the parties. For an Conciliation or Review Officer not to disclose information, which has been gathered outside of the hearing, is a denial of natural justice, as it follows that the party has not had the opportunity to be properly heard, because that party does not know the case against it.

This is most likely to occur where a Conciliation or Review Officer makes enquires of a medical care provider. The details of a telephone conversation with a General Practitioner, for example, would need to be relayed to the parties, in order for there to be no doubt that the Conciliation and Review Officer has acted properly. Some difficulty is always likely to emerge. For example, what specific questions were put to the doctor (or other witness)? Were they leading questions? What information was the witness supplied with before answering? All these matters need to be approached with care. A full record would need to be kept. The requirement of keeping a full record and disclosing the details to the parties, may delay proceedings, but would be fundamental to fairness.

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<sup>34</sup> Osborne's Concise Law Dictionary. 7th Edition. Sweet & Maxwell 1983.

<sup>35</sup> *General Medical Council v Spackman* (1943) AC 627.

(iii) Privilege

It is well known that there is a legal privilege attached to the relationship of solicitor and client. This means that information passed between solicitor and client for the purposes of advice in relation to matters of litigation is not information which is accessible to the courts or the Conciliation or Review Officer. It follows that where a party has obtained advice, but is not legally represented, it would be improper for the Conciliation or Review Officer to obtain information as to the nature of the advice received by that party. This information would be subject to legal privilege. Legal privilege does not attach to a number of other confidential relationships. For example, confidential relationships exist between doctor and patient, accountant and client and in a number of other relationships of trust. These relationships are not protected by legal privilege. Therefore it follows that it is not improper to illicit answers to questions that relate to information which is passed between those parties.

There is some difficulty if the worker has not seen a lawyer, but has received advice from a trade union. Perhaps the union has put certain advice in writing. It seems that that such correspondence may not be protected under the laws of privilege. Given the restrictions in legal representation, it seems appropriate that modifications be made to the laws of privilege, so as to protect such correspondence.

It is not uncommon for insurers to conduct a claim for an extended period without seeking legal assistance. This course seems to be encouraged under the new dispute resolution model. If so, the potential for employer-insurer correspondence to be unprotected is increased. Already under section 84K modifications have been made to the rules of discovery and privilege, requiring the employer to disclose a range of documents.

(iv) Discovery

It is usual practice for Review Officers to make some preliminary procedural directions for the exchange of material, the subject of the proceedings. All relevant information, documents and reports, should be made available for inspection by the other side. If this were not the case, then it may be that the other side had not had the opportunity to answer fully the case against it. There are two relevant considerations for a Review Officer. Section 84ZB

deals with the ability of parties to obtain subpoenas. Witnesses can be required to attend before a Review Officer to give evidence. In addition, the Act provides that documents can be subpoenaed to the Review Officer.

It is consistent with a power to issue and obtain subpoenas of documents and persons, that there be full and frank disclosure by way of discovery. Although this is normally the legal procedure, it is probably good practice for Review Officers to follow the procedure of discovery, especially where there are large numbers of documents which need to be disclosed. Where a document comes to an Review Officer but which has not been disclosed to the parties, the Review Officer should disclose the document to them and not simply ask questions based upon the document.<sup>36</sup> This notion is closely tied in with the fact that although the tribunal can inform itself as it pleases, it still has the duty to advise the parties of the information obtained.

(v) Hearsay

Because a Conciliation or Review Officer is not bound to observe the rules of evidence, they are not bound by the rule which prevents the admission of hearsay evidence. In general terms, hearsay evidence is secondhand evidence, that is, it is evidence given of what someone else said, did or experienced. The person who said or did the original thing is therefore not available to be questioned. The main objections to hearsay evidence, are that it is unreliable and that the person who is the source of the information cannot be cross-examined. Some care should be taken in admitting, into a workers compensation dispute, hearsay evidence but there is no reason why with special care, Conciliation or Review Officers cannot take such evidence into account. In most cases it is a question of weight attached to that evidence. Where hearsay evidence is given contrary to direct evidence, then the direct evidence should be preferred.

### Conclusion

Whilst the conciliation or review officer is not bound by the rules of evidence, they may be a useful guide to the conduct of proceedings. A recently published text on Dispute Resolution, noted:

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<sup>36</sup> *Freedman v Petty and Greyhound Racing Control Board* [1981] VR 1001.

