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Self Insurance, Workers Compensation & Workplace Law

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WORKCOVER UPDATE 2011

THE YEAR OF UNCERTAINTY - WORKCOVER OUT OF THE SPOTLIGHT OR RABBIT STEW?

In March and again in May, I reflected upon a range of issues that were likely to impact upon the WorkCover scheme.

The issue of the legitimacy of the medical panel and its ability to bind the Workers Compensation Tribunal was highlighted because of the significance of the expected Supreme Court decision in the matters of *Campbell and Yaghoubi*. Also of significance was the expected decision in the matter of *Davey*, the impact of which would bear heavily upon the manner in which determinations of work capacity are made. I referred to the review of the 2008 WorkCover reforms undertaken by Bill Cossey and Chris Latham and I postulated that, *"it seems doubtful that the review will support a view that the scheme has demonstrated a sustained financial turnaround"*.

We now know the outcome of the *Campbell, Yaghoubi and Davey* decisions and the "Cossey Review" has been released. It is fair to say that an assessment of each provokes more questions than answers and promotes the validity of my assessment that, so far as WorkCover is concerned, 2011 will continue to be a year of uncertainty but it is also fair to say that overall WorkCover would be pleased with the results.

Cossey Review

In January, the then Minister for Industrial Relations appointed Mr Bill Cossey and Mr Chris Latham, a director of PriceWaterhouseCoopers, to conduct a review concerning:

"We now know the outcome of the Campbell, Yaghoubi and Davey decisions and the "Cossey Review" has been released. WorkCover would be pleased with the results".

(a) The impact of the 2008 amendments to the *Workers Rehabilitation & Compensation Act* on workers who have suffered compensable disabilities;

(b) On levies paid by employers; and

(c) On the sufficiency of the compensation fund to meet the liabilities of the WorkCover Corporation under the principal Act.

The Report was completed in May 2011 and only recently tabled in Parliament and released to the public.

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Too Early To Tell

The authors of the review found that, although some 2.5 years had elapsed following the amendments, it was *"either difficult or impossible"* to determine any clearly established trends because the implementation of the amendments had been staggered and some of the key amendments had been *"affected (slowed down or reduced in application) by legal challenges"*.

Not surprisingly, therefore, the review found that *"no firm conclusions can be drawn at this time, (and) Parliament or the Government may wish to consider a further review at an appropriate time in the future".* Nevertheless, the reviewers were able to identify some emerging trends and some findings provide comfort for the scheme, whilst others are a cause of concern.

The Good

The reviewers correctly identified that the 2008 amendments were designed to deal *"with the circumstances of those more seriously injured workers – workers incurring large medical costs and experiencing large amounts of time unable, as a result of their injuries, to work at all or in a much reduced capacity".*

It is comforting that the reviewers found that, *"Fortunately, more than 90% of people who are injured at work incur very little by way of medical costs or experience significant time away from the workplace. The amendments to the Act in 2008 were not designed to impact on these injured workers and, by and large, have had no impact".*

The Bad

"…the uncertainty which surrounds the status of some of the key changes because of legal challenges yet to be finalised has had a reported impact on injured workers to the extent that a system which is not particularly easy for all to comprehend is, at this point, even more difficult to comprehend"

Lump Sum Compensation

The amendments to section 43 of the Act were largely designed to:

- ensure that more seriously injured workers receive greater compensation for their injuries;
- eliminate payments to those less seriously injured; and
- achieve greater consistency.

The Winners

Injured workers assessed as having more serious injuries received an average of 20% more compensation than previously.

The Losers

It is clear that injured workers whose injuries are not assessed as severe but who previously may have qualified for a lump sum payment for non-economic loss pursuant to section 43 of the Act have, since the amendments, missed out if the degree of impairment or disability fails to meet the 5% WPI (whole person impairment) threshold.

