Submission No 29

REVIEW OF THE EXERCISE OF THE FUNCTIONS OF THE WORKCOVER AUTHORITY

Organisation: United Services Union

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United Services Union Submission to the Legislative Council Standing Committee on Law and Justice

Review of the Exercise of the Functions of the WorkCover Authority

January 2014

The amendments to the Workers Compensation Act which in large measure came into effect on 19 June 2012 has caused significant loss and detriment to the injured workers of NSW.

In this review process the Union will seek to illustrate the harshness and unreasonableness of the legislative amendments and the impact of such amendments.

At least part of the rationale of the State Government in the amending legislation was the financial circumstances of the WorkCover Authority and the Union seriously submits that that financial situation, whatever was alleged in 2012 must have improved by reference to the improvement in world equity markets and property values. Further it is presumed that dividends and income streams have also been enhanced since the legislative amendments. The alleged financial imperative, if any, has been removed.

This submission will address a range of issues arising out of the amending legislation and includes recommendations to enhance the scheme.

This submission does not seek to address the amended legislation by reference to specific section numbers and provide detailed interpretation of the amended provisions. Rather it is a submission that deals with the review at an overview level.

REASONABLY NECESSARY MEDICAL EXPENSES (SECTION 60 EXPENSES)

The amendments have severed a straightforward consideration of whether there was a causal relationship between the reasonably necessary need for medical management and the injury. An artificial and arbitrary timeline was created linked to the notion of the incapacity for work and only bearing the costs of medical expenses that arose within 12 months of the last period of incapacity.

This has completely ignored chronic long-term conditions which might not involve any significant periods of incapacity at all but which still require careful medical management e.g. skin cancers or the longer term need arising from a trauma to fuse a wrist or replace a knee.

These type of medical conditions are not rare or exceptional and rather the workforce faces the need for such medical management and review. In some instances inadequate management of a condition can lead to increased trauma and/or death. It is patently obvious that a trauma to the knee or wrist could have devastating long-term consequences and depending upon the worker's situation not have occasioned any incapacity for a number of years.

Further, the 30% threshold for ongoing medical expenses is overly onerous and unfairly prevents many workers from accessing unavoidable medical expenses related to their work injury. As an example, a below the knee amputation only attracts a 28% WPI rating, and so would fall below the 30% threshold. Under the new regime, workers are now required to pay for any replacement prosthetics required after the 12 month timeline has expired. This leaves workers liable for literally thousands of dollars.

There needs to be a restoration of the traditional approach to Section 60 expenses and not have a completely arbitrary 12 month timeline from the period of incapacity. This approach is causing hardship and losses to a wide cross section of workers.

A simple illustration of the situation involved a member of this union who was a long term employee of Newcastle City Council. In broad terms he suffered a fracture of his left hip in the course of his employment in 1991 and he had hip replacement surgery in February of 1996 for which the employer as a self-insurer was liable. That insurer has paid the relevant medical expenses that were due thereafter and there have has discussion regarding a replacement hip. This member received a letter from the Council in January 2014, albeit dated 19 September 2013 (this typing error is irrelevant for this submission) making it clear that no further liability will be accepted and in doing so it relies precisely upon "Recent changes to Sections 59A and 50". Attached is a copy of that letter and for reasons of privacy the member's details have been excluded.

A regime where the insurer has no liability for medical expenses that are not pre-approved is draconian and unfair and the question really at the end of the day is whether the expenses are reasonably necessary medical expenses related to the injury. The test still has to be satisfied and if it is disputed then the Workers Compensation Commission (the Commission) can determine this issue.

WEEKLY COMPENSATION

Work Capacity Assessments have proven to be a disaster for injured workers, including workers that have undergone a process of transition from the pre-amendment era.

