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INQUIRY INTO NSW WORKERS COMPENSATION SCHEME

Organisation: Construction Forestry Mining and Energy Union (NSW Branch)

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Submissions to the Joint Select Committee Inquiry into the NSW Workers Compensation Scheme

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Introduction

This submission relates to the industries covered by the Construction Forestry Mining and Energy Union (NSW Branch) that come within the jurisdiction of the NSW Workers Compensation system under review. The CFMEU represents workers in the construction, forestry and energy industries. These industries are characterised by heavy manual work, with workers working long hours (sometimes in excess of 10 hours per day), generally six days per week and where often the work is far away from home or in a difficult environment.

The work of our CFMEU members is hazardous and high risk. Our members regularly face the risks and consequences that inevitably come their way as a result of:

a) working at heights or in confined spaces or with electricity and gas;

b) operating or being near heavy moving plant and equipment;

c) exposure to fumes, asbestos and other highly toxic materials; and

d) the grind of heavy and repetitive manual work year after year.

Statistics alone on the serious injuries and deaths within the construction industry each year as horrendous as they are do little to paint the full picture of the human cost and tragedy caused by a workplace accident. Statistics will tell you at least one construction worker dies a week but tell you very ltle how the death of one our members Mr Villegas, who died a few weeks ago when he fell from scaffolding on a project in the Sydney CBD, has affected and will forever change the lives of his four children and wife.

The concerns of the CFMEU and Injured Workers

In amongst the many submissions and statistics this Honourable Committee will no doubt receive and hear, the CFMEU asks this Hononourable Committee to not lose sight of the human cost of doing business in New South Wales and how any "proposals" will affect workers and their families.

When our CFMEU members are hurt at work they typically suffer serious physical injuries, which often result in a worker having to leave the industry and loosing their trade or occupation of many years. Above all, it often results in a worker losing some or all of their ability to earn a living and the dignity this provides him or her in being able to look after themselves and their family.

A huge proportion of our members are workers who come from non English speaking backgrounds with little or no education beyond the age of 15. A huge proportion of our workers have very few transferable skills and qualifications outside their industry. More often than not, once these workers are injured they cannot secure alternative employment because they lack the ability to read and write in English. Many of our members can testify to this Honourable Committee that if all you have done since coming to Australia is worked for decades on construction sites doing concrete pours or demolition or formwork and then one day you suddenly find you cannot do this work, it is no easy task finding a new life when the best years of your working life are already behind you.

It is an open secret amongst many experienced advisors for employers, in what is know as "Human Resources", that the most economic and efficient and way to "process" an injured worker is to "rehabilitate" him or her as quickly as possible, even if it involves the cost of placing them in a meaningless job with no real long term economic sustainability or prospects for the sake of satisfying Workcover procedures so that the employment of the injured worker can be terminated afterwards as soon as possible with their file marked never to be employed again by this company. The CFMEU says injured workers need to be properly looked after and compensated for their loss of earning capacity. At present, too often workers are simply treated as Workcover statistics and put through paper rehabilitation schemes for the sake of returning to work for a few months so that an employer can terminate their employment as soon as the Workcover boxes for "rehabilitation" and "return to work" are ticked and left without hope of being given a job on the next project or finding real alternative long term work in another industry.

The severity of the injuries sustained by our members highlights a need for more support and protection of their rights under workers compensation and not a reduction as has been flagged. There appears to be no clear indication or paper on what exact proposals and options are being considered by the Parliament to amend the NSW Workcover scheme. Broad but ultimately unhelpful comparisons have been made with other jurisdictions in various papers without any concrete details as to what and how is to be implemented in New South Wales.