What Next

The changes were estimated to reduce the overall cost of the scheme by 0.06% of wages and the review concludes that, although experience to date is insufficient to reject the original assumptions, it is reasonable to continue to adopt the original costing assumptions. But the reviewers also point out that *"a key risk for this change is the extent to which the 5% threshold may be eroded over time and the degree of subjectivity that may emerge in assessment of the level of WPI".*

I expect that rather than the 5% threshold being eroded and/or a degree of subjectivity emerging in the assessment, a greater risk will come from claimants establishing impairment of other body parts which have been affected as a sequelae of the original disability. Individually, each affected body part may not reach the 5% WPI threshold but, taken together and aggregated, the WPI will exceed the threshold and establish an entitlement. A not uncommon scenario is where a worker sustains an injury to the (say) right shoulder, elbow or arm and subsequently develops an injury to the left shoulder as a consequence of "overuse" of the left arm as a result of the right shoulder disability. If a causal connection is found between the right shoulder disability and

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the left shoulder disability, the left shoulder disability will be found to have arisen from the same trauma and therefore treated together as one disability and aggregated. Overall I expect the costs of lump sum compensation in the scheme to rise.

"... it is too early to tell whether these amendments have had any long-term impact on return to work rates…(but)… there is evidence that the impact of the step downs has been most strongly experienced by the lowest paid female workers (those earning less than $500.00 per week)".

Step Downs

Another area in which less seriously injured workers appear to have been disadvantaged as a consequence of the amendments is those who have been affected by the "step downs". The "step down" amendments define three periods of entitlement to payments of weekly wages for injured workers. During the first entitlement period (13 weeks) the injured worker is entitled to 100% of average weekly earnings. In the second entitlement period (of up to a further 13 weeks), 90% of average weekly earnings and in the third entitlement period (after 26 weeks) 80% of average weekly earnings.

The amendments *"were proposed as encouraging injured workers to return to work as early as possible…The rationale put forward at the time of the amendments was that some injured workers needed an 'incentive' to do so. The 'incentive' was the prospect of reduced income".*

The reviewers concluded that, *"it is too early to tell whether these amendments have had any long-term impact on return to work rates…(but)…there is evidence that the impact of the step downs has been most strongly experienced by the lowest paid female workers (those earning less than $500.00 per week)".*

It seems that *"the data indicates that the steps downs have been made successfully from a financial view…(and)…by itself this should result in a reduction in costs of around 0.04% of wages. However, it is not clear that the step downs have been successful in providing disincentives for injured workers to remain off work (alternatively, incentives to return to work)".*

The step downs have not, been successful in "encouraging" injured workers to return to work at an earlier point in time and, in fact, *"The numbers active at 50 weeks is not very different to those active at 13 weeks".* This contrasts with more favourable experience for the December 2007 and June 2008 half years (i.e. before the amending Act).

I interpret the reviewers' conclusions to mean that step downs have saved money for the scheme, but they have not promoted better return to work outcomes and it has come at a cost to injured workers and their families, and particularly lower paid females in the workforce who, perhaps, can least afford to be financially affected.

Disputes

The reviewers conclude that *"there is a slight trend towards faster resolution for matters resolved at conciliation, but no overall trend towards earlier resolution is yet apparent".* They comment that, *"South Australia has a history of high levels of disputation. The number of disputes has been gradually reducing over a ten year period and there are encouraging signs that the level of disputes is continuing to reduce, although this trend is not firmly established".*

It may sound counter-intuitive, but I pose the question whether disputation is necessarily a bad thing, in the context of a workers compensation scheme which was designed to be a pension scheme and, despite a number of amendments since its inception in 1987, remains essentially a pension scheme. There will always be people prepared to take advantage of such a scheme and a level of disputation is necessary to create tension in the scheme and discourage less meritorious claims.

A reduction in the number of disputes over a 10 year period correlates with a dramatic increase in the unfunded liability over the same period from a scheme that was fully funded to one that is at best 66% funded. Perhaps there has been an unintended consequence associated with a "reduce disputation at all costs" approach.

Work Capacity Reviews

The amendment to allow for work capacity assessments to be made at the 130 week point was based on a belief that injured workers with a capacity to work should return to work (at least to the extent that their work capacity allows).

An injured worker with no current work capacity is entitled to have weekly payments continue to age 65, but those assessed as having some work capacity have their weekly payments ceased. Since its introduction, apparently 700 injured workers have been assessed and 644 of those assessed as having some work capacity. Of those 644, 314 did not dispute the assessment and the balance have

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either lodged a Notice of Dispute with the Workers Compensation Tribunal or made application for a continuation of weekly payments.

