Productivity Commission

National Occupational Health & Safety and Workers Compensation Frameworks

Submission by

Working Armour
61 Iris Street
Paddington NSW 2021
Phone/Fax 61 2 93312282
Mobile 041 227 5228
jarmour@matra.com.au
www.workingartnour.com.au
ABN 47 336892 482

Julie Armour

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Phone/Fax 61 2 93312282 Mobile
041227 5228
jarmour®matra.com.au
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ABN 47 336 892 482

This submission is made by a frustrated Occupational Health & Safety (OHS) professional who began her career researching biomechanics in elite sports performance. As a researcher I was taught that biomechanics was a science with three main branches; technique analysis, injury prevention and equipment design. Although in this research we also applied these principles to injury rehabilitation the emphasis was prevention. Wanting to apply these skills to a broader section of the community I became involved in the application of biomechanics to the training of rehabilitation professionals. What became apparent was that as a nation we are happy to put millions into the ego's of a few elite sports performers but we are not so interested in helping people get out of bed each day. It also became apparent that rehabilitation in the workplace was and is no where near as effective as prevention. We would not entertain the option of rehabilitation over prevention for an elite sports performer but why do we for workers? As a researcher I was discovering that the majority of those injured in workplaces were involved in incidents which were totally preventable. So I hung up the academic hat and began what has become a 12 year career in workplace injury prevention. This has taken me through a number of industries at both ends of the OHS performance spectrum in both Australia and overseas. One thing that becomes obvious through all the research, review, auditing and legal work, is that only a very small number of organisations are effectively preventing injury through appropriate planning, implementation, monitoring and review of risk management processes.

Perhaps this is simply a question of priority- even this inquiry places Workers' compensation (WC) ahead of OHS. This reflects in the approach taken by the regulatory bodies in almost all Australian jurisdictions. At the same time as such bodies boast reduction in injury and illness statistics they still are experiencing massive increases in costs that are not flowing forward to the injured or ill party. The preoccupation with the reduction of WC costs has done little to effectively reduce the injury and illness incidence rates especially as the employment arrangements of our workforce change.

Not only is there absence of significant reductions in incidence rates but there has also been reductions in those covered by the WC and the statistical reporting umbrella with dramatic increases in the ranks of the self employed and other groups such as short term casuals not required to be covered by workers compensation. The self employed are of particular interest as they are generally small business workers, responsible for their own OHS prevention and insurance, work longer hours so are exposed to risks for greater length of time and tend to change worksites and production processes more often. They are the most likely group to access social security for income support and use Medicare based health treatments. So we may be seeing some decreases in the frequency of injuries but when expressed as an incidence rate we are seeing little change. A recent study examining sprain and strain injuries in the coal industry found a reduction in numbers of injuries from 1996 to 2001 but when expressed as an incidence rate there was little change. In other words the decreases in absolute injury numbers is more of a reflection of a decrease of the number of people working in that industry than effective injury prevention.

What then is the answer? The systems we have enforced, largely emphasise injury management over injury prevention, with consequent reoccurrences. If effective prevention isn't implemented we will continue to experience injury management cost blow outs. When will we seriously recognise this basic link? Since executive bonuses have been tied to lost time injury rates, compensation performance and company annual reports, the walking wounded are not new to Australian workplaces. What was intended

to motivate executives to take an interest in their workforce's health and safety has served to hide what is, in fact happening in some workplaces. This has been perhaps best seen in more remote workplaces with limited opportunities to suitable rehabilitative duties where personnel have been flown back to site to avoid incurring the dreaded lost time injury. In such cases the cost of transporting an injured party back to a workplace with no suitable rehabilitative duties, can be highly expensive but that expense is countered by the potential loss to an executive's bonus. Additionally many organisations put all efforts into managing an injury to ensure cost reductions in compensation and are ambivalent about determining how to prevent the reoccurrence of the most prevalent and costly injuries.

Who has hoodwinked who? As a result of billowing costs we have chosen to reduce payments, restrict access to common law so those that are seriously and permanently incapacitated will ultimately end up on sickness benefits. We all end up paying for an employer who has not managed their responsibilities to prevent injuries. Is it the employers who are at fault? No- they simply follow the way the framework of self regulation is applied. Auditing protocols in most Australian jurisdictions (whether completed by the inspectorate or by the private sector) place an emphasis on paper audits and injury management. Is an OHS policy displayed? Is a rehabilitation policy displayed? Are procedures for injury management established? What happened to observing whether personnel are working safely or that risk is actually controlled? The author was recently asked to assist a public sector organisation review their health & safety performance which although showed evidence of minimal lost time injuries had not achieved any effective risk management. They had received reports of excellent performance by the jurisdiction's OHS review even though the review reports showed inadequate performance in risk management and responsibility for OHS. How is it possible to effectively prevent injuries when you do not manage risk and you do not make personnel responsible for it?

