

Victorian Ombudsman's Report (edited for psychiatrists)

WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims - December 2019

Executive Summary

1. This investigation looked at the compensation and support provided to people injured at work in Victoria, particularly those with complex injuries. This follows an earlier investigation by the Ombudsman in 2016 which found the scheme had failed some particularly vulnerable people.

2. Victoria's workers compensation scheme, also known as 'WorkCover', provides a range of entitlements to people who are injured at work under the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic). Entitlements include 'weekly payments' for loss of income if they are unable to work and payment of the reasonable costs of medical treatment and other rehabilitative services directly related to their injury.

3. The scheme is funded by compulsory employer insurance and administered by WorkSafe. WorkSafe is responsible for ensuring appropriate compensation is paid to injured workers, while also maintaining a financially sustainable scheme.

4. WorkSafe does not manage WorkCover claims itself, instead outsourcing this to five claims agents. The agents are commercial organisations and as a result have a vested interest in the outcome of individual claims. Notwithstanding this, agents are required to stand in the shoes of WorkSafe and make independent decisions on claims in line with the Act.

The Ombudsman's 2016 investigation

5. In 2016, the Ombudsman investigated WorkSafe and its agents, focussing on agents' management of 'complex claims'. These claims involve workers who were unable to work long term and/or required long term medical treatment. While these claims do not represent the majority, research has shown that these workers are likely to have complex health conditions and represent a substantial and disproportionately high cost to the scheme and broader society.

6. The investigation found cases of unreasonable decision making on complex claims across all five agents, the evidence of which the Ombudsman said was 'too strong to be explained away as a few "bad apples"'. This included numerous examples of agents 'cherry-picking' evidence to support a decision, while disregarding overwhelming evidence to the contrary. In many cases, agents were found to defend unreasonable decisions when injured workers disputed them, despite knowing they would likely be overturned.

7. The investigation acknowledged that as commercial organisations, it was reasonable for the agents to expect to profit from managing WorkCover claims. However, the evidence suggested that in the case of complex claims, financial reward and penalty measures in agents' contracts with WorkSafe were driving a focus on terminating and rejecting claims to maximise profit, at the expense of sound decision making.

8. The investigation also identified deficiencies in WorkSafe's oversight of the scheme, particularly in relation to agent decision making on complex claims.

9. The Ombudsman made 15 recommendations to WorkSafe which included:• improving WorkSafe's oversight of complex claims and its use of information from complaints, stakeholder feedback and dispute outcomes to identify potential systemic issues• reviewing the financial reward and penalty measures to increase agents' focus on quality decisions and sustainable return to work outcomes for injured workers• providing training and additional guidance to agent staff.

10. The Ombudsman also made two recommendations to the Victorian Government, which WorkSafe said it did not support. These related to the process for injured workers to dispute claim decisions, which involves conciliation and then court.

Follow-up investigation

11. While WorkSafe and the agents have implemented many changes since the 2016 investigation, the Ombudsman continues to receive many complaints about WorkSafe and its agents, with nearly 700 complaints received in 2017-18 and about 800 in 2018-19.

12. In May 2018, the Ombudsman decided to conduct a 'follow-up' investigation to examine whether the implementation of the recommendations from the 2016 investigation had improved agent practices and decision making and the effectiveness of WorkSafe's oversight.

13. This follow-up investigation concentrated on agent decision making on complex claims in 2017-18, which were primarily long term claims where an injured worker had not worked and had been receiving weekly payments for 130 weeks or more (two and a half years). As at 30 June 2018, these claims represented about a quarter of the 18,519 active weekly payments in the scheme, or about seven per cent of the total 63,085 active claims in the scheme (including those involving medical treatment only).

14. The investigation involved:• reviewing 102 complex claim files in depth, some of which were randomly selected• reviewing WorkSafe's handling of 51 complaints received in 2017-18 about agent decisions and Independent Medical Examiners (IMEs), about half of which were randomly selected• meeting with WorkSafe during the investigation and interviewing 16 witnesses, including seven Conciliation Officers and the then Convenor of Medical Panels• reviewing other

information, including a sample of agent staff email records, policies and procedures, research reports, data, written submissions from stakeholders and complaints to the Ombudsman.

15. The investigation also asked WorkSafe to review a number of decisions on the complex claim files reviewed, which appeared unreasonable but had not been overturned through the dispute process. As a result, WorkSafe and the agents withdrew 30 decisions across 19 claims and back-paid about \$70,000 collectively to two injured workers.

Unreasonable decision making by agents

16. Although witnesses reported to this investigation a temporary 'marked change' in agent behaviour after the Ombudsman's 2016 report was released, the Ombudsman identified continuing issues with unreasonable agent decision making on complex claims.

17. The evidence obtained suggests that the Ombudsman's 2016 recommendations were not enough to change agent behaviour and stop unreasonable decision making on complex claims. After two investigations by the Ombudsman and a number of reviews commissioned by WorkSafe, the evidence points to this being a systemic problem. Unreasonable use of evidence

18. Agents may consider a range of evidence when making claim decisions, including medical reports from IMEs or a worker's treating doctors; information from an occupational rehabilitation provider; 'circumstance' investigation reports and surveillance footage of an injured worker.

19. Agents are required to adhere to 'principles of good administrative decision making', which include that agents must consider all matters relevant to a decision; make decisions supported by the best available evidence; and give 'proper, genuine and realistic consideration' to the merits of a decision.

20. This investigation found that since 2016, agents have continued to unreasonably use evidence to terminate or reject complex claims in some cases by:

- selectively using evidence, while ignoring other available information – even where the medical opinion relied on was unclear, contradictory or inconclusive
- conducting surveillance of workers without adequate evidence they were misrepresenting their injury
- selectively using IMEs and 'doctor shopping', despite new measures introduced to prevent such behaviour
- providing incomplete or inaccurate information to IMEs
- posing leading questions to IMEs and workers' treating doctors
- relying on an opinion from an IME from the incorrect specialty.

Unfair return to work practices

21. A key objective of the workers compensation scheme is to provide 'effective occupational rehabilitation' and 'increase the provision of suitable employment to workers who are injured to enable their early return to work'.

22. Injured workers have 'return to work' obligations, which include that they must make reasonable efforts to return to work and actively use an occupational rehabilitation service. If a worker does not reasonably comply with their obligations, an agent may issue a non-compliance notice, which can impact the worker's entitlements.

23. In the sample of complex claims reviewed, this investigation identified several non-compliance notices which had been unreasonably or incorrectly issued. This included cases where:

- workers were required to participate in occupational rehabilitation at inappropriate stages of their recovery, such as a case where a worker was experiencing severe psychotic hallucinations. Agents failed to genuinely consider workers' individual circumstances and the reasonableness of their non-participation, including a case where a worker had just been released from hospital after attempting self-harm and had become homeless
- agents incorrectly issued notices under the legislation.

24. The investigation also received evidence that agents sometimes issued non-compliance notices with a focus on liability management. This included evidence from a WorkSafe-commissioned review that occupational rehabilitation consultants perceived in some cases that referrals to their services were 'not in the interest of the injured worker and were being used as a tool to cut benefits'.

Agents acting unreasonably during conciliation

25. This investigation also looked at agents' actions with respect to claim decisions disputed at conciliation.

26. When a worker requests conciliation, agents are required to review the disputed decision and withdraw it before conciliation if it would not have a reasonable prospect of success at court (ie not be 'sustainable'). However, a Conciliation Officer is only able to direct an agent to overturn their decision where there is 'no arguable case', which is a lower threshold.

27. While overall the number of disputes at conciliation has reduced since the Ombudsman's 2016 investigation, the rate at which decisions are withdrawn or changed through the dispute process remains high. In 2017-18, about half of the decisions disputed at conciliation and 70 per cent of decisions that proceeded to court were varied or overturned.

28. Although the dispute process should provide a 'safety net', the investigation found that unreasonable decisions are slipping through the cracks. Agents continue to defend 'arguable' decisions during conciliation, even if they would not be 'sustainable' at court, rendering Conciliation Officers hamstrung to resolve such disputes. Conciliation Officers also reported particular difficulties resolving factual disputes. The result is that injured workers are left to contemplate the costly, stressful and time-consuming path to court if they wish to dispute a decision further. Most workers simply give up.

Decisions contrary to binding Medical Panel opinions

29. Where a dispute involves a medical question, a Conciliation Officer or court may refer questions to a Medical Panel. A Panel's opinion must be adopted, applied and accepted as 'final and conclusive' by all parties.

