Submission No 37

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

AMWU

Rev. Hon Dr Gordon Moyes MLC
Chair
Legislative Council Standing Committee of Inquiry
Inquiry into Personal Injury Compensation Legislation
Parliament House
Macquarie St
SYDNEY NSW 2000

11 March 2005

Dear Reverend Moyes

I am writing to you in response to the Legislative Council Standing Committee of Inquiry into Personal Injury Compensation Legislation.

At the outset I should say that the right to a safe workplace and to just compensation for injured workers is absolutely fundamental to this Union. There are clearly a number of very significant issues that we believe need to be addressed in the current legislation. We had hoped that the Government would have held its own comprehensive Inquiry into the current Workers Compensation legislation. However, that opportunity has not yet presented itself. We are therefore most appreciative of the opportunity to participate in this very timely Inquiry.

The AMWU has always completely rejected the American Whole of Body Assessment system which underpins the current workers' compensation system in NSW. We continue to support a model that is based upon assessment of an injured worker's ability to continue to perform their duties.

A major tenet of our submission is our concern that only damages for loss of earnings are currently awarded in Common Law claims. Under this arrangement, "economic loss" is restricted to loss of earnings and does not take into account other economic losses associated with a serious injury. In effect, the right for even very seriously injured workers to claim for non economic loss (general damages) has now been extinguished under Common Law. This forces workers with a long term injury to rely entirely upon compensation through the Statutory Scheme for a regular income. Compensation awards have been significantly reduced by this arrangement because of the restructured impairment scale that has replaced the Table of Disabilities and because there can no longer be a claim for "general damages".

A further issue arises for a seriously injured worker who requires long term hospitalisation or nursing home accommodation, or must purchase a new home to accommodate their injury. A seriously injured worker, particularly one with a family, has not only normal living expenses for their family, but also those very costly ongoing expenses of care for themselves as a dependent person.

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Many of these issues arise precisely because the Act only allows an injured worker one gateway to compensation. Since both schemes are on their own inadequate, injured workers are in an invidious position. While the restricted access to compensation is a major issue for all injured workers, very clearly the worst effects will be felt by the most catastrophically injured. While at their most vulnerable, these people will be forced to make a decision about how to support themselves and their families possibly for the rest of their dependent lives. This position is exacerbated in the case of a worker whose injuries only reach their full portent in older age, since it will be extraordinarily expensive for a severely injured worker to support themselves and his/her family for the rest of their dependent life.

The 15% Threshold scheme means that inevitably that there will be many workers who fail to achieve the threshold, yet are nonetheless very seriously injured. They will clearly be far worse off than under the former system where they could access Common Law damages. These same very seriously injured workers who are forced to rely upon the Statutory Scheme will be forced to live on a level of income barely above Social Security payments while being required to continue to meet all of the necessary imposts of insurance companies etcetera to continually prove themselves worthy of payments. Given the notoriety of insurance companies and the arbitrary nature of their dealings with injured workers, the additional emotional damage caused to a seriously injured worker by the whims and vicissitudes of insurance company staff is alone sufficient to recommend against this arrangement.

The Government has made many pronouncements about the cost to the Workers Compensation Scheme of lawyers and other aspects of the legal system. Clearly the Government would prefer that as many injured workers as possible would not seek compensation through the courts. It has therefore imposed a range of obstructive conditions and impediments to dissuade and prevent workers from choosing Common Law as a path to compensation. It is our very strongly held view, substantiated by the statistical evidence provided herein, that despite the protestations of Government, injured workers in NSW are indeed much worse off than they were under the previous Workers' Compensation scheme that operated in this state.

We wish you well with your deliberations and hope that you will consider the evidence that we present in this submission to support significant reform to the current workers' compensation system in this state. We would welcome the opportunity to appear before any public hearings that you may hold.

Yours sincerely

Paul Bastian
State Secretary

LEGISLATIVE COUNCIL INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

SUBMISSIONS ON BEHALF OF THE AUSTRALIAN MANUFACTURING WORKERS' UNION

The Union's submissions deal solely with the workers compensation legislation amendments enacted in 2001.

At the time when the amendments were enacted, it was claimed that they would not lead to injured workers being worse off than they were under the legislation which then operated. The Union calls for a well-resourced review of the 2001 amendments, particularly focusing on whether this guarantee has been satisfied.

The Union believes that the current workers compensation legislation requires some modifications in the following areas in order to ensure that the guarantee can be maintained:

(a) Use of current WorkCover Authority Guidelines to determine whole person impairment.

