Submission No 7

FIRST REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: The Australian Workers' Union New South Wales Branch

Date received: 26 September 2016

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A submission by the Australian Workers' Union – New South Wales Branch to the first review of the workers' compensation scheme, by the Standing Committee on Law and Justice.

Background

The Australian Workers' Union – New South Wales Branch (AWU NSW Branch) is a branch of The Australian Workers' Union, an organisation registered under the *Fair Work (Registered Organisations) Act 2009*.

The AWU NSW Branch was formed on 1 September 2016, following the dissolution of the three geographical branches that had previously covered the state.

The AWU NSW Branch represents thousands of members throughout New South Wales across a wide range of industries, many of which compose a relatively high risk to the health and safety of workers. Industries that the AWU has coverage of include: gas, steel, aluminium, glass, civil construction, metalliferous mining, oil refining, agricultural, aviation, cement and concrete products, nurseries, alpine resorts, asphalt, wine, aquaculture, seafood processing, sugar, quarrying, pharmaceutical, hair and beauty and laundry workers.

This submission provides a snapshot of a handful of the multitude of problems with the workers' compensation scheme (the Scheme), many of which have arisen from the 2012 legislative changes. It is by no means an exhaustive summary of the issues or the necessary changes. Further, this submission touches on the phenomenon of some employers seeking to keep workers that have suffered a workplace injury or illness away from the Scheme and seeking to terminate workers upon their return to work. Included are brief case examples with respect to AWU members.

Objective of workers' compensation scheme

Following the 2012 legislative changes, the current workers' compensation system is severely weighted against injured workers. Moreover, it is counterproductive to achieve the fundamental purpose of the Scheme; being that employees who suffer a workplace injury or illness are provided with proper support. This support properly includes:

- continued compensation for loss of income;
- lump sum payments for more serious / permanent impairment of injuries and illness; and
- continued and timely medical treatment, which is facilitated by the swift payment of medical expenses by the insurer.

Importantly, this support goes some way to redressing the difficulties that arise from the workplace injury or illness and give workers the best chance of returning to work.

The swift upturn in the financial state of Scheme has been overwhelmingly caused by the unmerited 2012 amendments that harshly cut compensation and support to deserving and in need workers

that suffered a work related illness or injury. This is the very group that the Scheme must be focussed on assisting.

Suitable employment / work capacity decisions

The fundamental change associated with the introduction of work capacity decisions by the 2012 amendments has presented the perfect storm for injured workers. A work capacity decision is the determination of an injured workers' work capacity and allows the insurer to reduce or terminate a worker's entitlement to weekly compensation payments. Reducing the weekly benefits payable to injured workers hamstrings their ability to achieve reasonable financial security and / or return to work.

It is the insurer that makes a work capacity decision, with no particular weight having to be afforded to a doctor's view of the worker's capacity. This is but one demonstration of the exceptionally broad discretion held by the insurer in making a work capacity decision. A key consideration remains whether there is suitable employment. However this definition now expressly excludes factors of utmost importance and which should not be ignored, including whether this employment is actually available, the nature of the worker's pre-injury employment and where the worker lives.

Excluding these factors allows insurers to reach manifestly unfair and absurd outcomes that severely limit or deny continued compensation payments when, in reality, there is no suitable employment. Vulnerable employees, including those with complex claims and more serious injuries are particularly susceptible to experiencing enormous disadvantage and suffering.

Injured workers have to deal with a gamut of issues that arise from the injury. This includes significant mental and emotional stresses that can often arise from a workplace injury or illness that are. The impact of mental ill-health that is experienced by these workers must be borne in mind.

The workers compensation process is complex and arduous for workers, with a number of AWU members having basic literacy and numeracy skills. This is particularly pronounced when challenging a decision of an insurer regarding a work capacity decision considering they are navigating a complex and prescriptive process opposite well resourced insurers and agencies, without a proper right to legal representation, let alone any legal aid.

Considering the profound impacts outlined above, it is manifestly unfair that injured workers do not have the right for an independent tribunal to deal with a dispute regarding a work capacity decision. As it stands, the only merits review rights for injured workers are for an internal review followed by a review by an officer of the State Insurance Regulatory Authority (SIRA). The conflict of interests for the reviewer, whether characterised as actual or perceived, is but one of the many reasons that it is essential for an independent tribunal to have jurisdiction to resolve any disputes.