30. WorkSafe told the investigation that where an agent seeks to revisit the same issue considered by a Medical Panel, it expects the agent to demonstrate there has been a 'material change' in the worker's situation since the Panel's opinion. This may include, for example, improvement in symptoms as a result of further treatment or an increase in the worker's skills as a result of retraining.

31. In the complex claims reviewed by this investigation, agents generally waited at least 12 months after a Medical Panel before re-assessing a worker's capacity. While this is positive, the investigation identified several complex claims where agents terminated workers' entitlements without sufficient evidence of a 'material change' in the worker's condition since a Medical Panel Opinion.

The effect of financial rewards and penalties on agent decisions

32. This investigation also revisited the financial rewards and penalties WorkSafe pays agents, based on their performance against key measures.

33. Since the Ombudsman's 2016 investigation, WorkSafe has made a number of changes to these, which included reducing the rewards and penalties for terminating claims, and increasing the rewards for quality decisions.

34. The investigation found limited overt evidence in the complex claim files and sample of agent staff emails reviewed of the financial rewards and penalties influencing agent decisions. However, the investigation received evidence that some agent staff have made efforts to conceal certain behaviours and practices identified by the Ombudsman's 2016 investigation, including agents' focus on managing liabilities.

35. Although less documentary evidence was identified, compared with the 2016 investigation, this investigation still found evidence showing:• agents' continued focus on terminating claims and maximising profit. This included agent staff emails where staff referred to claims which achieved a financial reward as 'wins'; congratulated staff for terminating claims; discussed the monetary value to the agent of terminating individual claims; and referred to targets for terminating claims• the influence of the rewards and penalties on agents' offers at conciliation, which meant that offers were not always informed by the merits of a decision.

36. This evidence, when combined with the extent of unreasonable decision making on complex claims identified by the investigation, raises questions about the suitability of commercial organisations to manage complex claims.

WorkSafe's oversight

37. Although WorkSafe delegates the management of claims to the agents, WorkSafe has a role in overseeing agents to ensure injured workers receive appropriate compensation and are not 'wrongfully disentitled'.

38. WorkSafe has made a number of changes to its oversight mechanisms since 2016. However, the investigation found that WorkSafe is still not optimally using them to address unreasonable agent decision making on individual complex claims and to identify and respond to systemic issues.

39. WorkSafe's process for auditing the quality of agent decisions has improved since 2016. However, the investigation found that WorkSafe has not always held agents accountable for unsustainable decisions identified through the audits. In its 2017-18 audits, the investigation found instances where WorkSafe: • passed questionable decisions where the agent had only one piece of supporting evidence • re-assessed failed decisions as 'passes' when disputed by the agent, even if they would not hold up at court • did not require the agents to overturn most of the failed decisions.

40. Complaints and stakeholder feedback also offer WorkSafe opportunities to check agents' performance and identify areas for improvement; however, the investigation found that its role in complaints about agent decisions is unclear. On the one hand, WorkSafe considers agents maintain authority on the vast majority of decisions and that the dispute process is the appropriate mechanism for an injured worker to dispute an agent decision. On the other hand, WorkSafe has the power to direct an agent to change a decision and has established a procedure for when it identifies a worker has been 'wrongfully disentitled'.

41. The investigation found that this has led to inconsistent approaches in the way WorkSafe handles complaints, including cases where WorkSafe: • referred workers to conciliation, even though WorkSafe identified concerns with the agent's decision and could have resolved the complaint itself • accepted agent responses without questioning whether they were correct or reasonable.

42. WorkSafe appears reluctant to adequately deal with unreasonable agent decision making when it is brought to their attention, which raises the troubling prospect that WorkSafe feels beholden to the agents and dependent on their participation to deliver a financially viable scheme.

43. Given WorkSafe's statutory responsibility to ensure appropriate compensation is paid to injured workers 'in the most socially and economically appropriate manner, as expeditiously as possible', it must do more.

Recommendations

44. Nothing short of wholesale changes to the system will address the issues identified by both the 2016 investigation and the current one.

45. The Ombudsman therefore recommended the Victorian Government:• commission an independent review of the agent model to determine how and by whom complex claims should be managed• introduce a new dispute resolution process which allows for binding determinations on the merits of claim decisions; is inexpensive; and provides timely outcomes.

46. The Minister for Workplace Safety, the Honourable Jill Hennessy MP said the Victorian Government accepted both recommendations, stating she was 'committed to reform' and 'disturbed by the findings' of the investigation.

47. Given the time it will take to implement these recommendations, the Ombudsman also made 13 recommendations to WorkSafe to address the immediate issues identified by the investigation. This includes a recommendation that WorkSafe establish a dedicated business unit to independently review disputed decisions when requested by workers following unsuccessful conciliation. WorkSafe accepted all 13 recommendations.

Oversight of the IME system Page 189

597. WorkSafe is responsible for appointing IMEs to examine injured workers and provide an opinion about their condition, work capacity and treatment. IMEs can be medical practitioners, dentists, physiotherapists, chiropractors, osteopaths and psychologists.

598. WorkSafe has quality assurance processes to ensure its IMEs and their reports meet required standards. WorkSafe also handles complaints from injured workers and other parties about IMEs, and manages part of the IME booking system.

599. This investigation re-examined the effectiveness of WorkSafe's oversight of the IME system and whether this has improved since the Ombudsman's 2016 investigation. IME appointment

600. Any medical practitioner or allied health professional wanting to become an IME must complete an application and induction process managed by WorkSafe.

601. At the time of the Ombudsman's 2016 investigation, WorkSafe's selection criteria had been in place since 2003. The investigation identified that although WorkSafe strengthened the selection criteria over time, it failed to protect the system from inappropriate appointments. In one case, WorkSafe reappointed an

IME using the criteria, even though the IME had been found guilty of previous professional misconduct. Changes since the Ombudsman's 2016 investigation

602. In June 2018, WorkSafe implemented a new appointment process for IMEs, which requires them to:• submit an application and written submission to WorkSafe• undergo a series of phone interviews to ensure they meet WorkSafe's selection criteria and have 'exceptional behavioural and communication skills'.

603. A WorkSafe panel reviews each application to assess whether the prospective IME meets WorkSafe's requirements.

604. WorkSafe also introduced new selection criteria, tailored to suit each medical and allied health discipline. Among other things, the new criteria require a prospective IME to:• perform a minimum of eight hours 'direct clinical care' each week aligned to the IME's chosen specialty • have a minimum of five years full-time work experience as a practitioner in that specialty• have the necessary insurance• be registered with the Australian Health Practitioner Regulation Agency (AHPRA) without conditions.

605. Successful applicants must participate in an induction process that covers their legislative obligations, reporting expectations and WorkSafe's policies. IMEs must also complete training in relation to conduct and agree to meet service standards at the end of the induction process.

606. As at May 2019, WorkSafe had 269 IMEs under its new criteria.

607. WorkSafe can suspend or revoke an IME's registration if they fail to meet WorkSafe's IME Service Standards (the Standards), which have been updated since the Ombudsman's 2016 investigation. The Standards set out WorkSafe's expectations about matters such as conduct during examinations and the content and structure of IME reports. They require IMEs to notify WorkSafe of significant matters such as formal complaints and changes to their AHPRA registration.

608. In 2017-18, WorkSafe took action against five IMEs following investigations into misconduct, breaches of the Standards and recurring complaints. This resulted in:• the resignation of two IMEs• a decision to take no further action regarding one IME• a warning for one IME• a one-month suspension for one IME.

609. An external review WorkSafe commissioned in early 2019 identified a potential gap in WorkSafe's oversight of IMEs once appointed, as WorkSafe did not proactively check if IMEs continued to meet the new criteria throughout their three-year appointment term. The review found this created a risk that IMEs who no longer met the criteria would continue conducting examinations. For example, IMEs might stop performing the minimum of eight hours direct clinical care per week or have conditions imposed on their registration by AHPRA.

610. WorkSafe told the investigation that it has since gained access to AHPRA's medical practitioner registration system so it can identify any changes to an IME's registration status. Stakeholder feedback regarding new selection criteria

611. Some witnesses raised concerns with the investigation about the new requirement that IMEs engage in eight hours of direct clinical care each week.

612. One IME representative interviewed during the investigation said this had resulted in some experienced medical practitioners not being re-appointed as IMEs because they could not demonstrate eight hours of clinical practice per week. The representative said in introducing this change, WorkSafe 'threw the baby out with the bath water' and there was 'a great skill level lost'. The representative said this change also resulted in WorkSafe 'under-appointing' the number of IMEs required to meet the demand of appointments requested by agents.