Accordingly the CFMEU reserves it position and right to further comment on amendments and proposals as they come to light but in the meantime the CFMEU in particular wishes to express its concerns to this Honourable Committe and place on the public record its opposition and disgust with respect to some of the proposals being discussed in the media such as:

1) abolishing "journey" claims and in effect contradicting the good common sense held by generations and most people that define a working day as being finished when you returned home unharmed;

2) taking away rights of families to nervous shock claims;

3) reducing the already modest amount of weekly compensation payable to workers and their dependants with "step downs";

4) increasing "workplace capacity testing" without providing any secure long term employment prospects or placing any obligation on the employer or scheme to provide long term employment options;

5) further raising the "threshold" workers must satisfy before a work injury is recognised as "serious" to qualify for lump sum compensation in repect of injuries clearly causing permanent impairment, disability, and pain; and

6) further restricting or abolishing the few residual rights workers have been left with to sue their employers for damages for negligence in respect of seriosus and life changing injuries.

Journey Claims

To compare "Journey claims" in NSW workers compensation scheme with say that of the Victorian scheme is not just to compare apples with oranges but is plainly ridiculous. By far the vast majority of "Journey claims" involve motor vehicle accidents. In Victoria the compulsory motor vehicle third party scheme (i.e your "green slip" insurance as it is called in NSW) is a "no fault" scheme. In reality this means that in Victoria you are entitled to compensation from their *Transport Accident Commission* if you are hurt in a motor vehicle accident travelling to or from work whether you are at fault or not for the accident. This is not the situation in NSW with our "green slip insurance" which requires fault to be proved and also why it so important for NSW workers to have a "Journey claim" provision in the NSW Workers Compensation Act.

Further, to say that the journey to and from work is not in the course of employment or its removal would "*provide a closer connection between work, health and safety responsibilities and workers compensation premiums through eliminating workers compensation costs arising in circumstances over which employers have limited control*" as set out in one paper, fails to account for the mobile and transient nature of our industries. Our workers are often forced to travel significant distances to get to their nominated site for the day. It is naive to

presume in these circumstances that the employer has limited control as they control the location of the day's work and their decisions directly correlate with the journey the worker is to take. The very long hours demanded by industry of workers in construction and the consequent fatigue are very often the key factors in the cause of deaths and injuries suffered by our members in "journey claims" whilst travelling to or from work.

To abolish journey cover would have tragic consequences for injured workers in NSW , as well as the families who lose loved ones to fatalities arising to and from work. Indeed to remove journey cover is to compound the injustice for families who already pay the ultimate price. Here are a couple of real life examples for this Honourable Committee to consider out of the many statistics available:

Glen is 47 years old, a husband, a father, a scaffolder, a CFMEU member, a construction worker for over 20 years living in Miranda.

He had never made a compensation claim in his life until a few weeks ago when he had an accident coming home from work .

He had been on a construction site at Maquarie University for the past couple of months. Each morning he got up about 4.30am and left his home in Miranda about 5am on his motorbike to travel up to North Ryde to turn up for work. Scaffolding is hard physical work involving heavy lifting and handling of steel tubing and boards, a lot of climbing and a good sense of balance while erecting and dismantling scaffolding at heights.

On the day of his accident he did overtime as usual and finished work 5.30pm. About 15 minutes later while travelling south through North Ryde he ran into the back of a vehicle and came off his motor bike. He was not afffected by drugs and alcohol but he was tired. He has suffered serious multiple injuries as a result of the accident and in particular is undergoing substantial surgery on his right arm which is essential in his work as a scaffolder. He will be unable to work for at least a couple of months as a scaffolder following surgery. He is not covered by the NSW compulsory third party motor vehicle "green slip" scheme as no one is at "fault" for his motor accident but fortunately he is protected by the "journey claims" provision of the Workers Compensation Act. His employer is a small scaffolding contractor who realistically will struggle to find anything much in the way or "suitable" or "alternative" duties for a scaffolder without the use of one arm.

There is a real risk this accident will result in Glen losing his job despite the best intentions and good will of both him and his employer. The CFMEU submits Glen's case is but one of

the many reasons a proper insurance scheme is so vital to the interests of workers and their families and must be maintained.

