Submission No 5

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Australian Services Union / United Services Union

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ASU/USU Submission

First Review of the Workers' Compensation Scheme

NSW Government
Standing Committee on Law and Justice

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The Hon. Shane Mallard MLC
Chair
Standing Committee on Law and Justice

By email: lawandjustice@parliament.nsw.gov.au

Dear Mr Mallard,

First Review of the Workers' Compensation Scheme

We refer to the above matter and write to you in your capacity as Chair of the Standing Committee on Law and Justice (***"the Committee"***).

We understand that the Committee is currently undertaking a review of the workers' compensation scheme in New South Wales including matters relating to the:

1. Workers' Compensation Scheme;
2. Workers' Compensation (Dust Diseases) Scheme;
3. Motor Accidents Scheme
4. Motor Accidents (Lifetime Care and Support) Scheme

The Australian Services Union, along with its state branch the United Services Union, represents more than 120,000 workers in New South Wales and would like to be heard on certain matters falling within the Committee's jurisdiction.

We should note that in 2012 the United Services Union made an extensive submission to the Joint Select Committee on the proposed NSW Workers Compensation Scheme. A copy of this submission is enclosed for your reference.

A number of the issues raised in the earlier submission persist with the current scheme and warrant revisiting as part of this review.

This is particularly the case given the scheme's apparent funding windfall which is predicted to grow to as large as $5 billion by 2019.

This windfall was brought about by excessive and short-sighted cuts in response to a specific 'point-in-time' economic climate arising towards the end of the last decade. This climate has since improved resulting in the abovementioned surplus.

Despite this surplus injured workers continue to feel the devastating effects of the 2012 changes, and we strongly submit that this act as the catalyst of a 'root and branch' evaluation of the current scheme and its inability to meet the practical needs of injured workers.

In particular, we point to the following key areas of improvement which we say could quite easily be addressed, resulting in practical benefits to injured workers engaging with the scheme.

a. **The definition of 'suitable employment' –** Under s 32A of the *Workers Compensation Act 1987* (***"the Act"***), 'suitable employment' is to be defined as 'work for which the worker is currently suited.' The assessment of whether there is 'suitable employment' available for an injured worker is directly linked to the determination of weekly benefit payable (see s 35 of the Act). However, this assessment cannot factor in a number of matters which would ordinarily form part of the assessment suitable employment, these include:

    i. Whether the work or employment is available;
    ii. Whether the work or the employment is of a type or nature that is generally available in the employment market
    iii. The nature of the worker's pre-injury employment;
    iv. The worker's place of residence.

    In practical terms this means that an injured worker may have his benefits reduced based on a finding that the worker is able to earn money in suitable employment despite the fact that this so-called suitable employment is not available in a location near the injured worker or may not even be available anywhere.

    This poses a significant problem for regional workers, who may have their benefits reduced based on a finding that there is suitable employment that they could undertake in a metropolitan centre many hundreds of kilometres away.

    This absurd result underpins a number of issues with the current scheme which seems to have little to no appreciation for the practical difficulties faced by injured workers.

    As a simple measure to improve benefits payable to injured workers deserving of support, it is submitted that the factors that are taken into consideration in assessing suitable employment be expanded to include questions about whether, from a practical standpoint, that work is actually available to the worker incorporating issues of geography and travel amongst others.

b. **Limit on permanent impairment claims** – Section 66(1A) restricts an injured worker from making more than one claim for compensation in respect of a permanent impairment. This means that once an employee make a permanent impairment claim in relation to an injury they are locked out from the compensation scheme in respect of that injury forever.

    The obvious difficulty that this creates is that often injuries will worsen over time and/or the medical assessment of an injury may change. Injured workers (and their advisers) are then placed in an entirely artificial position of determining when the best time to make a claim is. Instead of compensating an injured worker for their level of impairment, the practical effect of s 66(1A) is to force an injured into doing one of the following:

    i. Delay making a claim in case the injury worsens, thus denying them compensation in the present for a very real workplace injury; or
    ii. 'Gambling' that their present injury will not worsen in order to obtain the requisite level of compensation.

    Neither of these options represent an 'organic' method for assessing permanent impairment claims, rather it introduces an artificial restriction on the *number* of claims that can be made resulting in unjust outcomes for injured workers.

c. **Time limit for compensation payments** – Injured workers are denied compensation payments for medical treatments or services undertaken as a result of a workplace injury where that injury falls outside of specific time frames (two years from date of claim for less than 10% WPI, and 5 years from date of claim for 10-20% WPI).

   In light of the matters raised in section (b) above, this relatively short time frame in which medical expenses are covered places injured workers in the unenviable situation of being forced to determine whether to make a claim to meet growing medical expenses in the short term, or to delay making a claim to mitigate the risk of the injury worsening and to avoid being locked out of the compensatory scheme.

While there are a number of fundamental issues with the current scheme (see USU submissions from 2012), the above represent three relatively procedural changes which would result in substantively better outcomes for injured workers. These changes, alongside significantly greater compensation amounts flowing from the scheme's surplus, would reverse some of the damage brought about by the 2012 changes.