Since my previous submission to the Productivity Commissions 1995 Inquiry into Work Health & Safety it appears that most people in the Australian workforce are well aware of health & safety issues but have they really changed their practices since then? In that report the Minerals Council was quoted as criticising the lack of preventative work by Worksafe Australia's previous research priorities. We have all read the arguments associated with the academic nature of previous research conducted by Worksafe but is the situation today any better without a national strategy for research? Today a number of bodies offer research grants in all jurisdictions but there's a haphazard approach to how that research is targeted and, more importantly whether research findings are sent back to the regulatory bodies or the workforce. Has any evaluation of the true effectiveness of any OHS research grants been carried out in any Australia jurisdiction? One state concerned that millions of dollars in research grants had not produced any sustainable reduction in target area incident rates, now uses evaluation consultants. I was involved in one such project in that capacity. In this case the project was run off the rails by a few disgruntled stakeholders who were concerned about funding implications of trying to implement minimum OHS standards in their industry. With no required input from the evaluation consultant, the project is at a standstill. Evaluation would be more effective if applied after interventions have been implemented and consequent risk reduction is demonstrated. In the same way that employers are not evaluating the effectiveness of their prevention strategies neither are the bodies that are handing our the research grants.

Coal Services Australia (formerly the Joint Coal Board) is a granting body trying to ensure that research is not academic and involved all parties. For the past decade they have offered grants under their Health & Safety Trust. They have also recently completed an evaluation of their research program. The disappointing factor is that although the trust has been producing quality research and information booklets, the Coal industry has not taken up the research recommendations. I was involved in research determining the difference in strategies applied to prevent sprain and strain injuries between good and poor WC performers in NSW coal mines. It was disappointing to discover that in an industry with over two thirds of their WC expenditure on sprain and strain injuries and the only difference there was between good and poor performers was the age of the workforce and the injury management program. None of the mines were aware of their high risk areas for injury and none had developed specific targeted strategies to address issues.

So again we have an industry that places a significant emphasis on safety that had not specifically targeted preventative activities to areas where most injury risk was present. This is not so unusual for the Australian workforce where there has been little change in the incidence rates for sprain and strain injuries over the past 5 years. In NSW' over the past decade (1991-2001) the incidence rate for manual handling injuries has remained relatively constant whilst the WC costs have increased 321% from $94 million to $302 million in direct costs. The direct cost/claim has risen from $8 360/claim to $21 800/claim. Of added interest is that the proportion of workplace injuries caused by manual handling has increased from 30% a decade ago to 35% in 2001. It becomes disturbingly apparent that costs will only continue to increase if we can not prevent these manual handling injuries from occurring in the first place.

Let us think about our approach to health & safety in an abridged version for a NSW construction worker. Prior to 1983 there was no specific NSW health and safety legislation other than the very prescriptive Construction Safety Act of 1912 which had very little emphasis on risk management but a lot of very specific information associated with construction processes. Have we reduced the likelihood of a person falling on a construction site today any better than we did in 1912- well we may have different requirements but does it mean that personnel are "safer" today? An interesting example of this lies with commentary provided by the Industry Commission's 1994 report on Workers Compensation in Australia on how technology advances have altered the nature of risks increasing safety enormously. The example used of the fishing industry was interesting as the fishing industry today, according to most recent research, has one of the highest fatality rate of any Australian industry. This situation has perhaps changed little over the last 100 years. What we tend to forget as we make newer and better machinery, that is we fail to match them to the human operator, injuries will continue. For instance, if we fail to take into account the weight, fitness level, age and fatigue level of the driver of a brilliantly engineered, technologically advanced 220 ton dump truck, then we fail in injury prevention.

Comparisons can certainly be odious. If our construction worker fell in NSW after 1926 he would have been entitled to some worker compensation. If he was a SA construction worker he would have been entitled to this from 1900- bet they weren't told that by NSW careers advisers (if they existed) at the turn of the century. If our construction worker lost a limb associated with his fall he would be entitled to a different benefit than if he lost it in Victoria. Generally our injured worker would receive compensation for his injury but payment would be made out of a "compensation slush fund" where there was little accountability or

incentive for companies to try to prevent the same type of injury from recurring. The late seventies and early eighties were periods of WC reform with a greater emphasis on rehabilitation and prevention. Commutations of weekly benefits were only granted in special cases and common law remedies were restricted or abolished altogether. The quality of service to the injured worker was severely criticised with the market being affected by wild premium swings related to insurance investment performance. UK style OHS legislation was developed in Australian jurisdictions in the late seventies. These were based on Lord Robens recommendations which came out of the British review from 1970-72.