Mr Budesa had been a formworker since he came to this country. He was only 27 years of age at the time of his death. One day he did not come home from work. While driving home alone in his car he ran into a concrete truck and was crushed, dying on impact. It happened after a long day working on site stripping formwork moving formwork shutters used for concrete pours. Police and doctors confirmed there were no drugs or alcohol involved in the cause of the accident. He left behind a wife who already lost part of her leg in a previous and unrelated injury and two school age children. Without the "journey claim" provisions of the Workers Compensation Act his family would of been left destitute and forced to sell the family home.

The CFMEU submits Mr Budesa's case as another example of how any knee jerk reaction to abolish "journey claims" so as to reduce the number deaths or injuries classified as workplace injury statistics cannot possibly serve best interests of the people of New South Wales.

Jake is a 17 year old 3rd year apprentice who was on his way to work on his motorbike, when another driver ran a stop sign and hit him causing him to become trapped in the car's bullbar. He sustained several injuries including breaks to his left tibia and fibula, skin off the bone, serious artery and nerve damage, two 2 cm cracks in his pelvis. He narrowly avoided amputation.

Jake has had multiple operations and his doctor estimates he will need at least another two operations. Re-training cannot be considered until the operations are complete.

Jake has been on workers compensation for 2 years and is currently receiving the statutory rate. He is finding it difficult to keep on top of the financial responsibilities of an adult life including paying his rent. He was unable to finish his apprenticeship due to the injury and has essentially been cut off from the workforce before getting started. Any progress he has made towards a trade has been for nothing as there is no chance of him returning to the industry.

To deny Jake access to a journey claim essentially amounts to denying him adequate compensation for the sacrifices he has been forced to make financially and in terms of his future employment. Jake and others like him do not deserve to start their adult lives at such a disadvantage.

Because Jake's accident was caused by the fault of another driver the NSW workers compensation scheme as a matter of law should not have any problem recovering any monies it has paid in compensation to Jake from the NSW motor accident "green slip" scheme assuming those running and managing the claim for Workcover NSW are competent enough to understand how the law operates in NSW.

Abolishing Nervous Shock Claims

The CFMEU strongly opposes any move to prevent the family members of workers killed as result of someone's negligence from being able to sue for damages in respect of the nervous shock and loss that he or she may suffer directly as a result of the death or catastrophic injury caused to their loved one.

Any proposal to prevent such claims fails to publicly recognise the severe impact and dysfunction brought upon families as a result of a loss of a loved one through a reckless or negligent workplace death or catastrophic injury. It is our experience that family members of deceased workers can often suffer severe psychiatric illness needing medical treatment and support. We are aware of close family members of workers who have died at work suffering such severe psychiatric trauma as a result of the death that they themselves have taken their own life.

It seems incongruous to us that family members of the deceased could be precluded from bringing a claim in nervous shock however, a bystander who by chance witnessed the death of a worker falling off a building for example, could still institute proceedings and claim damages for their own shock and loss but not the family.

We submit it is not an acceptable argument to state that an employer's liability for psychological or psychiatric injuries "does not fall within the objects of the Legislation". On the contrary, we submit that an employer does have a responsibility for psychological injuries sustained by family members as caused by their negligence and this group of people needs to be supported by the Law in a time of profound tragedy for a family.

"Proposals" to Reduce Weekly Compensation

For many injured workers, being on worker's compensation is a financial burden, especially when totally incapacitated. There is often a significant drop in weekly income as individuals will be paid the base rate of either the EBA or award. They do not receive allowances or

overtime whilst on workers compensation. Therefore from day one our members lose financially.

These workers already feel as though they are being punished for being on workers compensation, any additional step down would be further punishment for circumstances beyond their control.

Take for example **Dominic,** a 39 year old concreter with a dependant spouse and young child who was earning approximately $1,500 per week prior to injury, this dropped to $645 a week after he started his workers compensation claim.

In 2012 he complained of lower back pain as a result of prolonged work in the concreting industry including lifting, constant bending and standing for long periods. Diagnosed with a bulging disc he is in constant pain unable to perform his usual domestic duties and has been declared unfit to return to work. Recent doctor's reports have declared him unable to return to concreting and he is currently undergoing rehabilitation to find a new occupation.