The reviewers conclude that, *"The extent of legal challenges in relation to work capacity reviews and the authority of medical panels has made any assessment of the overall impact of these legislative amendments extremely difficult…(and) the ultimate effectiveness of the changes will be determined by the extent to which the intent of the legislation is sustained in the dispute process…(and) coincident with this will be the success of focused return to work initiatives. This is not yet apparent in the data for 31 December 2010".* The latter point picks up the concerns expressed by John Walsh in his recent review into the use of vocational rehabilitation services in the scheme and his conclusion that *"the scheme shows little evidence of improved return to work performance, in spite of very heavy referrals to and cost of vocational rehabilitation compared to comparable schemes".* He also commented that there was *"limited upfront and strategic case management practice"* which was exacerbated by inexperienced EML case managers. The available data apparently shows that, *"The numbers of exits from work capacity reviews have been less than expected in the initial calculations…(but)…this is at least partly explained by the delaying effect of a number of challenges to the legislation".*

"... the amendments to restrict the ability of the compensating authority to redeem claims will need to be reviewed because the scheme will need a mechanism to enable potential high cost claimants to exit the scheme equitably if the "tail" is not to grow, and, with it, the unfunded liability".

This situation can only be worsened by the practical effect of the decisions in *Campbell and Yaghoubi.*

Redemptions

The amendments prescribe the criteria under which a future liability for weekly payments can be redeemed by agreement between the compensating authority and the injured worker by way of a capital sum. The criteria are quite restrictive and the intent of the amendment was to address what was described as a "lump sum culture" which was said to exist in South Australia and which it was perceived compromised the objective of return to work at the earliest opportunity.

The reviewers describe *"the key point being made in both the Clayton/Walsh Report and by WorkCover in its Policy Position is that if an injured worker,* ***relatively early in the period after incurring the injury,*** *believes that a lump sum payment is possible or likely, then the worker may be disinclined to cooperate fully, or at all, with any return to work-oriented assistance".*

The reviewers have concluded from the data available that because *"the revised redemption provisions have been in operation for a limited time (less than 2 years for claims after 1 October 2009)…it is not possible to assess their full impact".* The reviewers also make the point, in relation to scheme performance (as I pointed out in my March Report), that, *"The short-term impact on the fund as a result of the payment of the $270 million in redemptions over the two financial years 2008/09 and 2009/10 has been positive to the extent of $380 million".*

I think that the amendments to restrict the ability of the compensating authority to redeem claims will need to be reviewed because the scheme will need a mechanism to enable potential high cost claimants to exit the scheme equitably if the "tail" is not to grow, and, with it, the unfunded liability.

Medical Panels

The introduction of Medical Panels by the 2008 amendments was fundamental to the achievement of savings in the scheme and the reduction of the unfunded liability. As I said in my March Report, *"It was intended that many of the functions of the Workers Compensation Tribunal would be undertaken by the Medical Panel, whose decisions would be final and conclusive. Importantly, the role of the Medical Panel and the binding nature of its decisions was intended to underpin the work capacity reviews and ensure the ongoing removal of long-term claimants from the scheme".*

There can be little doubt that WorkCover and the Government intended that Medical Panels were to be utilised as an efficient way to transition long-term claimants from income maintenance to social security without the intervention of the Tribunal.

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In its proposal for legislative change, the WorkCover Board based its submission on the Victorian experience and submitted that:

"in Victoria, the establishment of Medical Panels provides better outcomes than in South Australia as a range of medical matters are decided by doctors with appropriate legal support where necessary. They provide fast decision making and remove the adversarial nature of a dispute where there is a disagreement between a worker, claims manager and employer. In Victoria, the legislation allows for the establishment of an independent Medical Panel, and provides that:

> *'the function of a Medical Panel is to give its opinion on any medical question in respect of injuries arising out of, or in the course of or due to the nature of employment…referred by a Conciliation Officer or the Country Court or the authority or a self-insurer…Once a Medical Panel issues its determination the decision is final and binding and is only reviewable through judicial review on procedural fairness grounds. The purpose of making decisions by Medical Panels final and binding is that the decisions are on medical matters with the appropriate legal support provided by the Registry and* ***that there is no role for Judges in decision making on medical issues, this is left to the medical experts to decide'."***

