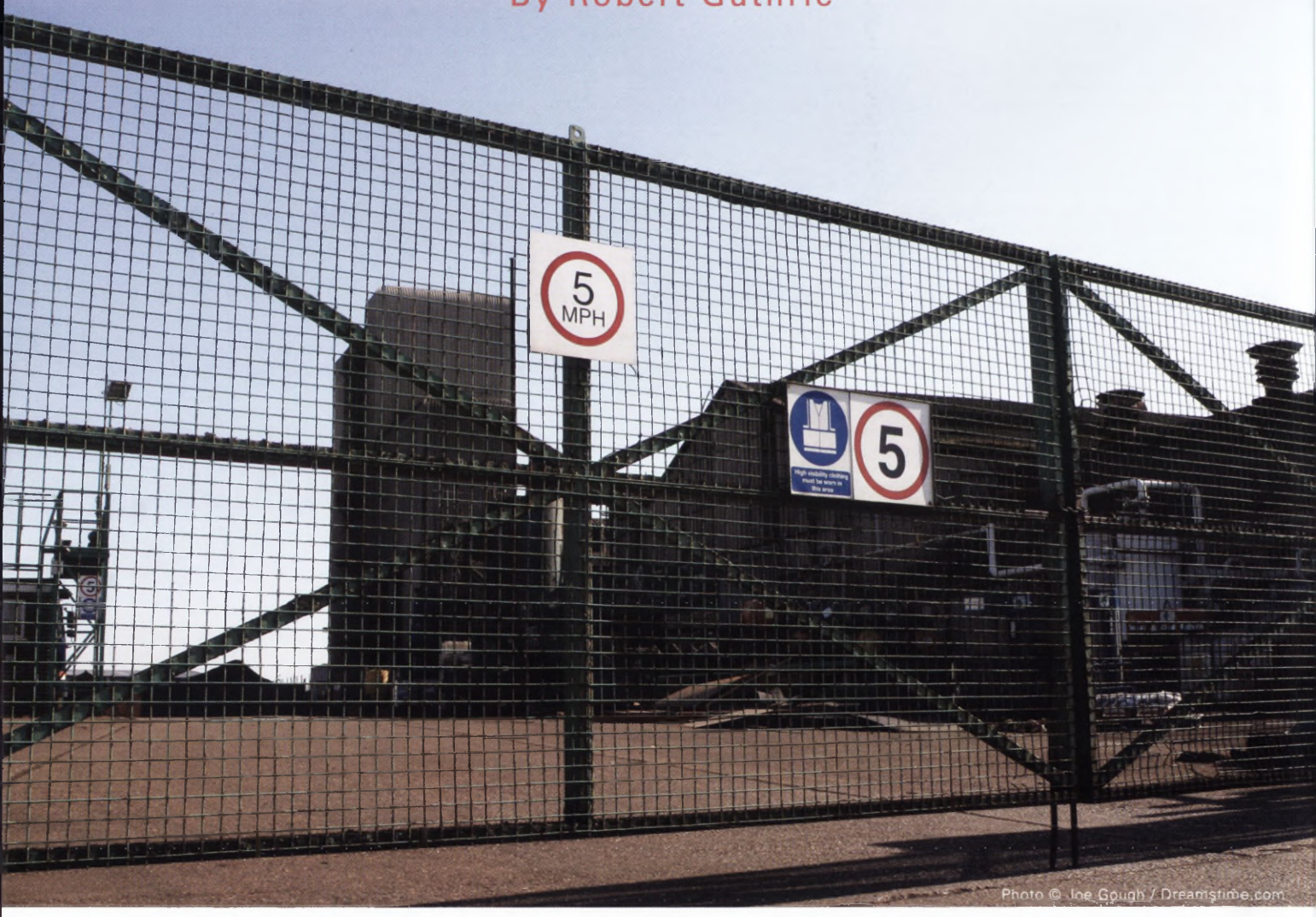
Workers' compensation – some salutary tales

By Robert Guthrie



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In 2002, John Howard's conservative Liberal government announced a House of Representatives inquiry into workers' compensation matters. Two of its terms of reference related directly to issues of fraud in workers' compensation, the first to the costs and incidence of fraud incurred by employers and employees, and the second to methods that might be implemented to prevent such claims. A third term of reference required the House of Representatives Standing Committee to inquire into issues relating to rehabilitation. Its report was titled *Back on the Job*.