Dominic and his partner had accumulated some savings in the hopes of securing a mortgage this year, however due to the significant drop in income he has been forced to spend his savings on ordinary expenses and has been unable to secure a loan to purchase a house for his family.

Dominic was financially burdened by his injury. The step down provisions as discussed, if applied to someone like Dominic, would see Dominic exhaust his savings earlier making it more difficult for him to support his family as he continues with his treatment and now rehabilitation. Dominic has complied with every request of his doctor and insurer. He has been proactive in his treatment researching other treatment options apart from physiotherapy, which the doctor and insurer have now approved.

The CFMEU rejects the presumption that the workers compensation system needs financial disincentives to prevent long term dependency. This presumption fails to account for the differences in industry, occupation and location of the worker. It also fails to account for the skills of the individual and the avenues for retraining.

Take for example **Pedro** a 60 years old formworker earning $2,200 per week.

In February 2011 he experienced severe pain in his abdomen and was diagnosed with a hernia. He worked for a little until his operation in May 2011. Once he had recovered from the operation he resumed full time employment July 2011, working 8 hours a day 5 days a week. However he soon realised that the pain had not subsided and he could not work that many hours. His employment was terminated in September 2011 after 37 years service.

In October 2011 he was diagnosed with a reocurrence and was forced to have another operation to remove the hernia. He is currently fit for suitable duties
He is seeking the assistance of a rehabilitation provider who has offered him retraining for security. The member is concerned about his lack of English skills and is worried about getting hurt given his age and injury. He has asked if he can be retrained in something else as well as undertake some English classes to increase his language skills.

Pedro is an example of a person willing to return to work but struggling due to language barriers. This is common in the construction industry as is lower levels of literacy. In this regard placing further financial strains on the individuals will not assist them in finding work earlier and the added strain can only lead to added pressure and stress on the individual and the family unit

"Work Capacity Testing" – what does this really mean for workers?

Regular "work capacity" testing may not yield the results expected. Besides the effects chronic pain has on workers carrying serious and permanent injuries and their capacity to cope, they can also become quite depressed and anxious as a result of the "claim" or "rehabilitaion" process if it is poorly managed. Workers with serious injuries often face periods where they feel useless and worthless and start to believe that they are no longer a productive member of society. Aimless "work capacity" testing may be a constant reminder that they are unable to work as they had before, and should they not have progressed since the last test it will undoubtedly lead to feelings of hopelessness and only aggravate the situation.

Further, we have no confidence that those doing these assessments actually understand the industries that our members work in, the conditions in which they work and the reality that securing alternative employment in many cases is extremly difficult for workers that have had their employment terminated and left with a serious injury in their history.

Employers are reluctant to take on workers who have been injured, even those with minor injuries or disabilities. What regular work capacity testing will mean is that someone under

the control of Workcover scheme agents, will form views that medically an injured worker has the capacity to work, without any consideration for the brutal reality that it is likely a job cannot be secured because employers will not take them on. Again, many workers will end up on the scrap heap, without ongoing income and medical support, or left to the vagaries of social security or maybe even worse. A major and critical hole in such a proposal is that most households these days are double income families and as such the loss of one bread winner whilst having a devestating impact on the finances of a household is not sufficient to allow a family claim any disability support pension or benefit in respect of the injured bread winner under the assets and/or income tests. Again such a knee jerk reaction and proposal without properly compensating injurered workers for their loss of earning capacity simply ignores the devastating reality facing workers and families when a bread winner is seriously and permanently hurt and mained for life.

For many of our members they are sacked more easily by employers, sometimes well within the 6 month period, claiming that work which is generally project based, has slowed down requiring redundancy, even though in reality the reason is because they are, or have been, off on compensation.

Take for example **Angelo** worked for his employer for approximately 30 years. He was employed as a plant operator performing almost exclusively the duties of a forklift driver. In September 2004 he twisted his knee while cleaning a machine. After a short time of restricted duties he returned to pre-injury duties. He had several recurrences but returned to pre-injury duties quite quickly.