613. A representative from the Australian Medical Association said there was a 'level of artificiality' in the changes to WorkSafe's IME criteria. They said there had been a lack of explanation and 'openness' from WorkSafe about why eight hours of clinical practice was considered the appropriate measure for medical practitioners to be considered suitable as an IME, and that it had 'got a lot of people upset'. They further said that:

The number of doctors who are falling off the system or out of the system simply because they are not meeting the eight hours, but they're not necessarily doctors who don't have the capacity to do the work ... the result is a lot of doctors who might have incredible skill sets but are not practicing in a clinical sense of treating patients are locked out.

614. By contrast, a WorkSafe Clinical Advisor told the investigation that they believed the new criteria was an 'improvement' because it had caused a lot of IMEs with 'outdated' opinions to 'drop out'. They said in the past some IMEs were 'semi-retired' and not as 'up-to-date in their clinical practice', but that the new criteria had changed this.

615. In response to the draft report, WorkSafe said: WorkSafe

notes that it did undertake significant external consultation including through the IME Clinical Reference Group, a presentation to the AMA [Australian Medical Association] WorkCover/TAC committee, the establishment of a working group with representative from the College of Surgeons and consultation with various medical faculties and peak bodies in relation to the IME criteria.

Quality assurance

616. Once IMEs are appointed, WorkSafe oversees the quality of reports they produce through quality assurance processes. Reports are assessed against the IME Service Standards which, among other things, set out requirements for the content and structure of reports.

IME Service Standards – IME reports

The IME Service Standards set out standards for IME reports. Among other things, they say reports should:

- *contain reasons for all opinions expressed*
- *be consistent in that opinions should accord with examination findings• be 'free of advocacy and/or bias for any party'*
- *be in 'plain English' and 'avoid the use of jargon or language that is too technical'*
- *provide an 'accurate diagnosis based on references to a detailed and accurate history and an appropriate and thorough clinical examination'*
- *contain 'clear and unambiguous professional opinions' and, where required, 'recommendations based on science and with reference to best practice medicine or best clinical practice'*
- *present an 'evidence-based approach to evaluating symptoms and clinical findings, as far as practicable'*
- *note if there is 'insufficient clinical information to make a diagnosis'*
- *be 'independent and impartial', and not contain any 'value judgements or personal comments'*
- *contain 'only relevant information'*

Changes since the Ombudsman's 2016 investigation

New IME Quality Assurance Framework

617. Since 2016, WorkSafe has introduced a new IME Quality Assurance Framework which, according to WorkSafe, provides:

[A] connected approach focusing on building capability and supporting IMEs and claims staff in providing independent and non biased opinions. Ensuring that supports are in place and of the highest quality, will be important to help drive improved quality reports and detailed information and opinions that support the management of an injured worker's return to health.

618. In response to the draft report, WorkSafe said:

We confirm that the IME Quality Assurance Framework also includes recruitment, induction, [and] taking appropriate action in relation to IMEs who do not meet performance standards. We also note that further improvements arising from the review of the IME Quality Assurance Program are being implemented.

Peer reviews

619. At the time of the Ombudsman's 2016 investigation, WorkSafe's quality assurance process consisted of peer reviews of IME reports. WorkSafe describes these as a 'proactive management practice that is used to assess the level of quality of IME reports through the structured program that engages peers to review and comment against a set of standard criteria'.

620. Since 2016, WorkSafe has made changes to its peer review process so that:

- Its selection of IMEs for review is informed by the frequency and nature of IME complaints.
- There is a documented process to ensure claims are reviewed where an IME report is found to be 'significantly deficient'.

621. WorkSafe only completed 11 peer reviews in 2017-18, to allow it to prioritise the redevelopment of its IME Quality Assurance Framework. In 2018-19, WorkSafe conducted ten peer reviews, with another 14 in progress as at May 2019. New clinical desktop reviews

622. WorkSafe also introduced a second IME quality assurance process in October 2018, involving 'clinical desktop reviews' of IME reports. WorkSafe states that these reviews 'provide another quality layer' and allow WorkSafe to conduct a 'more agile, responsive review and in greater numbers'.

623. As distinct from peer reviews, WorkSafe states clinical desktop reviews are designed for 'quick resolution of one-off issues that require feedback to IMEs, in particular quality of reports, suggested improvements and education'. The reviews are conducted by one of WorkSafe's Clinical Advisors.

624. WorkSafe may conduct a clinical desktop review based on a complaint from an injured worker or agent about the quality of the IME report or where an IME is new to the scheme, for example. WorkSafe states an IME report is considered 'suitable' for this type of review in circumstances where:

- there are factual inaccuracies in the IME's report which are evident from supporting documents provided to the IME
- the IME failed to adequately or appropriately answer the agent's questions
- the content and/or format of the IME's report does not meet the IME Service Standards
- the IME's opinion does not accurately reflect the assessment findings reported
- WorkSafe has received more than two complaints about the IME within four weeks that directly relate to the IME report.

625. WorkSafe completed 39 clinical desktop reviews between October 2018 and May 2019. New IME Performance Management Framework

626. In addition to expanding the quality assurance processes, WorkSafe also introduced an overarching IME Performance Management Framework. The framework outlines specific actions WorkSafe will take when IME report deficiencies are identified, to ensure performance management of IMEs is handled in a consistent way.

627. The framework was developed in response to an external review which identified that WorkSafe had no formal policies, guidelines or other documentation outlining remedial action where an IME's performance is

considered unsatisfactory because of peer and desktop reviews and/or complaints. The review highlighted that a lack of clarity about this 'increases the risk of IMEs who may be underperforming continuing to provide services to injured workers'.⁵⁶ Limitations of quality assurance processes

628. While WorkSafe has expanded and improved its IME quality assurance processes since 2016, the investigation found that their value has been limited because WorkSafe does not give reviewers complete information when they undertake a peer or clinical desktop review of an IME report.

629. WorkSafe gives the reviewer the IME's report and the agent's referral letter to the IME. WorkSafe does not give the reviewer copies of other documents the IME received to inform their opinion, including previous IME reports, Medical Panel opinions, reports from the worker's treating doctor(s) and occupational rehabilitation reports. For complex claims, this documentation provides crucial background information about the worker's history.

630. The limitations of the approach became evident when WorkSafe arranged a clinical desktop review of one IME's reports as a result of issues identified during this investigation. The investigation read a number of the IME's reports when reviewing cases and observed that they sometimes contained similar, if not identical, comments and conclusions. This included statements that:

- The worker presented with a significantly disproportionate emotional response to their physical injury.
- The worker could return to work, despite a history of incapacity.
- There had been a 'significant change' in the worker's condition since a previous Medical Panel opinion.

631. Agents used the IME's reports to terminate workers' entitlements. In two thirds of these cases, the agent's termination was withdrawn or overturned through the dispute process.

632. WorkSafe arranged for one of its Clinical Advisors to undertake clinical desktop reviews of 10 of the IME's reports. The Clinical Advisor is a leader in their field and has been involved in the WorkCover scheme for about 15 years.

633. From these reviews, WorkSafe concluded that the IME's opinions were 'appropriate' but identified opportunities for improvement. It said:

The review of a sample of ... [the IME's] reports highlights that ... [they] had used similar wording or repetitive language within some of ... [their] reports. While it was noted that the ultimate opinion was seen to be appropriate based on the context and body of each report ... [the IME's] opinions were in general seen to be brief in nature. It was flagged that ... [their] opinions were often not well explained or supported by examples from the history and the examination taken. To ensure that further quality improvements are seen within ... [the IME's] reports, WorkSafe will provide feedback to ... [the IME] about these findings and will conduct further quality reviews on a sample of ... [the IME's] reports.

634. The investigation looked at the Clinical Advisor's written feedback for the 10 reports. While WorkSafe had stated that the IME's opinion in each case was 'appropriate based on the context and body of each report', the Clinical Advisor concluded that:

- There was some evidence of bias in four of the reports. The Clinical Advisor said one report was not free from bias and three reports were potentially not free from bias.
- There was an incomplete explanation in nine reports, which left the opinions open to interpretation by agent staff.
- There was possibly a 'discrepancy between the reported assessment findings and the outcome, opinion or recommendations of the report' in four reports.
- It was 'difficult to comment specifically' on six reports where the IME concluded there had been a 'material change' in the workers' condition since a Medical Panel examination, without reviewing the Panel's opinion. WorkSafe did not give the Clinical Advisor a copy of the Medical Panel opinion.