These are summarised below for your information:

- Legislation be replaced by a single act to be administered by one separate and self contained authority
- Workplaces should have a written OHS policy stating OHS objectives
- Content should be enabling covering matters applicable to employers, hazards and their industries
- Greater emphasis on employee education and training in OHS
- One unified inspectorate with inspectors being allowed to issue improvement and prohibition notices
- Allowance for the establishment of safety committees
- Streamline systems of accident reporting
- Greater obligations placed on employers and manufacturers
- Increase in penalties for non compliance

These recommendations were based on Lord Robens findings in relation to British OHS legislation prior to 1970 that:

- Apathy was the most important cause of accidents
- Punitive approach had not worked with insignificant penalties for non compliance and rare imposition of maximum fines by the courts
- Employees and employers had become complacent lacking the incentive to make positive provision of OHS in the workplace

So what followed in Australia? All jurisdictions developed separate OHS legislation which were loosely based on the Robens recommendations with 9 separate OHS Acts administered by 9 separate authorities. Employers spend the majority of their time and effort putting up OHS policies and objectives on walls, training employees who don't follow the requirements of their training as they are not supervised to do so and having committee meetings which take over line management responsibilities for safety. The regulators don't provide accident analysis back to employees or employers and the courts don't apply the greater penalties that are present.

It could perhaps be argued that the same situations existing in British OHS prior to 1970, exist in Australia today in that we are apathetic towards incident cause, don't enforce increased penalties or provide sufficient incentive to change behaviours and allow complacency- by both employee and employer in providing for OHS. Following recent overseas work, particularly in South East Asia, I have realised just how poor our practices are in Australia. I remember using photos I had taken from ship yards in

Singapore, construction sites in Malaysia and mines in Indonesia for training courses in Australia. Naturally their Australian counterparts scoffed at the poor practices in the Asian countries to only be further embarrassed on a tour of their own worksites to see the exact same apathy and poor risk management approaches.

Let us return to our construction worker who is still working in an industry in the early nineties which has one of the highest fatalities rates, a large number of these caused by falling from height. OHS legislation has still not changed markedly with some increases in penalties which has not been accompanied by significant increases in their application or risk reduction associated with injury causation factors. In the nineties the emphasis changed for WC schemes. The changes were linked to financial viability with further restrictions on common law access, continued capping of benefits as well as restrictions on certain types of claims such as stress. The changes meant we still had a functioning insurance system but often those with serious injuries were not fully covered by payments and ended up on welfare benefits previously estimated to be 40%" of costs going to the government and community. So what did that mean to our construction worker permanently incapacitated by falling from a height? In NSW it meant that our injured worker could drag this out through the courts in a civil case which he may ultimately win but where the damages award may be insufficient to cover ongoing costs leading him to wind up on sickness benefits. If the case occurred under the Commonwealth, SA or NT compensation schemes he would not be entitled to this action. These changes however have not created the desired results for workers, insurers or the employers, because injuries are still continuing to occur and costs are continuing to escalate.

In making the employer more accountable for health and safety, emphasis has been placed on injury incidence instead of risk control and as a consequence injury prevention. Support has not been given to planning and resource processes that could address prevention issues. Supervisors are chastised over injury incidence but not supported to prevent injury either now or in the future.

I have been involved in much legal work in the past ten years of my career which has involved assisting in investigations associated with OHS prosecutions and coronial inquiries in most Australian jurisdictions. I have also been used as an OHS expert in WC disputes and personal injury claims. The most common instruction I am given by solicitors (whether acting on behalf of the employee or employer) is to provide opinion as to whether a safe system of work was in place, to identify the hazards which may have contributed to the injury, whether these were foreseeable and if there were any reasonable, possible or practical precautions which could have prevented the injury. In all the cases I have been involved in there is probably 2-3 that I could say that the employer had provided a safe system of work. In the other 300 or so cases there was generally a very poor attempt made at a system of work, not even a safe one. In most of these cases the employer had identified hazards and implemented strategies to address the risks. The two major flaws however was the failure to match the risk control to the degree of risk posed and the fact that little or no monitoring and review had ever taken place to assess whether these strategies were effective in reducing risk.

What is of even greater irony is that in some cases where an element of "Porting" was suspected (by the employer, insurer &/or legal team) it was still not possible to demonstrate that a safe system of work was provided. In other words although the employee involved may not have suffered an injury as reported, the

system of managing the foreseeable injury risk was inadequate. One case which comes to mind was an aircraft engineer who fell inside an engine whilst attempting to repair panels inside the engine. Although there was some query as to whether he had actually fallen in the manner outlined, the task the worker was involved in required him to glue panels around the centre of an engine from inside it with no appropriate access provided to reach the panel installation points without the risk of falling!