As personal injuries lawyers, we are often asked to reflect upon the credibility of our clients and the issue of fraudulent claims. Just as criminal lawyers are frequently asked how they can defend the guilty, personal injuries lawyers are often asked how they can stand up for 'dodgy' workers making fraudulent claims. In my evidence to a federal enquiry to establish the incidence of employer and worker fraud, I stated that in 25 years of legal practice, handling hundreds of workers' claims, I had come across only a handful of seriously fraudulent matters. On the other hand, after 20 years of academic research I had frequently encountered examples of employer fraud. So despite some spectacular media 'outings' of compensation fraud relating to workers, those cases are really few and far between. There is far more evidence that employers commit a form of fraud upon their insurers by failing to declare the correct number of workers in the workplace, the nature of their industry, and by masking the true risks involved in their activities.

The continuum of workers' credibility can best be illustrated by examining a few cases where the worker's credibility was a key element.

THE FENCE AND THE BILLIARD TABLE

First, a case involving a worker who injured his lower back. He was a young man who was waiting at the factory gates early one Monday morning with a group of other workers. The gates were locked, and the foreman was late, and they became impatient to get to work. Because he was young and fit, it was decided that he would leap the gates and unlock them to let the other workers in. However, while waiting, he had already had an in-depth discussion about his sexual exploits over the previous weekend. He had told his mates of his sexual intercourse with his girlfriend on Saturday night. Nothing unusual about that, except that, on this occasion, the intercourse took place on the billiard table. When our hero leapt the fence, he did so with such vigour that on hitting the ground he hurt his back and sustained what turned out to be a disc protrusion. Unfortunately for this young man, when the witness statements were taken, many of his colleagues included comments about his weekend sexual exploits. The employer's report form put it more bluntly, and suggested that the reason for the worker's lower back pain was his sexual acrobatics. Needless to say, the insurer took the opportunity to decline the claim, and we ended up in a hearing. Clearly, the worker's credibility was in issue. Ultimately, it came down to medical evidence as to whether it was more likely that the disc protrusion was caused by climbing and leaping over a high wire fence or by having intercourse on the billiard table. The Workers' Compensation Board was extremely attentive when this evidence was given. We did not have a specialist for this hearing. The period of incapacity was only a few weeks, and so it came down to a GP's evidence. Fortunately for us, the GP thought it was more likely that the back injury was related to climbing the fence. The case illustrates how a worker's credibility can be undermined by their own activities, stories and exploits. Had the medical evidence gone the other way, not only would we have lost the case, but there might have been real issues as to whether or not this amounted to a fraudulent claim. I thought the worker would give his evidence well. He was a straightforward character and, on the day, his evidence was lucid and clear. Of course, not all workers can give their evidence in such a straightforward manner, and this is one of the assessments that we as lawyers have to make before putting our witnesses in the box. The same applies in criminal matters, where the consequences may be more serious.

> In the 1990s the government in WA ran a campaign called *Get the Bludgers off your Back*. Fortunately, those days are gone.

DRUNK ON THE SCAFFOLD?

Another worker was injured when he fell from a paint scaffold and, again, the injury was to his lower back. In this case, the employer claimed that the worker should not have been on the job because he had previously been sacked and, in any event, he was drunk. At the trial, the defence was that the worker was not employed and, even if he was, he was guilty of wilful misconduct and therefore had no claim. Allegations of wilful misconduct against workers should always set off alarm bells. If you get it wrong, the worker is in big trouble. It is essential to get full instructions from your client and test him or her over and over again to make sure nothing has been missed, and that the client is not withholding some information that may damage his or her case. Often this means you have to rehearse cross-examination with the client.

In this case, the employer was not insured, so the stakes were high. Again, I thought the client was pretty solid and so, despite the allegations against him, we made the claim and went to trial. (I should also say that I was clear about the risks, the costs and what might happen to him if he was not telling the truth.) At trial, he did well in the witness box. The employer, on the other hand, turned out to be unreliable, incoherent and, in the end, the worker's evidence was preferred. (As an aside, it transpired that it was the employer who was drunk when the accident occurred, and his recollection of events was accordingly poor.)

So there are circumstances where a worker's credibility is really put on the spot. Often this is because of suspicions or alternative versions of stories, and sometimes it is because employers and co-workers can be fairly tough on workers who make claims. We all know that workers' compensation is surrounded by stigma, compounded by >>

negative campaigning over the years against workers. During the mid-1990s in Western Australia, for example, a specific campaign launched by the Coalition government was called *Get the Bludgers off your Back*. Western Australian practitioners will remember large billboards with these messages. Fortunately, those days are behind us.