635. The investigation interviewed the Clinical Advisor and gave them an opportunity to review all of the documentation considered by the IME. After reviewing these documents, the Clinical Advisor expanded on their original criticisms and said:

- The IME's opinions were often 'unclear' and 'inadequately explained'.
- In most of the cases where there was a previous Medical Panel opinion, there was insufficient evidence to support the IME's view that the worker's condition had materially changed. The Clinical Advisor formed a different view to the IME and, in some cases, said the worker's condition appeared to have actually worsened.
- Instead of basing opinions on 'objective clinical science', the IME referred to subjective information in their assessment of workers' conditions. For example, the IME often commented that workers had a disproportionate emotional response to their physical injuries. The Clinical Advisor disagreed with these comments and indicated they had limited bearing on a worker's capacity for work. However, the Clinical Advisor noted that agent claims staff sometimes interpreted the comments as meaning workers were not being 'truthful' and 'therefore there's nothing there'.

636. In response to the draft report, the IME said they had been subject to three peer reviews over a six-year period. The IME said one of these reviews recommended some improvements to their reports, but that the most recent review concluded their reports met WorkSafe's requirements.

637. The IME said that the 10 cases the Clinical Advisor reviewed generally involved 'complex injuries', with 'both a physical and psychological component' and that the IME's reports 'concentrated on the physical assessment'.

638. The IME said that their reports were 'usually submitted in a standard format, using standardised headings' and the injuries reviewed were a similar type. The IME said this 'may explain the commonality of the language used in the reports'.

639. The IME acknowledged that:

- They made references to work restrictions, but in some cases did not expand on these.
- Their explanations in some reports were 'brief' and 'would have benefitted from greater detail'.
- Where they identified emotional responses to physical symptoms, this should have been more thoroughly outlined.
- Where they commented on changes since a previous Medical Panel, the IME 'relied heavily on changes in examination findings' and it would have been beneficial to support these with other changes.

640. The IME said they 'take on board the reviewer's comments that without detailed explanation, the report submitted could be subject to interpretation'.⁶⁴¹ Three examples of complex claims involving a report by this IME (whom we call 'IME Y'), which was reviewed by WorkSafe's Clinical Advisor, are outlined on the following pages. In each case, the Clinical Advisor provided negative feedback about the IME's report.

Example 1

Hamish was working as a tradesman when in 2013 he injured his neck.* He ceased work and made a WorkCover claim which was accepted by his employer's agent at the time. His claim was later managed by Xchanging.

In early 2016, a Medical Panel concluded that Hamish was indefinitely incapable of returning to any form of work because of his persisting neck injury and a secondary mental injury.

In forming its opinion, the Panel considered Hamish's symptoms, his age (he was in his early 50s), his limited work experience and few transferrable skills, his low formal education level, his lack of any effective computer skills and his absence from the workforce since 2013.

About a year later, Xchanging arranged for Hamish to be examined by IME Y to assess his physical injury.

After examining Hamish, IME Y concluded:

- Hamish could now return to suitable employment (despite having not worked for four years).
- Hamish's employment was partially responsible for his impairment, but he presented with a significantly disproportionate emotional response to his physical injury.

- There had been a material change in his condition since the Medical Panel's examination.

In late 2017, Xchanging relied on IME Y's opinion to terminate Hamish's weekly payments. Hamish disputed the decision at conciliation and the matter was referred to another Medical Panel.

In mid-2018, the Panel came to the same conclusion as the previous Medical Panel: Hamish was indefinitely incapacitated for all work.

The Panel noted that based on its 'judgement, expertise and experience' it came to a different conclusion to IME Y regarding Hamish's capacity for work.

Xchanging reinstated Hamish's weekly payments. When undertaking an initial clinical desktop review of IME Y's report in this case, WorkSafe's Clinical Advisor said IME Y's opinion did not seem to be supported by his assessment of Hamish.

The Clinical Advisor also said that although the report appeared to be free of bias, incomplete explanation left IME Y's opinions open to interpretation.

At interview after having reviewed further documentation, the Clinical Advisor said 'objective clinical science' did not indicate a 'material change' in Hamish's condition since the 2016 Medical Panel. The Clinical Advisor also commented on IME Y's assessment that Hamish could return to 'suitable employment', which required consideration of Hamish's injury, previous work experience, education, age, and where he lived.

The Clinical Advisor said unlike the previous Medical Panel's assessment of these factors, IME Y's opinion appeared solely based on whether Hamish could physically perform the jobs Xchanging proposed, and not whether the jobs were 'realistic' based on all of the factors which must be considered.

The Clinical Advisor said IME Y's approval of the jobs was 'unrealistic' because they had not considered the retraining required, location of the proposed jobs, Hamish's age, and length of time since Hamish had last worked. In response to the draft report,

IME Y said:

I take on board the observation that my explanations [in this case] could have been expanded upon. In future, I will incorporate more detail into the answers to the questions posed, in particular with regard to any evidence of an emotional response to the examination, changes since the Panel convened and greater detail regarding my recommendations for return to work and retraining.

Example 2

James had been working as a police officer for nearly 40 years when in late 2012, he injured his lower back.*

James made a WorkCover claim, which was accepted by his employer's agent, Gallagher Bassett. James returned to work on light duties but ceased completely in early 2014 due to pain from his injury.

In mid-2016, a Medical Panel concluded that James was indefinitely incapacitated for all work. The Panel considered James' employment options were limited having regard to his injury, his age (he was in his early 60s), place of residence in country Victoria and inability to drive a car for longer than 30 minutes.

About a year later, Gallagher Bassett arranged for James to be examined by IME Y.

After examining James, IME Y concluded:

- James could now return to work performing modified duties (despite not having worked for nearly four years).
- James's employment was partially responsible for his impairment, but he presented with a significantly disproportionate emotional response to his physical injury.
- There had been a 'significant change' in James's presentation since the Medical Panel examined him about one year prior.
- All four job options that the Medical Panel previously considered were not appropriate were now suitable for James.

In late 2017, Gallagher Bassett relied on IME Y's report to terminate James' weekly payments. James disputed the decision at conciliation and the matter was referred to another Medical Panel.

In mid-2018, the Panel came to the same conclusion as the previous Medical Panel, that James was indefinitely incapacitated for all work.

Gallagher Bassett reinstated James's weekly payments based on the Panel's opinion.

WorkSafe's Clinical Advisor told the investigation at interview that they considered the factors listed by IME Y were not 'significant enough to say that there was a material change' in James's condition since he was assessed by the Medical Panel. The Clinical Advisor noted IME Y's opinion included subjective comments about James's presentation at examination and said 'I would rather rely on objective signs to demonstrate [material change]'. The Clinical Advisor said they came to a different conclusion regarding IME Y's recommendation that James was fit to return to suitable employment. They said that although James

might have had a 'theoretical' ability for suitable employment, it was 'unlikely he would be able to find suitable employment' having regard to his age, residential location, and need for retraining.

In response to the draft report, IME Y said that on reviewing the case, there was some objective evidence of change in James's condition; however, IME Y accepted this was not specifically identified within their conclusions. IME Y said they accepted their conclusions were 'not adequately explained' and that they would endeavour to 'more comprehensively' address both material changes and recommendations for return to work.

Example 3

Theodore was working as a machine operator when in the late 1990s he injured his back.* Theodore made a WorkCover claim, which was accepted by his employer's agent, Gallagher Bassett. Theodore made several attempts to return to work but had to stop work completely a year after his injury.

Between 2000 and 2016, Theodore was examined by five separate Medical Panels each of which concluded he was suffering from a back injury and chronic pain syndrome. The Panels which considered his work capacity concluded he was indefinitely incapable of returning to any work. Theodore was also diagnosed with a secondary mental injury.

In late 2016, Gallagher Bassett arranged for IME Y to examine Theodore. IME Y noted there had been a significant deterioration in Theodore's spinal movements. However, IME Y concluded there was 'no physical basis for his current impairment', contrary to the findings of five previous Medical Panels.

Despite not having worked for over 16 years, IME Y concluded Theodore could now return to work performing his pre-injury duties as a machine operator. IME Y also said Theodore could participate in occupational rehabilitation and that there had been a material change in Theodore's condition since he was examined by the previous Medical Panel.

Gallagher Bassett relied on IME Y's opinion to require Theodore to participate in occupational rehabilitation. Theodore requested conciliation and complained to the Ombudsman because he believed he did not have the capacity to attend.

Following enquiries by the Ombudsman, Gallagher Bassett told Theodore he no longer needed to participate. When undertaking an initial clinical desktop review of IME Y's report in this case, WorkSafe's Clinical Advisor said:

[IME Y] stated the injured worker has a capacity to return to work performing pre-injury duties. This opinion is inadequately explained by the IME taking into consideration the injured worker has not worked for 16-17 years, has no other current skills and has documented functional difficulties which had been also noted by two medical panels. ...The opinions provided are inadequately explained and supported. In the absence of further explanations and details in answers to questions, there are

potential discrepancies in the opinions provided which could be open to interpretation by the case managers reading the report at the agent who may not have the same medical background.