The reviewers conclude that, *"The full implementation of the legislation related to Medical Panels has been affected by several factors"* and the most important of these relates to legal challenges to the constitutional validity and authority of Medical Panels and, *"In the meantime, the uncertainty is not only impacting on injured workers, but on the desire of clinically active medical specialists to make themselves available for Medical Panel work".*

The uncertainty will continue for a very long time, as the *"very real issues"* referred to by Mr Justice White in *Campbell* are identified and work their way through the judicial process to be ultimately decided by the Supreme Court, if not the High Court.

Sufficiency of the Fund

The reviewers have concluded that a cautious view should be taken in estimating the financial impact of the amendments, primarily because *"the key amendment (WCRs) is at an early stage and that there are challenges to some aspects of the legislation".*

"'favourable claims experience' will not be replicated in the future, because of the limiting effect on redemptions of the amendments and WorkCover policy".

There are some key conclusions, but the following are the ones that I would like to highlight:

> *"(f) The funding level of the scheme has increased from 61% at 30 June 2008 to 66% at 31 December 2010. This is the net effect of unfavourable economic conditions (investment returns and lower discount rates for measuring liabilities) offset by overall favourable claims experience.*
>
> ***(g) Were it not for favourable claims experience, the funding level at 31 December 2010 would have been 58% only.***
>
> ***(h) The favourable claims experience derives essentially from a focus on paying lump sum redemptions to long tail claims, a 'window' existing for such redemptions until 30 June 2010.***

This has led to a reduction in liabilities of around $380 million.

The project focusing on redemptions is only indirectly related to changes in the amending Act. Changes arising from the amending Act might be more like $70 million."

The $70 million was attributed by the reviewers to the effect of WCRs (Work Capacity Reviews). This is an extremely important conclusion. The reduction in liabilities of around $380 million came from the redemption program. The redemption program resulted in a large reduction in the numbers of active weekly claims of more than three year's duration and consequential reductions in weekly payments and medical expenses. That "favourable claims experience" will not be replicated in the future, because of the limiting effect on redemptions of the amendments and WorkCover policy.

A reduction in the funding level to 58% would be unacceptable and make it extremely difficult to maintain a levy rate of 2.75%, never mind reduce it further within the target range of 2.25% to 2.75%. Potential lower levy rates rely upon fewer income maintenance claims continuing into the tail through a

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combination of improvements in front-end continuance and the impact of work capacity reviews.
It is a little difficult to envisage significant improvements in front-end continuance when the data shows that the amendments have had little or no impact on the approximately 60% of injured workers who are able to return to work reasonably quickly (before reaching the 13 week mark) and there does not appear to be any significant change in the number of active claims at 50 weeks. Certainly, the criticisms of the vocational rehabilitation services in the scheme which were made by John Walsh in his report will be addressed and, one would hope, result in greater effectiveness of vocational rehabilitation. That is not something that is going to be achieved in a hurry and ultimately all of the "sound and fury" which will no doubt come from efforts to address the deficiencies identified by John Walsh may come to nothing. Similarly, the impact of work capacity reviews will remain problematic for quite some time. The result is that employers should not expect any reduction in the levy rate any time soon. The total hindsight break-even levy for the 2010/11 year is 2.79% of wages and that compares with the actual rate of 2.75%. There is no material difference between the hindsight levy rates before and after the amending Act and, whilst the reviewers conclude that, *"There is still the potential for reductions in break-even levies in the future",* that potential rests upon the extent to which *"the full intent of the amending Act can be realised".*

I frankly doubt that the *"full intent"* of the amending Act will ever be realised. The *"single most significant change in reducing claims costs in the scheme"* relates to the effectiveness of a work capacity review operating to successfully cease payments to the majority of workers still receiving compensation at the 130 week mark. This depends upon the efficiency of the Medical Panels operating to exit from the scheme those persons assessed as having some work capacity. The efficiency can be expected to have been significantly undermined by the decision in *Campbell and Yaghoubi.*

Campbell and Yaghoubi

On 27 June 2011, the Full Supreme Court delivered Judgment in the matters of *Campbell and Yaghoubi.* The Full Bench of the Workers Compensation Tribunal had referred questions of law to the Full Court of the Supreme Court in both matters and by a majority decision the Full Court determined that a compensating authority may refer a medical question to a Medical Panel at **ANY** time, and even after a matter has been referred by the Workers Compensation Tribunal for Judicial Determination.

