Submission No 48

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

Organisation: CFMEU FFPD Division, NSW Divisional Branch

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Subject: Submission to Personal injury compensation legislation lodged by Craig Smith

Summary

The CFMEU Forestry, Furnishing, Building Products and Manufacturing Division (FFPD Division), NSW Divisional Branch, wish to indicate our full support for the submission made by Unions NSW, in which it is argued that the mechanisms for assessing and awarding compensation for permanent impairment and pain and suffering, and the restrictions on access to common law remedies for injured workers are unfair.

To supplement the Unions NSW submission we submit the following, and have also attached a Project Evaluation Report prepared by our Return to Work Facilitator for WorkCover NSW in June 2004. Some of the content of this report may not be considered within the terms of reference of the inquiry, but it is submitted as a whole for the purpose of providing an overview of problems with how workplace injuries are managed in NSW, and some of the ways in which injured workers are being denied statutory entitlements. We ask that the issues raised in the report be considered with regard to the impact on employment in rural and regional communities. We ask that in particular the Standing Committee consider the observations and comments under the heading The Role of Fund Managers (Insurers) (pp. 9-11), the observations and suggestions under the heading Recommendations for Improving RTW Outcomes (pp. 11-13) and the case study on determination of earning capacity in Appendix 3 which relates to a CFMEU FFPD Division member in regional NSW. Note especially the apparent contradiction between S40(4) and S40(3)(b)/S43A(1)(f) in the Workers Compensation Act 1987, and the huge problem of injured workers performing suitable duties not being paid correct WC Act 1987 S40 make-up pay entitlements.

Since preparing the attached report the RTW Facilitator has paid particular attention to S40 make-up pay for partially incapacitated workers performing suitable duties. For the purpose of this submission the RTW Facilitator has reviewed the issue of S40 make-up pay for injured workers with whom first contact was made during the period 5 June 2004 to 22 March 2005, with reference to those who returned to work on suitable duties and whom it was known were entitled to S40 make-up pay to compensate them for overtime payments, bonuses and the like that they would have earned if they had not been injured. 28 CFMEU FFPD Division members with whom the RTW Facilitator had contact fell into this category. Of these 23 were not being paid make-up pay to Average Weekly Earnings (as defined in S43 WC Act 1987) until the CFMEU intervened, i.e. 82%. Furthermore, in most cases when payments were made, the injured workers were not consulted about the fairest method of determining Average Weekly Earnings, and the Union had doubts about whether the methods used were fair to those workers. In the 5 cases where the employers did pay make-up pay to Average Weekly Earnings, the injured workers were employed with companies that had not been paying correct S40 entitlements in the past and had begun to do so only after intervention of the CFMEU which prompted them to get legal advice leading to them acting on their legislative responsibilities. In one case the Union had to take the matter to the Workers Compensation Commission before the employer began determining and paying injured workers performing suitable duties their correct S40 entitlements. Without this previous action by the CFMEU it would have been the case that in none of the 28 cases would injured workers have been paid their full statutory entitlements, at least not at the times that they are required to be paid (see S84 WC Act 1987), i.e. 0% compliance with the legislation.

The RTW Facilitator has found that the majority of employers who employ CFMEU FFPD Division members across metropolitan and regional NSW simply do not know about their legislative responsibilities to pay make-up pay up to Average Weekly Earnings and to claim this amount back from their insurer. We contend that it is the responsibility of insurers contracted by WorkCover NSW as fund managers to educate the employers for whom they manage claims about their legislative responsibilities in general, and particularly with regard to S40 of the WC Act 1987, and to take whatever action is needed to ensure that correct entitlements are paid in a timely fashion. WorkCover NSW has provided confirmation to the Union that this is indeed the case. Some insurer case managers (claims officers) have told the RTW Facilitator that they prefer not to go to the trouble of determining and paying a claimant's full S40 entitlements until the claimant's solicitor takes the matter to the Workers Compensation Commission. As the Standing Committee would be aware the time that this takes is typically at least 6 months. Usually such claims are not taken to the Commission until claims for compensation for permanent impairment can be made, i.e. when the claimant's physical and/or psychological condition has stabilised, often years after the injury occurred. Meanwhile in many cases the injured worker has been denied substantial statutory entitlements for long enough to seriously affect their capacity to support their families and maintain mortgage and other crucial

financial commitments. The resulting financial burden must surely in many cases not be beneficial to their recovery from injury and the return to work outcome. In one case that the RTW Facilitator has been dealing with the worker is being underpaid $222.37 per week, and the period on suitable duties has so far been more than 18 months.

Of even greater concern is that most injured workers do not understand their S40 entitlements and therefore do not realise they have a valid claim and need legal assistance. Since claims officers may not take any action to pay correct entitlements unless challenged legally, it is feared that a very large number of injured workers are being underpaid and do not know it. As far as this Union is aware the only circumstance in which insurers are required to advise injured workers to engage a solicitor is when they have the right to claim compensation for permanent impairment (S66). In cases where the worker fully recovers from their injury they may never be informed by anyone that they need to engage a solicitor, and will therefore never know that they have been denied statutory entitlements. It is understood that a fundamental responsibility of insurers in the NSW Workers Compensation system is to treat workers fairly according to the relevant legislation. At present this is not occurring. The underpayment of S40 entitlements is unfortunately just one of many examples of injured workers not being treated fairly according to the legislation.