At interview after having reviewed further documentation, the Clinical Advisor queried IME Y's opinion that there had been a material change in Theodore's condition since the Medical Panel opinion, noting they did not provide any specific examples regarding how his back injury had changed.

The Clinical Advisor also disagreed with IME Y's opinion that Theodore could return to his pre-injury duties, stating they thought it was unlikely he could return to alternative duties, let alone pre-injury duties.

In response to the draft report, IME Y said:

In this case, I reached the opinion that the impairment was now predominantly psychological and that the physical injuries from 20 years ago had now settled. I will accept that this was not well defined in my report.

642. In addition to commenting on the three individual cases, IME Y said in response to the draft report:

I have had the opportunity to reflect on my practice, my report writing and also the manner in which the reports are received. I have also had the opportunity to reflect on the emphasis that is placed on the various components of the assessment; in particular, assessing the emotional response of workers to the evaluation.

Whilst I note the absence of such features is a useful clinical finding, the presence of such features should be presented in a way which the reader can attribute the appropriate weight to the information.

In addition your report has caused me to reflect on the importance of such findings in isolation of other validity test results. I have also considered the issue of changes in the interval since the Panel last convened and will be carefully reviewing my recommendations in such cases. I have also considered further how to quantify a material change. This is likely to require further discussion and I have already raised this at a Peer Review.

Since I received your letter, I have already made changes as to how I present reports

- I am ensuring that the evidence to support my conclusions is fully disclosed
- That I explicitly address the findings within my responses to the questions posed
- That the balance of the evidence is addressed whilst presenting and summarising my findings. I would stress that the observation of potential bias is particularly concerning as I have always taken an independent role and will now reflect very carefully to ensure that not only my reports are independent, but are also seen to be independent.

Other sources of information about IMEs

643. Noting the proportion of claims reviewed where a termination based on IME Y's opinion was later overturned or withdrawn through the dispute process, the investigation asked WorkSafe if it captures data regarding:

- the proportion of individual IME opinions which have led to adverse decisions by agents
- the proportion of those decisions that are subsequently overturned through the dispute process (either at conciliation, court or by a Medical Panel).

644. WorkSafe said it does not have regular reporting on adverse decisions that are as a result of an individual IME opinion, although it has reported on this in the past on an 'ad-hoc basis'. WorkSafe said there were 'certain complexities' which meant it could not accurately report on this.

645. WorkSafe also said Medical Panel outcomes could not 'necessarily be directly linked to an IME opinion' because:

- A Medical Panel may consider further information which was not available to the IME at the time of their examination of the worker.
- An injured worker's presentation may change from the time of their examination by the IME to that of the Panel, as the worker may have had 'further medical appointments, diagnostics or treatment in that time'.

Complaints about IMEs

646. WorkSafe handles complaints about IMEs, which provide another source of feedback about IMEs and the quality of their reports. In 2017-18, WorkSafe received 276 complaints about IMEs.

647. WorkSafe has a dedicated team to handle IME complaints, which is separate from the team that handles complaints about agents. Changes since the Ombudsman's 2016 investigation

648. In response to the Ombudsman's 2016 investigation, WorkSafe made changes to its IME complaints policies and procedures so:

- Workers are not required to put their complaint in writing.
- WorkSafe shares complaints about IMEs with the team that oversees the IME quality assurance processes.

Effectiveness of complaint handling in 2017-18

649. To examine the effectiveness of WorkSafe's handling of IME complaints, this investigation reviewed:

- WorkSafe's policies and procedures for IME complaints

- WorkSafe's records for 24 IME complaints in 2017-18, about half of which were randomly selected.⁶⁵⁰.

Although WorkSafe has made some changes to its handling of IME complaints since 2016, this investigation identified that:

- There is a lack of clarity around WorkSafe's role in IME complaints.
- In some cases, WorkSafe has accepted IMEs' responses to complaints without considering whether they were reasonable.
- There is no clear process for referring complaints between WorkSafe's IME complaints and agent complaints teams. Lack of clarity around WorkSafe's role in IME complaints

651. WorkSafe has three policies and procedures dealing with IME complaints.

652. Firstly, it has an IME complaints procedure which outlines the steps WorkSafe takes upon receipt of an IME complaint. However, the procedure does not define the types of IME complaints WorkSafe can handle.

653. The procedure says WorkSafe: • obtains the worker's consent for WorkSafe to contact the IME about their concerns • writes to the IME about the worker's concerns and seeks their response • provides the outcome to the worker and IME.

654. The procedure sets out detailed advice about administrative steps such as where to save documents in WorkSafe's system, but it is silent on whether WorkSafe reviews the IME report that is the subject of the complaint to form its own views on the issues raised by the worker.

655. Secondly, the WorkSafe Claims Manual provides further advice about IME complaints. It states that 'the nature of the IME complaint determines how the complaint will be handled' and that WorkSafe only investigates 'administrative complaints'. However, the Claims Manual does not define an 'administrative complaint' or provide examples.

656. The Claims Manual further states that 'other complaints about the professional and ethical conduct of IMEs' may be referred to more appropriate bodies, such as the Medical Practitioners Board of Victoria or the Health Services Commissioner. WorkSafe also does not define these terms or provide examples.

657. WorkSafe introduced a third policy dealing with IME complaints in June 2019, in the form of its new IME Performance Management Framework. It outlines 'issues' relating to IMEs and the relevant 'performance management actions' WorkSafe should take. This framework is not confined to complaints; it also covers concerns identified through the IME quality assurance processes.

658. The Performance Management Framework states that WorkSafe may write to an IME and seek their response where a worker raises concerns such as:

- an IME causing the worker pain during the examination
- excessive appointment wait times
- an IME recording the examination without the worker's consent
- factual errors in the IME's report.

659. The Performance Management Framework states that where a worker disagrees with an IME opinion, WorkSafe should refer them to conciliation. While the conciliation process can resolve disputes about agent decisions, it cannot address deficient IME opinions.

660. In the sample of IME complaints the investigation reviewed, there were cases where WorkSafe did not take any action regarding complaints about IME opinions despite the opinions potentially breaching the IME Service Standards. These include requirements that an IME report:

- contain reasons for all opinions expressed
- be consistent in that opinions should accord with examination findings
- be free of advocacy or bias for any party
- contain 'clear and unambiguous' professional opinions.

661. While WorkSafe considers these issues in its quality assurance reviews of IME reports, it does not appear to consider complaints about the same issues.

662. In response to the draft report, WorkSafe said:

We confirm that WorkSafe has developed a new work practice on the complaints process and have recruited a specialist to oversee all IME complaints. It categorises all complaints and will investigate further if the issue raised is factual, an agent issue, behavioural, a breach of service standards or a conflict of interest issue.

663. The following is an example of a complaint about an IME opinion, which WorkSafe declined despite the worker's concerns that it had no basis.

Case study 52 – WorkSafe 'unable to intervene' despite concerns about unfounded IME opinion

Damien was working as a police officer when in 2010 he developed PTSD after attending traumatic incidents.* Damien made a WorkCover claim which was accepted by his employer's agent, Gallagher Bassett.

In 2017, Gallagher Bassett arranged for an IME to examine Damien. The IME concluded Damien continued to suffer from PTSD and was indefinitely incapacitated for all work. Gallagher Bassett requested a supplementary report from the IME, noting the IME commented that Damien played golf twice a week. Even though the IME already concluded Damien was indefinitely incapacitated for work, Gallagher Bassett asked whether his 'level of commitment in regards to

this activity' translated to Damien having at least a partial capacity for suitable employment or capacity to participate in occupational rehabilitation. In response, the IME said that when he saw Damien three months ago he had no capacity, but that it was 'possible' he had 'improved now'. The IME did not explain how or why.

Based on the IME's supplementary report, Gallagher Bassett required Damien to participate in occupational rehabilitation.

Damien complained to WorkSafe about the IME's supplementary report. He said his 'main concern' was that there was no basis for the IME's statement that it was 'possible' he had improved, when the IME had not reassessed him. WorkSafe did not take any action and told Damien it was 'unable to intervene' as his complaint related to the IME's opinion.

WorkSafe told him it would 'make a note' of his concerns but said:

WorkSafe does not strictly govern the content of a medical report, instead setting guidelines for the structure of the report and leaving the composition of the report to the discretion of the IME.

Gallagher Bassett subsequently withdrew its requirement for Damien to participate in occupational rehabilitation after he made a complaint to his local MP.

664. In another case, WorkSafe told an injured worker's daughter it was unable to look into her complaint about an IME's opinion, despite the IME relying on incorrect information.