"... the Full Court determined that a compensating authority may refer a medical question to a Medical Panel at ANY time"

"The outcome, whilst settling some of the questions surrounding Medical Panels and their operation, will nonetheless raise many others and, in particular, to what extent an opinion of a Medical Panel is binding on the Workers Compensation Tribunal".

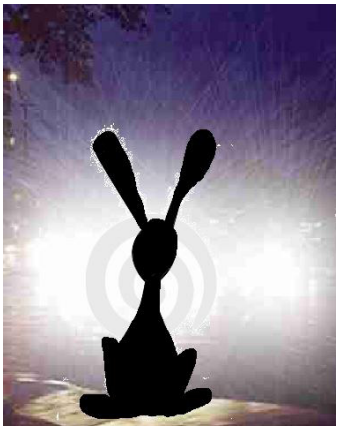
The Full Court also determined that any opinion provided by a Medical Panel is binding and to be accepted as final and conclusive, with the specific exception that it is not binding on the Workers Compensation Tribunal which retains, *"the overall supervisory responsibility for the dispute resolution process"* and *"it remains for the Tribunal to determine what weight shall be given to an opinion (of the Medical Panel)".*

Each party in the proceedings came away with something of a win and it now appears much less likely that the matter will go on appeal to the High Court.

Mr Campbell's lawyer, Steven Dolphin, of Lieschke & Weatherill was quoted just before the decision was handed down as saying *"(WorkCover) argued Medical Panels are constitutional and their opinions were able to bind judicial decision makers. A rejection by the Supreme Court of any of their arguments put forward…will be a significant victory for the injured workers in this State".* After the decision was handed down he said, *"This decision is a hammer blow to WorkCover's push to usurp the Court system… it remains for the Tribunal to determine what weight shall be given to an opinion (of the Medical Panel)".*

WorkCover on the other hand, will take heart from the fact that the Supreme Court accepted unreservedly their contention that a compensating authority may refer a medical question to the Medical Panel at any time.

The Government, which intervened, will presumably be satisfied that its submission that a *"body or person"* does not include the Tribunal was accepted by the Supreme Court which neatly did away with the need for much of the argument on the constitutional validity of the Medical Panels.



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Panel is binding on the Workers Compensation Tribunal.

The Supreme Court whilst asserting that the Tribunal cannot be *"directed to a certain outcome"* has also said that, *"the Tribunal is obliged to give effect to the medical opinion (although) it remains for the Tribunal to determine if and to what extent that opinion is decisive in a given matter".* Individual members of the Tribunal may have differing views upon the extent to which an opinion is decisive and will, no doubt, find their own ways in which to give effect to their philosophical views.

> *"In reality I suspect that it will take a number of years before we finally have clarity in relation to the interaction between the medical panel and the Tribunal".*

In his Dissenting Opinion, Mr Justice White said, *"Secondly, I consider that if, contrary to the construction of part 6C which I prefer, the Tribunal is bound to adopt and apply in a final and conclusive way the opinion of the Medical Panel on a medical question, issues as to whether the Tribunal does have any remaining genuine adjudicative function to perform do arise. In my opinion, these issues should not be determined in the abstract. The very breadth of the matters which may be the subject of medical questions in a given case, and the possibility that those matters may be the same matters which are the subject matter of the dispute referred to the Tribunal for Judicial Determination, indicate that very real issues may arise in this respect.* ***It would be preferable, in my opinion, for this Court to defer consideration of those issues until an appeal, following the Judicial Determination by the Tribunal in the circumstances of a given case, is brought before it."***

I have no doubt that lawyers who act for injured workers will take heart from those comments and, ensure that those "very real issues" will be tested by the Supreme Court.