(b) Access to common law entitlements.

(c) Procedure before the Workers Compensation Commission.

The Union believes that a fairer balance is needed in these areas between the needs and entitlements of injured workers and their employers. The 2001 amendments clearly shifted the balance away from injured workers in these areas.

The Union also notes that the Labour Council has lodged a submission to this Inquiry, and generally endorses and supports that submission.

Use of current WorkCover Authority Guidelines to determine whole person impairment

These Guidelines are highly dependant upon the American Medical Association Guides to the Evaluation of Permanent Impairment (fifth edition), although they do modify those Guides. They are used for the following purposes:

(a) To determine injured workers' entitlements to lump sum statutory compensation under section 66 of the *Workers Compensation Act* for their permanent impairments.

(b) To determine whether injured workers meet a threshold (10%) in order to claim lump sum statutory compensation under section 67 of the *Workers Compensation Act* for their pain and suffering.

(c) To determine whether injured workers meet a threshold (15%) in order to make claims for common law damages.

The Guidelines are therefore central to ascertaining injured workers' entitlements as a result of their injuries, yet experience since their introduction has shown them to be unfair, and has also shown that they result in many injured workers receiving less in lump sum statutory compensation under section 66, than they would have prior to the 2001 amendments. In this regard, the Union directs the Inquiry to the annexure to these submissions. The annexure lists

the examples of members of the Union who initially had their lump sum statutory compensation entitlements under section 66 assessed both under the current WorkCover Authority Guidelines and under the Table of Maims which operated prior to the institution of those Guidelines. (This arose by reason of initial confusion because of the circumstances surrounding their injuries, as to whether the injuries were compensable pursuant to the 2001 amendments or compensable pursuant to the law as it was before those amendments). The examples are not theoretical examples of injured workers being worse off under the Guidelines, but they are examples of real people who have been injured at work being worse off.

The justification given for the initial introduction of the WorkCover Authority Guidelines in 2001 was that they were objective, and would minimise disputes occurring in workers compensation claims. Experience has proved otherwise. There are many aspects of the Guidelines that are highly subjective, and it is very rare for medical practitioners accredited in the use of the Guidelines (by the WorkCover Authority) to agree among themselves as to the whole person impairments of injured workers. The Union believes that there are as many disputes now in relation to claims under section 66 as there were prior to the 2001 amendments.

There were many objections to the use of the WorkCover Authority Guidelines which were canvassed prior to the institution of those Guidelines. Those objections are still largely relevant and include:

(a) The American Medical Association Guides themselves state that they should not be used in the context of determining compensation.

(b) The Guidelines are arbitrary and internally inconsistent, and have been widely criticised by the medical community - the use of the Guidelines was criticised by the Australian Medical Association prior to their institution as compromising the clinical independence of treating and examining doctors, and as focusing on impairments rather than disabilities and the ways that impairments affect the ability of individual workers to undertake various activities.

(c) The Guidelines mechanically concentrate on impairments (defined in the American Medical Association Guides as deviations from normal in a body part or organs system and their functioning) rather than disabilities (defined in the American Medical Association Guides as capacity to meet personal, social or statutory or regulatory requirements).

(d) The Guidelines are complex, complicated, and rigid - the Union notes the number of highly qualified medical practitioners who have failed to/refused to become accredited in the use of the Guidelines by the WorkCover Authority - under the Guidelines, the opinions of these doctors (in many cases the treating doctors of injured workers) in relation to those injured workers' impairments and disabilities are almost irrelevant - the Union also notes a substantial number of appeals from approved medical specialists which have been instituted since the 2001 amendments, suggesting that even these medical practitioners have difficulties in applying the Guidelines.

Through experience and through consulting with its members, the Union believes that at the very least, the Guidelines need amendment so that they deal more equitably (and so that injured workers are not worse off than they were prior to the 2001 amendments) in relation to the following types of injuries/disabilities:

(a) Back injuries.

(b) All other orthopaedic injuries.

(c) Disabilities - it may be appropriate to upgrade the percentage whole person impairment that is applicable to various impairments under the Guidelines to take into account individual injured workers' differing disabilities from the impairments.

The Union calls for a review of the Guidelines to ensure that the Guidelines do not result in injured workers being worse off under them than they were under the Table of Maims in operation prior to their institution. The Union does not believe that any such review has yet been properly undertaken.

Access to Common Law entitlements

It is universally accepted that the 2001 amendments have effectively abolished the ability of injured workers to make common law damages claims. This has been achieved by:

(a) Requiring injured workers to have over 15% whole person impairment in accordance with the WorkCover Authority Guidelines before common law claims can be instituted.