So where do we go now? It becomes apparent that we require a change in our priorities which will require incentive for employers to effectively manage risk and prevent injuries. If employers were penalised when injuries are repeated this would certainly prompt greater attention to injury prevention. Conversely if employers could demonstrate "effective" injury prevention (not passing a paper audit) they could be rewarded as part of the compensation system. There is a need to have national uniform OHS and WC legislation. At a most basic level this could be derived from the integration of the current separate OHS acts to better align with some of the original Robens recommendations. Industry specific (coal mining, maritime, diving) or hazard specific (radiation, scaffolding, lifts, boiler & pressure vessels, agricultural chemicals) requirements could be covered within the regulations rather than by separate legislation. This has been partially completed in the recent NSW OHS regulations and there is no reason why this could occur in national OHS legislation. The 9 jurisdictions would remain responsible for the enforcement of the national legislation.

There is a need for this legislation to cover all workplaces and be based on a risk management approach. We would have a single comprehensive framework of legislation rather than over complex detailed statutory regulations. A single centre of initiative would replace the 9 separate heavily fragmented administrations that generally reflect the power of the jurisdictions lobby groups in the both the content and application of the legislation. Much risk management in Australian OHS legislation has been based on the power of specific lobby groups involved in each jurisdiction than objective recognition of risk and its management. We need to put the priority back into injury prevention. It is interesting to note that the UK also were not successful in implementing all of Lord Robens findings and it was not until Piper Alpha and the loss of 167 lives did one administrative body, the Health & Safety Executive take over high risk work sites such as those in the offshore petroleum industry. Will we have to wait for a large scale significant disaster to realise that our current disparate systems are not effectively preventing injury? It is also of interest that a more recent review of the UK OHS legislation concluded that there was a need for a more rigorous enforcement policy with additional offences of corporate killing. Some jurisdictions in Australia have attempted to follow with little success in initially getting this into legislation and where it has been legislated, no enforcement of available penalties.

There has been much discussion in the past of the conflict in roles of having the one authority managing both the OHS and WC legislation. The concept argued often is that there should be separate body covering the advisory and educative aspects of this role which is often in direct conflict with one of a regulator. What is perhaps more important is to get the priority right in the framework and then if necessary assess the roles of adviser and regulator.

If the objectives of each of our nine OHS Acts are reviewed, it becomes apparent that the regulator would have a great deal of difficulty demonstrating that these objectives are being achieved. Firstly, of the 9

separate jurisdictions, the objectives of the OHS legislation is almost identical in all states, though varying levels of detail, with the exception of NT and Tasmania who do not define the objectives or purpose of their legislation. This is of a concern if a government does not articulate their objectives in particular legislation, how will their constituents know if they have been achieved? In the principal WC legislation, the objects are described in legislation for NSW, SA, VIC, NT, QLD & WA. In the other jurisdictions we are not able to either specifically identify what the legislation is aiming to achieve and more importantly establish whether this has been achieved.

Where objects have been defined in compensation statutes, an objective which tends to be always mentioned initially is "the prevention of workplace injury". So why do our compensation systems place such little emphasis on prevention in application and practice. Indirectly, through premium increases, claims history is considered but too often inadequate cost benefit analysis takes place so effective and more rigorous risk reduction techniques are not applied. All efforts go into managing the injured and there is little time or priority placed on correcting what caused the injury. A good example was a client I had that needed to manufacture product for 3 months of the year just to pay their WC premium. In their factories their main injuries were sprain and strains associated with highly repetitive practices. Ideally of course, the factory needed to be re-engineered to eliminate most of the risk but the employer would not even look at task rotation as a far less expensive alternative. The employer opted for the usual manual handling training they had been doing for the last 15 years with no sustainable change in handling risk. This "prevention" objective also appears in most jurisdiction OHS legislation objectives but as we have discussed this is not being achieved. What can be said from all this is that the objective of prevention is not being achieved under either OHS or WC statutes.

Conclusion

Although there has been a slight reduction in Australian injury and illness rates, this has done little to reduce the costs of WC payments, costs which are not necessarily flowing on to the injured party. One thing that comes through all the research, review, auditing and legal work, is that only a very small number of organisations are effectively preventing injury and illness through appropriate planning, monitoring an review of risk management, at all levels and holistically. Additionally many employers are not even evaluating the effectiveness of the prevention activities (if any) nor are bodies handing out research grants. It seems necessary not only to re-order priorities to give Occupational Health & Safety (OHS) prevention the first concern but to re-order regulatory bodies to enforce this priority uniformly across Australia.

WorkCover Authority; Statistical Bulletin 2000-01, WCA NSW, *Sydney,* NSW 2002.

ii Productivity Commission; Inquiry in Work, Health and Safety, AGPS, Canberra, 1995