Case study 53 – WorkSafe fails to look at complaint about IME opinion, later overturned by Medical Panel

Lana was employed as a packer when in 2002 she developed pain in her shoulder, neck and arm from repetitive work. She ceased work in late 2002 and made a WorkCover claim which was accepted by her employer's agent, Gallagher Bassett.

In 2005, a Medical Panel concluded that Lana was no longer suffering from physical injuries, but had developed a pain disorder. The Panel concluded she was indefinitely incapacitated for all work as a result.

A series of IMEs between 2005 and 2016 also said she was indefinitely incapacitated for work as a result of her pain disorder and a secondary mental injury.

In 2017, Gallagher Bassett arranged for a psychiatrist IME to examine Lana. The IME concluded Lana had major depression with psychotic symptoms, but did not

comment on whether she had a pain disorder as diagnosed by the previous Medical Panel and other IMEs.

The IME said the cause of her mental injury was 'uncertain' but 'risk factors' included:

[H]er status as an immigrant, and early refugee, time of life issues, divorce and then separation from her de facto, and initially at least, some sort of musculoskeletal problem that has now reportedly resolved.

The IME further said:

Employment is now only a cause, if it causes a physical injury. If it does not cause a physical injury now, then employment is not the cause.

This was contrary to the Medical Panel's opinion that although Lana's physical injury had resolved, she had developed a pain disorder as a result of the original injury.

Lana's daughter complained to WorkSafe by phone about the IME's opinion. A file note about the phone call said Lana's daughter told WorkSafe she was 'not happy' with parts of the report, including the IME's reference to Lana being a refugee. Lana was not a refugee, but rather had migrated to Australia to reunite with family members. WorkSafe took no action regarding the complaint and told Lana's daughter it was unable to intervene as her concerns related to the IME's opinion.

Gallagher Bassett terminated Lana's entitlements based on the IME's report. Lana requested conciliation and the matter was referred to a Medical Panel. The Panel concluded Lana was indefinitely incapacitated for all work, as a result of a severe chronic pain disorder and depression, caused by her original physical work injury.

The Panel disagreed with the IME's opinion, noting that the 'risk factors' the IME highlighted were 'general risk factors for psychiatric illness', but said they did not significantly contribute to Lana's condition.

The Panel also said contrary to the IME's opinion, 'persisting physical injury' was 'not a prerequisite for the development of chronic pain disorder'. Gallagher Bassett reinstated Lana's entitlements based on the Panel's opinion, three months after they were terminated.

665. The following case is another example, where WorkSafe took no action regarding a worker's complaint about an IME opinion, despite the worker identifying several inaccuracies and missing information in the report.

Case study 54 – WorkSafe unable to look at ‘anything relating to the opinion or the context of a report’

James had been working as a police officer for nearly 40 years when in late 2012, he injured his lower back. James made a WorkCover claim, which was accepted by his employer’s agent, Gallagher Bassett.

In mid-2016, a Medical Panel concluded that James was indefinitely incapacitated for all work.

About a year later, Gallagher Bassett arranged for James to be examined by an IME.

The IME concluded:

- Despite not having worked for nearly four years, James could now return to work performing modified duties.
- James’s employment was only partially responsible for his impairment.
- There had been a ‘significant change’ in James’s presentation since the Medical Panel examined him about one year prior.

James complained to WorkSafe about the IME’s report, raising concerns that it was ‘not an entirely accurate and true account of all that was discussed’ during the examination. James raised several concerns about inaccuracies and missing information in the report and queried how the IME reached some of their conclusions.

WorkSafe did not take any action regarding the complaint and told James it was unable to intervene in ‘anything relating to the opinion or the context of a report’. WorkSafe told him it could only raise concerns with an IME when the Service Standards had been breached.

However, it is unclear whether WorkSafe reviewed the IME report upon receiving the complaint and why it concluded the IME’s report complied with the Service Standards.

In WorkSafe’s written outcome to James, it stated:

As discussed, I have closed your complaint because the resolution you would like is a change to the opinion provided by ... [the IME]. This resolution can’t be achieved through the complaints process; however the Accident Compensation Conciliation Service may be able to help you.

Although the ACCS can resolve disputes about claim decisions, it does not have a role in changing an IME opinion or addressing concerns about a deficient opinion. Gallagher Bassett terminated James’s weekly payments based on the IME report and he requested conciliation. The matter was referred to another

Medical Panel which came to a different conclusion to the IME. Gallagher Bassett reinstated James's entitlements based on the Panel's opinion.

666. In another case reviewed by the investigation, WorkSafe declined a complaint about an IME opinion because the IME had not breached the IME Service Standards. However, it is unclear how WorkSafe formed this view.

Case study 55 – WorkSafe declines to look at complaint about inconsistent IME opinion

Mary was working in finance when she developed a mental injury from work-related stress, bullying and harassment.

In 2013, Mary made a WorkCover claim, which was accepted by her employer's agent. Mary was examined by a Medical Panel in mid-2016, which concluded she was indefinitely incapacitated for work.

In mid-2017, the agent managing Mary's claim, Gallagher Bassett, arranged for her to be examined by an IME.

The IME provided an inconsistent and contradictory opinion in their report stating that Mary's mental injury was 'in remission' and she had 'recovered', but that her treatment should continue and she was unable to return to work. The IME also said the cause of Mary's mental injury was no longer work-related, contrary to previous IME and binding Medical Panel opinions.

Gallagher Bassett relied on the IME's opinion to terminate Mary's entitlements because her mental injury was no longer work-related.

Mary complained to WorkSafe, querying how the IME concluded her injury was no longer work-related after four years. WorkSafe did not take any action regarding Mary's complaint and finalised it on the basis that the IME had not breached the IME Service Standards. It is unclear how or why WorkSafe formed this view and whether it reviewed the IME report.

Mary requested conciliation regarding the termination. When Gallagher Bassett reviewed the decision, it acknowledged that the IME's opinion was 'unclear'. At conciliation the matter was referred to another Medical Panel, which disagreed with the IME's opinion that Mary's mental injury was 'in remission' and that it was no longer work-related.

Gallagher Bassett reinstated Mary's entitlements based on the Panel's opinion

IME responses not assessed by WorkSafe

667. WorkSafe's policies and procedures say it can deal with 'administrative' complaints about IMEs. However, where WorkSafe decides to write to an IME about a worker's complaint, it is unclear whether WorkSafe assesses the

adequacy and reasonableness of the IME's response. There is no information in WorkSafe's IME complaint procedure about this step.

The procedure states:

Once you have received a response from the IME, you will need to then send an outcome letter to both the IME and the worker. ... Once this has been completed, you can then close the complaint.

668. WorkSafe told the investigation that the IME's response is 'always' reviewed before the complaint is finalised. However, the sample of IME complaints the investigation reviewed suggested this does not always occur, as WorkSafe finalised some of the complaints based on IME responses which did not address the worker's concerns.

669. The following case study is one example, where a worker complained to WorkSafe that an IME told her at the examination she did not have a work capacity, but stated the opposite in his report.

Case study 56 – WorkSafe closed complaint despite unclear IME response

Roseanne was working as a gaming attendant when in late 2011 she suffered a mental injury due to work stress and verbal abuse. She made a WorkCover claim which was accepted by her employer's agent.

In 2014, a Medical Panel concluded Roseanne was indefinitely incapacitated for all work.

A few years later in mid-2018, Roseanne's agent arranged for a psychiatrist IME to examine her. The IME concluded Roseanne had a capacity to return to work when only the work-related psychiatric condition was considered. However, the IME said there had been no 'material change' in Roseanne's condition since she was examined by the Medical Panel.

Roseanne complained to WorkSafe that the IME told her at the examination they believed she did not have a work capacity, but stated the opposite in their report. WorkSafe wrote to the IME asking them to respond to Roseanne's concerns.

The IME's response to WorkSafe did not address Roseanne's concerns, as the IME said their report did not contradict the opinion they provided at the examination that she had no work capacity. However, the IME made no reference to their comments in their report that Roseanne had a work capacity.

WorkSafe finalised Roseanne's complaint based on the IME's response and told her:

- Medical opinions and recommendations could only be changed by the provider of that opinion.

- After reviewing her concerns and further information, the IME stood by their original opinion. If Roseanne disagreed with any decision Xchanging made based on an IME opinion, she could request conciliation.

When the investigation sought further information from WorkSafe about its handling of this complaint, Worksafe acknowledged it had not ‘fully addressed’ Roseanne’s concerns when it closed her complaint. WorkSafe noted that the agent did not make an adverse decision about Roseanne’s entitlements based in the IME’s report, but said:

WorkSafe acknowledges that there is an opportunity to further improve our IME complaints handling process to integrate all relevant areas of WorkSafe at the earliest opportunity to ensure all aspects of a complaint are addressed.