"It is easy and fashionable to point to the disadvantages of litigation, notably its costs and delays, and to assume that alternatives must be better. However, there are considerable benefits in presenting disputes in a public adjudicative forum where litigants receive the protections provided by court procedures and rules. These rules, while formal and time consuming, have been developed through long years of experience and are generally for the protection of litigants and society. In some disputes these protections are indispensable. However, the reality must be recognised that litigation might not be a practical option for all disputants and may not deliver its promised protections."<sup>37</sup>

Perhaps another way of putting this, is that the rules of evidence should be discarded if they are likely to increase the time and costs of the procedures, and where they do not protect the parties, the subject of the proceedings. The informal nature of a workers compensation dispute, is one of the main objectives of the Act and should not be overlooked when deciding upon the procedure for dispute resolution.

Finally, it is worth reflecting upon the South Australian experience. In that state, Review Officers have assumed significant importance, (although this may change with further changes likely in that state) and like the Review Officers in Western Australia, they are the primary adjudicators of fact.

The Supreme Court in South Australia has held in *Simpson Ltd v Arcipreste*<sup>38</sup> that the proceedings before a Review Officer are not to be considered as a "trial run", on a preliminary test of the evidence, before moving to an appeal.

The function of South Australian Review Officers have been described as inquisitorial. The Supreme Court in South Australia seems to have been prepared to give Review Officers broad powers. This may not be entirely consistent with the attitude of the Federal Court to similar Tribunals.<sup>39</sup> The Federal Court has stressed the need to act judicially.

In South Australia (at the time of writing) appeals from Review Officers (there are 15 of them!) are made to the Worker Compensation Appeals Tribunal. McCusker J, sitting on that Tribunal, stressed that Review Officers were bound by the rules of

<sup>37</sup> Astor, H. and Chinkin, C.M. *Dispute Resolution in Australia*. First Edition. Butterworths, 1992. p.XXIV.

<sup>38</sup> (1989) 53 SASR 9

<sup>39</sup> See *Sullivan v Department of Transport* (1978) IALD 383 at 402-8.

natural justice.<sup>40</sup> McCusker J noted the caution of Evatt J in *R v The War Pensions Entitlement Appeal Tribunal, ex parte Bott*<sup>41</sup>, to the effect that a tribunal which ignores the rules of evidence, is in grave danger of doing an injustice.

Review Officers in South Australia, and Western Australia need not be legally qualified, yet they are empowered to determine questions of law. It is necessary therefore that Review Officers make sure that they make clear the legal issue to be determined. To decide that the law is different to that which the parties have agreed, may put in peril the Review Officer's decision.<sup>42</sup>

The words of Zelling J should be repeated

"The provisions of section 88 (a section similar in nature to S84ZD of the WA Act) however, do not equate a Review Officer with that vision of the legal imagination, the *cadi* under his palm tree, unfettered by the constraints of precedent, and unworried by the thought of what courts of appeal might do."<sup>43</sup>

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40 The Rules of Natural Justice and their application. Hon Judge P McCusker Paper "Dispute Resolution in Workers Compensation" Conference Proceedings Adelaide October 1992 Workcover Review.

41 (1933) 50 CLR 228

42 See *Pantorno v R* (1989) 84 ALR 390.

43 *Pica v The Local Government Association* (unreported Supreme Court (SA) s3400 15 May 1992)

**RAISE YOUR HAND AND REPEAT AFTER ME:****OATH:**

I swear by almighty God: That I will speak the truth, the whole truth and nothing but the truth.

**AFFIRMATION**

I do solemnly, sincerely and truly, declare and affirm: That I shall speak the truth, the whole truth, and nothing but the truth.

**INTERPRETER**

I swear by almighty God, that I will well and faithfully interpret, and a true explanation make to the Court, and to the witness, of all such matters and things, as may lawfully be required of me, to the best of my skill and understanding.

**BUDDHIST**

I declare in the presence of Buddha that I am unprejudiced and if what I shall speak shall prove false or if by colouring the truth others shall be led astray then may the three holy existences, Buddha, Dhamma and Pro Sagha in whose sight I now stand, together with the devotees of the Twenty-two fundamendments punish me and my misgracing soul.

**CHINESE**

If I do tell the truth, the whole truth or if I tell anything but the truth in this case may the Great God extinguish my soul hereafter as I now extinguish this light.  
(Blows out a candle or match).

**MOSLEM**

I swear with the Sacred Koran in my hand, before Allah that the evidence I shall give in this case shall be the truth, the whole truth and nothing but the truth.  
Allah is my Judge and my maker.

**INTERPRETER (AFFIRMATION)**

I, \_\_\_\_\_ solemnly promise and declare that I will well and truly translate such of the evidence given to \_\_\_\_\_ as I shall be asked to interpret.