What statistics if any which are available, in addition to the anecdotal evidence will lay out a situation where:

1. Thousands of decisions have been made in terms of work capacity.

2. The number of internal review applications and/or subsequent appeals have been absolutely minimal.

Anecdotally the situation pertains where the workers are overwhelmed by the documentation and do not have the resources or skills set to comprehend the situation and respond in a meaningful way.

The workers have been marginalised from seeking legal advice through the contrivance of:

1. Not permitting workers to pay lawyers for legal advice.

2. Not permitting the lawyers to be paid by the insurer if they succeed in overturning the decision.

3. Not permitting WIRO through the ILARS process to approve grants of aid to lawyers to advise workers on these issues.

Injured workers with language barriers or limited literacy skills are particularly disadvantaged. Further, the limited timeframes and legal support prevent the opportunity for relevant documentary evidence to be obtained.

At the very least this is an issue that should be addressed by returning the issue of incapacity again to the Commission for determination including extending ILARS grants to cover this type of advice. .

The inhibiting factors in securing weekly compensation over the longer term have led to very harsh outcomes for injured workers.

To satisfy a criteria of a 30% whole person impairment is extremely difficult and one must feel sympathy for any worker who such level of impairment.

Conversely a whole person impairment assessment does not directly correlate to incapacity for work and continuing restrictions.
The assessment process by not having regard to genuine market forces e.g. employers' reluctance to recruit injured workers and genuine capacities for work involves nothing more than an artificial assessment process. 8

Provision should be made for all work capacity assessments to date be open for reconsideration before the Commission with amendments to reflect reality and not a contrivance to exclude entitlements.

PERMANENT IMPAIRMENT THRESHOLD AND ONE CLAIM RESTRICTION

The greater than 10% threshold for entitlement to permanent impairment is onerous and serves to ensure most injured workers do not receive compensation for their restriction, pain or suffering. An injured worker may face multiple surgeries and achieve a poor outcome yet receive no compensation. A threshold of 5% should be in effect for initial and subsequent claims. That is, no initial entitlement unless 5% WPI and no further entitlement unless an additional 5% WPI.

CONCLUDING OBSERVATIONS

The Union has addressed a cross section of issues and does not say that this submission is exhaustive as to matters that need to be addressed. Rather the Union recommends an approach of an informed review against a background where there is:

1. full disclosure of the savings to the scheme estimated from the date of the changes to date;

2. a projection of the savings to the scheme from the changes under review on an annual basis for the next three years; and

3. a reviewed estimate of the financial robustness of the scheme given the improved financial circumstances in the wider economic community.

The Union rejects a situation where the profits are privatised and the costs are socialised. Nor does it support or endorse a situation at all where the employer is excused from its long term financial liabilities to injured workers and the liability falls on the worker. The shift in the last amendments was excessive and unnecessary, against injured workers.

Graeme Kelly, General Secretary
per Casey Young, Senior Industrial Officer
31 January 2014

City Engagement
Claim No.
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19 September 2013

The City of Newcastle

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Dear ,

As we discussed, you have had a workers compensation claim for a number of years in relation to your left hip for the purpose of paying your medical treatment and associated expenses.

Recent changes to Sections 59A and 60 of the Workers Compensation Act 1987 now limits the payment of medical expenses to 12 months after the last date a worker is entitled to weekly payments of compensation.

For injuries before 1 October 2012, the 12 month limitation commences on 1 January 2013.

As your entitlement to weekly benefits ceased prior to 1 January 2013, this means your entitlement to reasonable and necessary medical and related expenses will cease on 31 December 2013.

After 31 December 2013, Newcastle City Council as a licensed self Insurer is no longer liable to pay these medical related expenses.

For medical treatment after 31 December 2013, we recommend you contact Medicare, your private health insurer or your treating Doctor for information about the benefits available to you given your particular circumstances.

Should you require further information, you may contact Council's Workers Compensation Office on or the WorkCover Assistance Service on 13 10 50.

Yours faithfully

Injury Management Advisor
The City of Newcastle