670. In another case, WorkSafe closed a worker’s complaint based on the IME’s response, without considering whether factual inaccuracies in the IME’s report affected the overall opinion of the IME.

Case study 57 – WorkSafe closed complaint without assessing IME’s response

Natalie was working as a marketing manager when in early 2012, she developed a mental injury from bullying in the workplace. She made a WorkCover claim which was accepted by her employer’s agent.

In mid-2017, Natalie’s agent arranged for her to be examined by a psychiatrist IME who concluded:

- Natalie’s condition was largely in remission.
- From a psychiatric point of view, she could return to work in suitable employment and participate in occupational rehabilitation.
- Natalie had received treatment from a psychologist for some years and now attended every two to three months. There was ‘no clinical worth’ in such infrequent psychological treatment.

Natalie complained to WorkSafe about a number of factual inaccuracies in the IME’s report. This included the IME’s statement that Natalie saw her psychologist every two to three months, when she actually attended every two to three weeks.

Shortly after Natalie complained, her agent terminated her entitlement to psychological treatment based on the IME’s opinion.

WorkSafe wrote to the IME about her concerns. In response, the IME apologised and accepted they had made errors in the report, including their reference to the frequency of Natalie’s psychological treatment. The IME said the errors did not change their opinion.

However, the IME's opinion was based on the IME's incorrect belief that she attended a psychologist every two to three months. It does not appear WorkSafe identified this, as it did not further clarify the IME's opinion and finalised Natalie's complaint based on the IME's response.

Natalie's agent ultimately reinstated her entitlement to psychological treatment as an act of good faith after a privacy breach was identified.

In response to the draft report, WorkSafe said:

WorkSafe notes that in relation to this matter, further engagement with the IME occurred in relation to errors in report. The IME apologised and corrected the errors within the report which related to [the] client's age and treatment frequency. No further action was taken as [the] IME explained the errors in the report were not material and did not change the medical opinion of his recommendation from [the] report. WorkSafe informed the injured worker of the apology and the scope of WorkSafe's ability to intervene where independent medical opinions are being challenged. The injured worker was advised of their rights to appeal to conciliation as the appropriate body to consider these types of disputes.

The investigation accepts the IME said their opinion had not changed, however, given their opinion about the appropriateness of Natalie's treatment was based on an error, WorkSafe should have further clarified this.

Miscommunication between complaints teams

671. Sometimes complaints to WorkSafe raise concerns about an IME report as well as action taken by an agent.

672. The IME complaints team cannot handle concerns relating to an agent, as these are dealt with by a separate team. However, there is no documented process for referring these matters between the two teams.

673. The investigation found that in some cases, this led to inefficient handling of complaints, an example of which is set out below. In this case, a worker complained to WorkSafe about an IME report, as well as Gallagher Bassett's management of his claim.

A lack of communication between WorkSafe's two complaints teams meant the worker's concerns about Gallagher Bassett's claim decisions were overlooked.

Case study 58 – Bureaucratic approach to complaint handling leaves worker's complaint unresolved

Jason was working as a truck driver when in 2015 he suffered an injury to his knee. Jason made a WorkCover claim which was accepted by his employer's agent, Gallagher Bassett. In 2016, Gallagher Bassett arranged for a psychiatrist IME to examine Jason because he had been receiving psychological treatment.

The IME concluded Jason did not have a work-related mental injury, so Gallagher Bassett told Jason it would not fund any psychological treatment.

In mid-2017, Jason complained to WorkSafe's IME complaints team about inaccuracies in the IME's report.

In response, the IME complaints team told Jason:

- WorkSafe could not intervene in matters relating to the IME's opinion.
- If Jason had any concerns relating to Gallagher Bassett, he could contact WorkSafe's agent complaints team.

Jason recontacted WorkSafe's IME complaints team raising further concerns about factual inaccuracies in the IME's report. He also complained that Gallagher Bassett did not give the IME important information, including that he had been admitted to hospital for stress just prior to the IME examination.

The IME complaints team wrote to the IME about the factual inaccuracies Jason raised and the IME apologised for the errors, which they said were typographical mistakes. The IME complaints team reiterated to Jason that it was unable to deal with his concerns about Gallagher Bassett and that he needed to make a separate complaint to the agent complaints team.

A couple of weeks later, Jason wrote to the IME complaints team again and raised additional concerns that Gallagher Bassett was withholding IME reports from him. It was apparent that Jason did not understand the distinction between WorkSafe's two complaint teams.

Accordingly, the IME complaints team referred Jason's concerns to the agent complaints team and asked them to contact him. However, this did not occur and the agent complaints team closed Jason's complaint in late 2017 'pending receipt of information that has been requested from complainant'.

It appears this was an error, as there was no evidence that either complaints team asked Jason for any further information. WorkSafe did not take any further action on this issue.

674. In another case, a worker's partner complained to WorkSafe about three IMEs, as well as Xchanging's management of the claim. WorkSafe's IME complaints team told the worker and her partner that it was unable to assist with their concerns about Xchanging and that they needed to make a separate complaint to the agent complaints team.

Case study 59 – WorkSafe failed to refer agent complaint to relevant team

Lena was working as a financial officer when in 2002 she suffered a serious stress-related heart condition at work. Lena made a WorkCover claim, which was

accepted by her employer's agent. Lena later developed a secondary mental injury.

Between 2015 and 2017, Lena's partner complained to WorkSafe's IME complaints team on her behalf about three IMEs. WorkSafe did not take any action regarding the complaints as Lena and her partner did not consent to WorkSafe contacting the IMEs about their concerns.

When discussing the IME complaints, Lena and her partner told WorkSafe they were also concerned about decisions of Lena's agent, Xchanging, including a decision to send her to an IME from the incorrect specialty for her injuries.

The IME complaints team did not refer their concerns to WorkSafe's agent complaints team, instead telling Lena and her partner to contact WorkSafe's agent complaints team themselves.

Booking of IME appointments

675. Historically, agents have been responsible for booking all IME appointments, which allowed them to choose the IME that examines an injured worker. However, this changed following the Ombudsman's 2016 investigation.

Changes since Ombudsman's 2016 investigation.

676. To prevent agents' selective use of IMEs, WorkSafe took over responsibility for booking all psychiatrist IME appointments in mid-2017. Under the new process, an agent must contact WorkSafe when it needs a psychiatrist IME to examine an injured worker, and WorkSafe books an appointment with an available IME.

677. WorkSafe said it targeted psychiatrist IME bookings as 'the highest priority' because injured workers with mental injuries (whether primary and secondary) have the 'highest risk of becoming complex and having long term work absence'.

Effectiveness of new booking process

678. WorkSafe told the investigation there had been a range of improvements since this change in practice, which included:

- 'Elimination of the possibility of agent selection bias by WorkSafe making over 16,000 IME appointments centrally'
- 'Improved transparency over service delivery, particularly around timeliness and requests to reschedule appointments'
- 'Development of clear service delivery standards for booking appointments'
- 'Minor improvements to service delivery to improve client experience; for example if a worker has already attended a psychiatric IME, any subsequent IMEs should be scheduled with the same examiner'

- ‘Improved engagement with IMEs resulting from the single point of contact for scheduling appointments. Clear, positive feedback was received from many IMEs reporting that having a single booking contact for the scheme as a whole was beneficial’.

679. WorkSafe also reported a range of negative outcomes from this centralised process, including increased wait times of up to 30 calendar days for non-urgent appointment bookings. This is contrary to WorkSafe’s IME Service Standards which require non-urgent appointments to be booked within seven days.

680. In response to the draft report, WorkSafe said:

While weekly payments should not be adversely affected by this, there have been instances where treatment approvals have been impacted. The delays also impact the client experience and the timeliness of entitlement decision-making.

681. WorkSafe told the investigation that the ‘root cause’ of the delays was ‘ultimately a mismatch between supply and demand’.

WorkSafe highlighted:

- higher demand for IMEs because of ‘excessive levels of cancellations’ of IME bookings, and higher volume of primary and secondary mental injury claims
- lower supply in psychiatrist and psychologist IMEs because they are paid far less than through other medical work
- an increase in workload based on ‘poor administrative practices by agents’ such as late delivery and large volumes of material before examinations.

682. WorkSafe reported that some issues which the new process sought to address have remained the same, for example:

- the selection of IMEs based on availability instead of proximity to the worker or ensuring an adequate spread of IMEs used
- instances of agents providing IMEs voluminous and unnecessary documentation prior to examinations
- limited change in the volume of requests for supplementary reports.