In June 2009 he experienced another recurrences causing him to revert to restricted duties, which had no affect on the duties he normally performed as a forklift driver. He continued on restricted duties until October when he took 8 weeks leave for unrelated reasons. When he attempted to return to work he was informed by the safety manager he could not return while the restrictions remained and he would have to stay at home on workers compensation.

In May 2010, after spending approximately 7 months at home, his employer terminated his employment stating he could not perform his usual duties while the restrictions remained. This was the subject of some dispute during unfair dismissal proceedings. The medical evidence presented stated that his restrictions did not prevent him from performing the work of a forklift driver, as he had been for quite some many years, and that for him to be at the workplace did not represent an increased risk to himself or his employer.

Angelo's case is a fair indication of the struggles that injured workers face when trying desperately to return to work. The medical evidence and his restrictions allowed him to continue to perform the same duties that he had been performing for approximately 5-6 years. The employer effectively turned their back on him, punishing him for making a workers compensation claim and actively avoiding their responsibility in rehabilitating Angelo.

The work capacity testing is just another form of punishment for injured workers who cannot control the circumstances in which they find themselves.

"Incentives v disincentives" in Managing Claims – Will more carrot or stick for workers help?

A lot of the changes proposed seem to focus on punishing injured workers for making workers compensation claims. They fail to take into account the behaviour of claims managers in denying or prolonging claims, by sending the workers for multiple doctor's appointments, denying treatment, withholding medical expenses, withholding wages, requesting early return to work when the injured worker is not ready.

These tactics can have a lasting and negaitive effect on an individual and their recovery. Apart from a tiny precentage, our injured workers want to get on with their lives and get better but have been stalled at every hurdle.

Further proposals suggesting workers need to be penalised are totally out of touch with the reality that being forced by an injury onto workers compensation is punishment enough to make workers want to return back to work. The amount paid for weekly compensation after the 26 weeks of incapacity is already so far below what our members take home compared to their pre-injury/accident earnings so no further "stick" is need to encourage them to return to work. Being forced by injury to go on workers compensation for our members is a huge financial burden and loss often causing family distress.

Take for example our member **Steve a** 61 year old maintenance worker earning approximately $1700 per week with 25 years service with his employer.

In April 2010 Steve injured his back when he stepped off a half metre retaining wall. The next day he was unable to get out of bed and the doctor certified him unfit for duties. After 10 days he returned to work on light duties for approximately a month and half before aggravating his injury forcing him to cease work entirely. In February 2011 his employer terminated his employment as Steve could no long perform his pre-injury duties.

In early 2011 Steve underwent a laminectomy in an attempt to fix his back. In June his neurosurgeon sent him for another MRI and discovered that he would still need a fusion operation. The insurer sent him for an independent medical exam in October 2011. The orthopaedic specialist disputed the findings of the neurosurgeon and refused to recommend fusion stating that the back injury was as a result of degeneration.

There was a three month wait before the insurer received the report at which time they declined the claim sighting degeneration as the issue. Further he was told by his case manager that should he have the fusion surgery he would end up in a wheelchair. At this time Steve asked for a second opinion. The second opinion agreed with the prognosis of the original neurosurgeon stating that fusion would provide Steve with up to 70% relief.

In March 2012 the claim went to arbitration. The outcome saw the insurer being forced to accept liability and they were to agree to the fusion operation. The arbitrator referred him to an AMS approved specialist which he will see at the end of June 2012. Steve is still awaiting back pay from the insurer dating back to Nov 2011.

The process has caused a great deal of stress to him and his family leading to serious depression and forcing Steve to seek the assistance of a psychologist and forcing him to take medication. He is unable to perform everyday tasks such as lifting a chair to sit at the table and is unable to shower himself

It is the insurer's decision in sending him to an orthopaedic surgeon, rather than a neurosurgeon, that has been the cause in delaying his recovery. He has been punished by the ineptitude of the orthopaedic surgeon. Whilst off work on workers compensation he has lost income and superannuation he will never recover.