In summary, the Union submits:

1. The amendments to the Workers Compensation Act affected in 2012 were draconian and unfair to the workers in New South Wales.
2. The amendments affected in 2015 offered very limited relief from the 2012 amendments.
3. There needs to be a substantial revisiting of the operation of the 2012 amendments.
4. This submission has a narrow focus however that is not to say there are not a wider range of considerations that need to be addressed.

In responding to the Committee, some further matters the Union wishes to address are:

1. The liability of the workers compensation system to pay reasonably necessary medical expenses for injured workers.
2. Work capacity decisions generally, including the inherent unfairness and artificiality of the definition of suitable duties within Section 32A.
3. The inherently unfair restriction on impairment assessments and entitlements in a system where access to other compensation benefits by level of impairment.

In our view, cornerstone features of the work capacity decision process include:

1. The Workers Compensation Commission (the Commission) is excluded from determining work capacity decisions.
2. Injured workers are precluded from paying for legal services and considering disputing and disputing any work capacity decisions.
3. WIRO is precluded from giving Grants of Aid to solicitors to give legal advice to injured workers in relation to work capacity decisions.

There is a fundamental power imbalance between individual unrepresented workers and insurers in the current system and that power imbalance is not remedied by:

1. A 'fair notice' letter.
2. Internal reviews.
3. Merit reviews.
4. Procedural issues.

All of these review processes are undertaken against the background of a complex regulatory framework in which the insurer has access to resources beyond the scope of a worker. This imbalance extends to commissioning evidence and is exacerbated by unrealistic time periods to respond to evidence. The injured worker has limited resources or capacity to comprehend such wide ranging issues and limited capacity to identify what alternative evidentiary material could have been submitted.

The artificiality of the definition of "suitable work" produces a contrived and unrealistic result as to what is happening in the labour market in the real world irrespective of whether you were an injured worker or are fully fit.

In our view, having a system which creates an inherently unfair and biased assessment, is one which does not have regard to:

1. Whether the work or the employment is available;
2. Whether the work or the employment is of a type or nature that is generally available in the employment market;
3. The nature of the workers' pre-injury employment;
4. The workers place of residence;

As we have outlined above, workers who have limited educations, limited vocational skills or live in regional or remote areas of New South Wales and/or have limited access to public transport are automatically disadvantaged.

That disadvantage operates such that entitlement to weekly compensation is extinguished without any reference to suitable work in their labour market.

The remedies of this injustice are to:

1. Amend the legislation such that work capacity decisions can be addressed before the Commission and to allow multiple injuries to be considered when determining a workers residual work capacity.
2. Extend WIRO Grants for legal representation.
3. Delete sub-clause (b) from the definition of suitable employment within Section 32A.

This Union has many members some of whom unfortunately have been injured and have faced chronic long term restrictions in their capacity to work and are not able to engage in their pre-injury employment.

They reside throughout New South Wales generally and the current statutory provisions need urgent attention to stop the bias against employees in more remote locations and/or in locations where the range of employment opportunities are limited.

Medical expenses

59A

Whilst the amendments to 59A in 2015 were of some assistance, in the Union's view there is still a completely artificial disconnect between:

1. The need for reasonably necessary medical treatment and factors such as:
    a. The level of whole person impairment.
    b. The date they suffered injury and/or the date they were last incapacitated for work.

2. Issues of incapacity as distinct and separate from issues of reasonably necessary medical treatment.

These contrivances operate unfairly against a wide range of injured workers who are excluded from having long term security in terms of their medical management by the operation of Section 59A.

The Union strongly supports a position to return the provisions dealing with reasonably necessary medical treatment to what was in place immediately prior to the 2012 amendments.

Use of the WPI to determine the extent of entitlement to coverage for medical treatment and incapacity payments is contrived and necessarily unfair.

This unfairness is compounded when a worker is prevented by s66(1A) WCA and s322A of the WIM Act from having more than one claim or one assessment of their WPI.

The nature of injuries is often of a gradual deterioration and a rigid and artificial restriction on access to permanent impairment compensation and a WPI assessment deprives injured workers of any prospect of recognition and coverage for injuries.

This problem is most obviously demonstrated in a 'catch 22' situation where an injured worker requires surgery at a later date. Their WPI will (usually) be greater after a surgery, however if they do not proceed with an impairment claim now their coverage for medical expenses will expire 2 years after their date of injury or when they last received weekly payments.

Alternatively, if they do proceed with an impairment claim now, they deprive themselves of any subsequent WPI assessment (and potentially enhanced access to medical coverage) if this condition worsens.

The Union supports an amendment of s66(1A) and s322A to delete restrictions on impairment assessments and entitlements.

The Union would welcome an opportunity to discuss these issues or to be heard further on these issues as primary position remains one of restoration of the range of compensation available prior to the 2012 amendments. However, against that background the aforesaid matters are raised as issues of priority and are matters which can be the subject of comparably straight forward proper amendment.

Should you wish to discuss any of the matters raised herein please do not hesitate to contact Acting Assistant National Secretary Robert Potter

Yours faithfully,

Robert Potter
Acting Assistant National Secretary
DP/CY