683. In 2018, WorkSafe surveyed psychiatrist IMEs who had participated in the new centralised booking process.

The IMEs provided mixed responses, which included:

- ‘Booking process is streamlined and efficient. Staff are very supportive and responsive’.
- ‘I am now getting steady referrals, and the system is transparent and straightforward’.
- ‘I think it is much fairer to the workers. Generally it works ok but there are a lot of cancellations’.

- ‘Because the appt isn’t made by the person actually requesting the IME there is sometimes confusion around length of appointment and report delivery times’.
- ‘The agents are not always sending documents and often need to be reminded’.

684. Witnesses interviewed in the investigation echoed the issues WorkSafe identified regarding its new IME booking process. A former agent employee stated that in their experience, the wait times for psychiatric IME appointments were ‘astronomical’. The former employee said they had seen examples where the timeframe between a claim being identified as needing an IME examination and the actual examination taking place was ‘greater than six months’.

They said:

It will often sit at WorkSafe for an extraordinary amount of time before WorkSafe are able to book in an appointment ... For the claims where a liability decision needs to be made they’ll make that booking pretty quickly. That’s the focus of their attention and then for others they seem to sit there for a really long time.

685. A worker representative raised similar concerns at interview about delays in psychiatric IME appointments being booked, noting the impact this often had on a worker’s ability to receive treatment.

686. Conciliation Officer G said at interview that the new booking process was ‘worse than it ever was’. They said the booking delays sometimes affected the timely resolution of disputes at conciliation, because they were reliant on the worker being examined by an IME.

The Conciliation Officer said:

There’s so many steps to the process and there’s so much delay around it now. It seems to take three or four weeks to get an appointment and before if it was recognised that we needed a psych appointment straightaway, I could get that information from the agent rep[resentative] that afternoon, and I could put it in a progress certificate and say ‘Here’s your appointment coming up. So we’re going to have a follow up two weeks later once we have the report’. You were able to keep the momentum up, which is what injured workers in that space really need. I was so hamstrung ... [for] the last two that I’ve had to organise, and I thought ‘gosh, if this is progress, we’re really in strife’. And it’s mental health ... it’s the last thing that people need delay on.

687. An IME representative interviewed by the investigation said:

What was a flawed process with the agents, they [WorkSafe] lifted it up, created another layer of bureaucracy and gave it to that other layer of bureaucracy to do [the] same process.

688. WorkSafe told the investigation that its new booking process would remain as a ‘business as usual’ practice until a new service model is developed as part

of WorkSafe 2030. WorkSafe also said it was making a number of further changes to the booking process to address the issues identified during the pilot.

689. In response to the draft report, WorkSafe also said:

To address critical issues in the short to medium term, the following changes have been made to address the imbalance in supply and demand:

- WorkSafe has commenced work to reduce over-reliance on IMEs and reduce the level of cancellations.
- WorkSafe reviewed its fee schedule for IMEs. In April 2019, WorkSafe increased the fee for psychiatric IMEs by 25% and made other changes to the fee structure, such as providing a higher fee if there were more than 200 pages of reading material. Anecdotal evidence suggests the fee structure increase has had an overall positive impact of psychiatry IMEs engagement, with a small increase in [the] number of appointments being made available for WorkSafe claims.

Psychiatric hospital substitute pilot

736. During the investigation, WorkSafe said it was implementing a trial to examine alternatives to hospital bed-based services for workers with mental injuries likely to be at risk of re-admission.

737. WorkSafe said this was designed to 'reduce, if not prevent, unnecessary and inappropriate hospitalisations' and included 'comprehensive clinical assessment, ongoing clinical interventions, collaboration with the worker's wider health-care team and links with other services as needed'.

738. WorkSafe told the investigation:

WorkSafe will be implementing an evaluation framework across mental services to assess the impacts of these types of initiatives, the effectiveness of community mental health treatment and the best recovery pathways that result in positive outcomes for our workers.

WorkSafe WorkWell

739. In 2018, WorkSafe announced a 'WorkWell' campaign, designed to 'improve the mental health and wellbeing of every Victorian worker'. The \$50 million program includes WorkSafe offering funding to employers for programs and initiatives focussed on worker mental health and wellbeing.

740. WorkSafe states:

The WorkWell model is an integrated approach to workplace mental health and wellbeing and combines the strengths of disciplines such as OHS, health promotion, and psychology. It has the potential to optimise both the prevention and management of mental injury and illness in the workplace.

RECOMMENDATIONS

Recommendation 1

Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:

- a. the need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme
- b. the experience of other accident compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international workers compensation jurisdictions.

Recommendation 2

Introduce a new dispute resolution process which:

- a. allows for binding determinations on the merits of claims decisions, including factual disputes; is inexpensive; and provides timely outcomes
- b. complements the existing dispute resolution processes of conciliation and legal review at court.

Victorian Government response:

Accepted both recommendations

WorkSafe Victoria

Recommendation 3

Establish a dedicated business unit to independently review disputed decisions when requested by workers following unsuccessful conciliation. Where necessary, WorkSafe should use its existing powers to direct agents to overturn decisions which do not have a reasonable prospect of success at court (ie would not be sustainable).

Recommendation 4

Amend its quality decision making audit procedure to ensure that: a. only sustainable decisions pass b. unsustainable decisions identified through the audit process are overturned.

Recommendation 5

Establish a centralised complaints process which triages and provides a single point of contact for all complaints about the claims process, including agent decisions and IMEs.

Recommendation 6

Update the Claims Manual, and provide training to agent staff, to:

- a. require that agents make sustainable decisions
- b. require that agents provide reasons in an adverse decision notice if they have disregarded or discounted any relevant evidence or information in making the decision
- c. clarify and expand the requirements about agents' use of surveillance, including what constitutes 'adequate evidence', record keeping standards and the use of surveillance in mental injury claims
- d. clarify the circumstances in which agents should refer a worker to a psychiatrist IME for assessment of a potential secondary mental injury
- e. provide guidance on the appropriate IME specialty to assess workers with chronic pain syndrome or a pain disorder
- f. provide guidance on the rejection of mental injury claims under section 40(1) of the WIRC Act (reasonable management ground), including the evidence required to support a decision on this ground
- g. provide clarification and greater guidance regarding the circumstances in which it is appropriate to issue a return to work non-compliance notice, including assessment of whether a worker has made 'reasonable efforts' to comply with their obligations
- h. provide guidance on the evidence required to show a 'material change' in a worker's condition since a previous Medical Panel examined them and provided an opinion.

Recommendation 7

Increase WorkSafe's oversight of the following claims management activities by agents, through targeted 'health checks' or audits:

- a. agents' use of surveillance
- b. mental injury claims rejected under section 40(1) of the WIRC Act (reasonable management ground)
- c. return to work non-compliance notices
- d. terminations of 'top up' weekly payments provided under section 165 of the WIRC Act (or section 93CD of the Accident Compensation Act).

Recommendation 8

Amend the Injured Worker Survey measure so that it better targets complex claims, which may include:

- increasing the focus on complex claims in the current survey; or

- introducing a separate survey of workers with complex claims.

Recommendation 9

Introduce a contractual requirement regarding the timeframe in which agents must respond to:

- a. requests for reinstatement of weekly payments
- b. requests for medical and like treatment.

Recommendation 10

Establish a mechanism enabling the regular review of Medical Panel outcomes to identify potential trends in:

- IME opinions
- agents' use of IMEs
- agent decision making.

Recommendation 11

Amend its IME Quality Assurance processes to ensure that reviewers are provided all of the documentation the IME considered to inform their examination of the worker and prepare their report.

Recommendation 12

Ensure IMEs consider the definition of 'suitable employment' in the WIRC Act when forming opinions about whether a worker has a current work capacity, by:

- a. amending the relevant template question(s) so that IMEs are required to detail how they considered each factor in the definition of 'suitable employment' when providing their opinion, similar to the way in which Medical Panels address this
- b. providing training to IMEs on what constitutes 'suitable employment'.

Recommendation 13

Provide different time allocations for independent medical examinations of injured workers with 'complex claims' and remunerate IMEs for these accordingly.

Recommendation 14

Provide guidance and/or training to IMEs regarding:

- a. what constitutes 'material change' in a worker's condition since a previous Medical Panel examined them and provided an opinion

b. how surveillance material should be considered when forming an opinion about a worker's work capacity.

Recommendation 15

Undertake a further review of the issues identified by the investigation regarding IME Y and engage with them direct to ensure any necessary changes to their practices occur.

WorkSafe response: - Accepted all recommendations.