Steve is not alone in his story. Many workers face these tactics regularly as insurers attempt to streamline their liability and avoid liability. Had Steve received the correct medical treatment as his original neurosurgeon provided, he may well be on his way to recovery. Instead he will be subject to many of the changes proposed and ultimately punished for the behaviour of the insurer.

Commutations

The CFMEU supports the use of commutations, with the agreement of injured workers, for those workers who want to exit the scheme. This should only be done upon workers receiving independent legal advice and pay outs being reflective of a worker's loss of earning capacity and ongoing medical costs as a result of the injury.

At present there appears to be an endless and pointless cycle of paper "rehabilitation plans" and "work capacity testing" for many older workers who clearly have permanent serious injuries and have long ago been abandoned by their employer and the labour market through absolutely no fault of their own.

In many cases it often beggars belief as Workcover appoint yet another different scheme agent insurer to "manage" a long term seriously injured worker. Surely it would make more commercial sense and provide some dignity to workers left with little hope of realistically returning to work to pay some sort commutation lump sum so they can exit the system. It would also leave the workers compensation scheme to focus on rehabilitation for workers with realistic prospects of finding alternative work during the critical one to two of years that follow a serious accident, injury and so often surgery.

Other Options

a. If this review is all about getting workers back to work then consideration needs to be given to greater compulsion for employers to provide suitable duties if they are available.

b. Banning employers from forcing job applicants to disclose their workers compensation history as a condition of employment. The reality is, if workers disclose this, they do not get job interviews, nor do they secure employment.

c. For those workers who are found genuinely to have a capacity to be re-trained that properly resourced programs are made available, incorporating work experience so as to support real return to work, not just a tick box exercise, which effectively leaves workers to fend for themselves. This should include subsidised transport costs, like concessions on buses and trains so that workers can get themselves to Tafe courses or other programs without compounding their financial position.

d. Review the financial arrangements of scheme agents. Since 1997 insurers have been paid more than $3.9 billion, with fees growing 5 times faster than inflation and actual benefits paid to injured workers. This accounts for a waste of $1.6 billion.

e. In the past few years employers have received generous premium reductions. To be fair consideration should be given to increasing premiums in order to meet any alleged deficit.

f. In industries such as the construction industry and other industries characterised by subcontracting, there is considerable scope for employers to underestimate wages in respect of premiums. Further in the construction industry the growing prevalence of sham subcontracting, where employment arrangements are disguised illegally as subcontracting arrangements, also results in further non-disclosure of wages for the purposes of calculating premiums payable.

In the early to mid 2000's WorkCover was active around the issue of employer non-compliance, including the requirement for quarterly certificates of currency which requires employers to reassess their number of employees and level of wages. Further this requirement, made it easier for principal contractors as well as union representatives, to detect non-compliance which ensured that where non-compliance existed could be acted upon. In the last few years, in the rush to embrace harmonisation, this requirement was removed which we believe allowed those employers who do not wish to comply, to do so with greater ease. Not only does this non-compliance place at a competitive disadvantage those employers who do comply with their obligations, we would also suggest it represents a significant drain on WorkCover funds.

We recommend to the Inquiry, that there be thorough review of the level of non-compliance, reintroduction of the requirement to provide quarterly certificates of currency and for there to be resourcing in WorkCover of systems of enforcement in and around workers compensation premiums compliance as a matter of urgency. In our view the scheme agents and WorkCover have failed to address this growing and ever present problem.

Conclusion

The CFMEU opposes any further reduction of benefits payable to workers or attempts to restrict access to what are already relatively modest benefits. Workers in New South Wales in the past couple of decades have already the burden of drastic amendments to the workers compensation scheme of this state that have severely curtailed their rights to access real compensation for serious injuries that cause major distress loss and disruption in their lives and for their families.

Some of the "proposals" being discussed in the media and raised in other papers strike at the most vulnerable workers being the long term seriously injured with for whom the workers compensation system is their only income support. We submit that the Parliamentary Inquiry take a different and more humane course to past "reforms" and consider what appear to be gross inefficiencies in the management of the scheme including the day to day claims management of long term seriously injured workers and massive avoidance of premiums in some industry sectors that is systematic and endemic.