In reality I suspect that it will take a number of years before we finally have clarity in relation to the interaction between the Medical Panel and the Tribunal.

In my view, the greatest impact of the Supreme Court Judgment in the cases of *Campbell and Yaghoubi* relate to the impact upon WorkCover's ability to efficiently utilise the Medical Panel to cease payments of income maintenance because of a work capacity review at 130 weeks. It can be expected that many of those persons who have had their payments ceased because of a work capacity review at 130 weeks will lodge a Notice of Dispute with respect to the assessment and, once in the Tribunal, the outcome will be uncertain and, no doubt, protracted. In the mean time the unfunded liability will likely blow out. The recent share market troubles will exacerbate the situation because investment income will reduce at the same time.

Davey

The Full Supreme Court delivered Judgment in the matter of *Davey* on 20 July 2011. It was an appeal from a decision of the Full Bench of the Worker's Compensation Tribunal in a matter involving WorkCover's determination that the worker had a current work capacity pursuant to section 35B of the Act. The Tribunal had taken the view that the determination was voidable on the grounds of procedural irregularity in that the worker had been denied procedural fairness because he had not been provided with the opportunity to make any meaningful submission or provide further material to WorkCover before it made its section 35B determination.

> *"What remains to be seen, however, is whether workers' solicitors will continue to pursue technical arguments which, in turn, will need to be disposed of by the Full Supreme Court and further delay the full and effective implementation of the worker capacity reviews".*

The Full Supreme Court made it very clear that the fact that the worker had a right to later dispute the section 35B assessment was sufficient to afford him natural justice and it emphasised that the Tribunal should act according to equity, good conscience and the substantial merits of the case and not be concerned by overly technical arguments about procedural irregularity. The Court pointedly gave direction to the Tribunal that it should get on with determining the substantial merits of each case in saying that: *"It may be observed that had the worker proceeded to litigate his dispute considering his work capacity and addressed the substantive merits of his case through proceedings in the Tribunal, that dispute would, in all likelihood, have been resolved by now. Instead, the Tribunal is yet to embark on that dispute. More than 12 months has been spent dealing with issues other than the substantial merits of the dispute".*

WorkCover will be well pleased with the emphatic pronouncement from the Full Supreme Court in *Davey* and there are many matters in the Tribunal which have been held up pending the resolution of this

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issue that will now proceed to be determined on their merits. What remains to be seen, however, is whether workers' solicitors will continue to pursue technical arguments which, in turn, will need to be disposed of by the Full Supreme Court and further delay the full and effective implementation of the worker capacity reviews.

"there will be winners and losers out of the change, hidden risks and unintended consequences!"

More to Come

On 23 May 2011, WorkCover announced its intention to commence a procurement process for the provisions of future claims management services and claims legal services for the scheme. The current contracts expire in December 2012. The WorkCover Board believes *"that it makes sense to WorkCover to procure claims management and claims legal services at the same time"* and it is anticipated that the process will take approximately 12 months and that the remuneration for the claims agent(s) is to be *"significantly reviewed"*. That is hardly surprising, considering that at the time of the amendments it was anticipated that administration costs in the scheme might increase by around $12 million. They have in fact increased by $26.1 million and the majority of that increase comes from increased payments to EML of $16.7 million!

WorkCover's new IT claims management system is being constructed to deal with more than one agent and it can be expected that CGU, QBE and Allianz will be interested in returning to the scheme and Gallagher Bassett will likely seek a berth. EML will, no doubt, seek to continue but I doubt that any more than three contracts will ultimately be offered. Similarly, I doubt that any one as part of the "pitch" will be bold enough to replicate EML's claim to cut the claims liability by up to $100 million a year after only two years!

WorkCover has also committed itself to the introduction of a new employer payments scheme. The new approach is proposed to take effect for the 2012/2013 financial year but will require legislative amendments towards the end of 2011.

The approach is radically different and there will be winners and losers out of the change, hidden risks and unintended consequences!

We will have more to say about the proposed changes later in the year.

Suffice to say the changes will put the rabbit in the spotlight once again!

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STRAIGHT TALK.