(b) Only allowing injured workers to claim for their economic loss in common law claims.

The Union believes that modifications are required in this area to prevent discrimination against injured workers.

It has to be remembered that common law claims are only successful if the defendants to those claims can be shown to have caused injuries through neglect or fault. It should not matter where or how the injuries occurred - if injuries have occurred as a result of negligence, the persons injured should have the same entitlements, whether they were injured in motor accidents, work accidents, through the negligence of doctors, or through some other form of negligence.

Presently, persons injured due to the negligence of their employers are significantly discriminated against, compared with persons injured in motor accidents which were not their fault, and especially compared with persons whose compensation entitlements are pursuant to the *Civil Liability Act*. This should not be the case - indeed, workers are entitled to expect a greater standard of care from their employers than from, for example, other drivers on the road, local councils, shopping centres, and so on.

The Union believes there are compelling arguments to ensuring that injured workers' abilities to bring common law claims are only restricted in the same manner as injured motor accident victims and as victims of other negligence. However, currently:

(a) Under the *Motor Accidents Compensation Act* and the *Civil Liability Act*, while there are significant restrictions on the damages that can be awarded, there are however

entitlements to claim for economic loss, past and future medical expenses, gratuitous care, and non-economic loss.

(b) Under the *Motor Accidents Compensation Act* and the *Civil Liability Act*, the thresholds that injured persons need to meet in order to institute claims for common law damages are significantly lower than the current threshold under the *Workers Compensation Act*.

The effective abolition of common law claims for injured workers since 2001, has meant that workers who have been seriously injured as a result of the negligence of their employers have had to solely rely upon their statutory workers compensation entitlements to:

(a) Receive a maximum weekly amount of just over $300.00 per week (for workers with no dependants) after they have been off work for over six months (or slightly longer in some circumstances) - workers in this situation find it almost impossible to meet their basic financial commitments, such as making rent payments or mortgage repayments - this undoubtedly leads to significant distress and despondency.

(b) Receive payment of their medical expenses.

(c) Receive their lump sum statutory compensation entitlements up to a maximum amount of $250,000.00.

Even if workers' injuries result in over 15% whole person impairments, they are unlikely to/unwise to bring common law claims as they will only be compensated for their economic loss in those claims, and by bringing the claims, they relinquish their entitlements to claim any further care or medical expenses pursuant to the statutory workers compensation scheme. As it would seem that only injured workers with the most catastrophic of injuries would have whole person impairments of over 15%, and as the nature of those injuries is generally that they require substantial ongoing care and medical costs, injured workers in those circumstances would be foolish to bring common law claims (where their ongoing care and medical expenses would be irrelevant) and thereafter, relinquish their entitlements to any further care and medical expenses. This situation gives the perverse result that the most adversely affected workers are those who have suffered catastrophic injuries.

In the view of the Union, it is clear that workers injured as a result of the negligence of their employers are worse off following the 2001 amendments then they were prior to those amendments.

The threshold (15% whole person impairment) that injured workers are required to meet in order to bring common law claims needs adjustment to bring it into line with comparable thresholds under the *Motor Accidents Compensation Act* and the *Civil Liability Act*, and injured workers need to be able to claim for their ongoing care needs, ongoing medical expenses needs, and non-economic loss (as well as their economic loss) in common law claims. These modifications need to be made to ensure that injured workers are not discriminated against compared with other injured persons, and to ensure that injured workers are not worse off than they were under the pre-2001 legislation.

The Union also notes that there are substantial public policy benefits in modifying injured workers' current access to common law entitlements in the manner suggested above. These include:

(a) Deterring employers from negligent acts or omissions - the Union notes that prosecutions brought by the WorkCover Authority in this regard are very rare and often unsuccessful.

(b) Encouraging independence and rehabilitation for injured workers - once common law claims have been resolved, injured workers' dependence upon their statutory workers compensation entitlements ceases, and they can use their compensation settlements to "get on with their lives".

(c) Ensuring that injured workers are treated individually rather than as part of the statutory workers compensation "system".

Procedure before the Workers Compensation Commission

The Union believes that injured workers are worse off under the current claims dispute resolution procedure before the Workers Compensation Commission, than they were when disputes were resolved by the Compensation Court.

The judges of the Compensation Court had high levels of legal and medical expertise, and injured workers were generally confident of receiving fair hearings in claims before the Court. Indeed, the Compensation Court was regarded by the Court of Appeal as a specialist tribunal. The experience of those judges has been lost under the current claims dispute resolution procedure before the Workers Compensation Commission.