ANOTHER FENCE

In the third case, the worker's claim had been admitted and he had been paid compensation for many months. A cursory look at the file revealed no obvious problem with the claim. But when we made a claim for a lump-sum payment, the self-insured employer had instigated further investigations. The worker's claim was based upon statements that he had made, as well as supporting statements by his co-workers. Rather than happening while he was at work, the accident had occurred when he was returning to work from a liquid lunch with his colleagues; while he was climbing the fence to get back into his workplace, he fell and injured himself (another fence case!). His co-workers, who were also intoxicated, decided that their injured workmate should make a worker's compensation claim to cover his medical expenses. The matter became more complicated, however, when it turned out that he could not return to work for some time, and that not only were his medical expenses paid, but also weekly payments of compensation. Fortunately for us, the employer disclosed the fact that there was something particularly unusual about the claim. We had an informal conference with the employer and, in due course, the worker disclosed the full story to us. The claim was a fraud, and the worker could have been prosecuted, had the employer decided to take the matter further. In the end, the worker agreed to repay the compensation and no further action was taken. This was a lucky escape.

ALWAYS GET THE FULL STORY

The hearing of another case had been going for about two days. It was another lower back claim and appeared to concern incapacity. The claim had been admitted, compensation payments had been made, and we had got down to arguing about how much the worker should get. This case took place about 15 years ago, when discovery of documents was not so straightforward and full disclosure was not necessarily routine. Of course, the key to the claim was that the worker's injuries were sustained while at work and I have no doubt that he did sustain an injury while at work. But he had neglected to tell me that he also had a personal income-protection insurance plan, upon which he had previously made a claim for an injury similar to that for which he was now claiming workers' compensation. His private insurance claim related to a lower back injury that had occurred while he was driving a beach buggy through sand dunes. During the proceedings, the insurer's solicitor slid the personal insurance claim form across the bar table. My client was halfway through his examination. It was four o'clock in the afternoon and nearing the time for the Board to finish its hearing. We had another day to go. I looked at the claim form and asked for an adjournment, so that we could recommence examination the following day. Needless to say, I then had a fairly heavy discussion with my client about what the claim form meant. He confessed that there was another insurance policy that he had made a claim on, and that there might be some doubt about whether or not his current back injury was work-related. I was in a pretty tough spot. What to do? I had a duty to the Board, as well as to my client. The first priority is to prevent any perjury taking place, and in this instance the only way to stop that was to halt the case. The next day I asked for leave to discontinue the matter. Of course, I indicated our intention to the other side, and they were happy with this. The problem was that it might have been possible for some of the evidence that had already been given to be regarded as perjured, and so I had to tread warily. Fortunately for my client and I, the case was never referred to the attorney-general for consideration. Realising that I did not have the full story from my client was one of the scariest moments that I've had in court.

For the most part, cases of outrageous fraud are few and far between. The two instances cited above are the only ones that I can recall that I would clearly identify as fraudulent.

We all have tough cases where the other side claims that workers are malingering, stringing out the claim and trying to get as much as they can from the insurer. But we've also heard our clients' stories of financial hardship, the loss of employment and the difficulties in returning to work, as well as how their medical treatment has been delayed or confused by an excess of medico-legal processes. Interestingly, though, news reports never seem to talk about the considerable body of research that shows a vast under-reporting of compensation claims by those workers who don't make claims for fear of retribution from their employers. Or by those workers who don't make claims because their employer tells them to process the claim through Medicare and make a sick-leave claim. It doesn't rate much media attention, but it certainly gets a good run in the academic literature.

Presumably the House of Representatives did not uncover a great deal of worker fraud. Much of its report is devoted to the real problems of making sure that employers make the correct payments and the win-win of negotiating the return to work of injured workers. We will probably have to live with questions about how we deal with 'dodgy' clients. Criminal lawyers have a pretty standard answer; they say that everyone has a right to be represented, and that it's up to the judge and/or jury to make a decision on the question of guilt. It's a similar story for personal injuries lawyers; everyone is entitled to make a claim, and it's up to the courts to decide whether or not they establish the necessary links. But we must not forget that, as practitioners, we have a duty to the court and to make sure that our clients do not get to court when there is a real doubt that an adverse finding of credibility might be made against them that might make their claim untenable. ■

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