Under this procedure, the task of resolving disputes is in the hands of arbitrators. The Union understands that there are currently around eighty arbitrators and that arbitrators (hearing certain disputed claims) do not need to have formal legal qualifications.

Experience has shown that most arbitrators do not have sufficient legal and medical knowledge to properly determine disputed claims, and experience has only shown that different arbitrators determine claims in different ways. Despite what the Workers Compensation Commission may be attempting to achieve, there is an inconsistency in approach among its arbitrators.

Arbitrators are given a wide discretion as to how to arbitrate disputed workers compensation claims, and this has led to not only injured workers not receiving a fair hearing in their claims, but it has led to a large proportion of arbitrators' decisions being appealed, despite the restrictive entitlements to appeal. Anecdotal evidence suggests that this appeal rate may be as high as 20%.

Further, it is taking many months for these appeals to be heard.

While the Union supports an arbitration based system, to ensure a fairer system of dispute resolution in relation to workers compensation claims, the Union recommends the following:

(a) The number of arbitrators be significantly reduced and those remaining be required to undertake an increased workload, to ensure consistent practices within the Workers Compensation Commission.

(b) All arbitrators be required to not only have legal qualifications, but to also have extensive experience in and knowledge of all workers compensation legislation and the various medical matters that arise under it.

(c) The current prohibition on arbitrators also conducting workers compensation legal practices be removed - this prohibition simply leads to arbitrators not having sufficient knowledge of workers compensation legislation.

(d) Consistent practices be adopted by the Workers Compensation Commission so that all claims are determined pursuant to a set procedure - the Commission should have the power to make its own rules in this regard.

(e) Section 354 of the *Workplace Injury Management Act* (Procedure before the Commission) should be re-worded to ensure that arbitration hearings are open, thorough, and informed - while the section's aim for hearings to be conducted with as little formality and technicality as possible is admirable, experience has shown that it

has often resulted in decisions being made by arbitrators without sufficient regard to the facts and the law involved in particular claims.

(f) Arbitrators be required to provide full and detailed reasons for their decisions - this is the least that injured workers deserve.

(g) The appeal procedures be revised so that legal errors of arbitrators are appellable as of right, and with no restrictions - currently, if arbitrators make legal errors in determining claims, no appeals lie in relation to those legal errors unless the errors relate to claims worth more than $5,000.00 among other requirements.

The Union calls for the Commission to be constituted by persons with sufficient legal knowledge and procedural ability to ensure that all injured workers have their claims arbitrated consistently and pursuant to natural justice principles.

Finally, the Union is exceptionally concerned at the results that its members have been receiving at the hands of approved medical specialists. As a result, a practice has evolved whereby injured workers' legal representatives are advising injured workers to negotiate and compromise claims (often to a significant degree) rather than be examined by approved medical specialists. However, insurers are generally not concerned with referring injured workers to approved medical specialists.

The Union believes that there are perceptions of bias amongst a number of approved medical specialists and the Union points out that the vast majority of the approved medical specialists have either performed medico-legal services for insurers in the past, or are still performing medico-legal services for insurers.

The Union recommends that, to avoid perceptions of bias amongst approved medical specialists, they be appointed by an independent panel comprising medical representatives, employer representatives, and employee representatives.

PRE AND POST 2002 COMPARISONS

Position	Injury	Pre 2002	Post 2002
Mechanic	Left Shoulder Right wrist	$23,500.00	$14,250.00
Printer	Back	$11,250.00	$6,250.00
Panel Beater	Back Left leg	$22,500.00	$16,000.00
Mechanic	Right arm	$16,000.00	$8,750.00
Laundress	Left leg	$11,250.00	$1,250.00
Printer	Left thumb	$1,300.00	$1,250.00
Process worker	Back Legs	$33,750.00	$10,000.00
Labourer	Back Legs	$27,000.00	$17,000.00
Process worker	Back Legs	$34,500.00	$21,500.00
Fitter	Back	$15,000.00	$8,750.00

Position	Injury	Pre 2002	Post 2002
Mechanic	Back L5-S1 disc protrusion	$15,000.00	$10,000.00
Fitter/Welder	Right leg (knee)	$11,250.00	$7,500.00
Printer	Lumbar disc lesion and referred leg pain	$15,850.00	$8,750.00
Maintenance Fitter	Back Right Leg	$30,000.00	$10,000.00