The impact of a work capacity decision that results in weekly payments ceasing is akin to being denied liability, yet it is only the latter scenario that can be determined by the Workers Compensation Commission and where legal aid may be granted. This inconsistency and imbalance should be rectified.

Proposal/s

- Broaden the relevant factors that must be considered in determining whether there is suitable employment to at least include the factors that were taken into account prior to the 2012 legislative changes, including whether work is available and where the injured worker resides.
- That injured workers have the right to have disputes relating to work capacity decisions dealt with and resolved by an independent tribunal, with the Workers Compensation Commission well placed to resume fulfilling this function.
- Ensure workers have a general right to legal representation and extend the availability for legal aid grants to work capacity decisions.

Journey claims coverage

The 2012 amendments unjustly removed coverage for employees that are injured on their way to and from work, with the introduction of the 'real and substantial connection' test. This change was made despite only 2.6% of total claims being attributable to journey accidents (Joint Select Committee on the Workers Compensation Scheme Final Report dated 13 June 2012). Travelling to and from work is a necessary aspect of performing work.

The AWU has had to take out an insurance policy for journey cover on behalf of its members so that they do not suffer a loss of income in the event they are injured travelling to or from work. Therefore, employees are effectively self insuring against these risks, which is an unjust reversal of the Scheme principles as to who should properly bear this responsibility.

It is essential that every worker is protected when they are travelling to and from work. The right for employees to access income compensation and medical treatment assists the employee to get back to work as soon as possible, which also benefits the employer.

Case Example

A worker is employed at a manufacturing facility in Newcastle. At around 7am, upon finishing a night shift, he was travelling on his motorcycle the few kilometres between his work and home. While travelling along a suburban road he hit an oil patch on the road and his ankle got caught under the sliding bike, which then struck the gutter. Because of the broken ankle injury that was sustained the worker was absent from work for 7 weeks. He had to pay for the significant medical expenses of his own accord, and had he not been a member of the AWU, he would not have received any income during this period.

A significant degree of uncertainty and disputation arises from the real and substantial connection test after it was inserted by the 2012 amendments, with scope for employers to unreasonably deny liability.

Case Example

An insurer denied liability for a workers compensation claim on the basis that the injury which occurred when the worker was taking a shower did not meet the 'real and substantial connection' test. This was despite the fact that the worker had been undertaking physically taxing work in an extremely hot environment, that the shower time was paid by the employer and indeed part of its safe work systems.

Proposal/s

- Reinstate workers' compensation coverage for journey claims.

Employer's actions with respect to the workers' compensation scheme

A further issue related to the Scheme is that some injured workers are being threatened, directed or encouraged away from the workers compensation scheme towards are far inferior manner of dealing with a workplace injury or illness, such as accessing their accrued leave which may be personal leave or annual leave. Workers in this situation have reported that the employer is determined to prevent any increase to their premiums. This approach leads to a number of hazards, such as employees bearing the financial cost of medical expenses and being at risk should the injury return or become aggravated at a later point in time.

By operating outside of the workers compensation scheme, there is the heightened likelihood that employers provide duties that are not suitable (so as to delay recovery or exacerbate the injury), with the employee feeling compelled to perform this work.

Workers have reported to us instances where they are threatened (whether that be actual threats or conduct perceived as a threat) to not claim workers' compensation. At times in some workplaces, the drive to 'maintain' safety performance measures (in name only), such as days free of lost time injury, appears to takes precedence. Accepting that there has been a workplace injury, properly dealing with it through the workers compensation scheme and improving systems are relegated.

Indeed it appears that, on a broader level, the 2012 amendments to the Scheme have not assisted in attaining the objective of driving health and safety improvements at workplaces throughout the state.

Another concerning incident is injured workers that have claimed workers compensation being targeted for claiming workers compensation, including having their employment terminated. Whilst this may not be a widespread problem, it causes grave financial and emotional harm to workers that have had their employment terminated soon after having returned to their normal work.

Case Example

Two AWU members in the past three months have been terminated one day after returning to work at pre-injury duties following a short absence. One worker was simply told over the phone that he was 'no longer required', without any prior notice or further explanation. The other worker was terminated (also without any prior notice) purportedly because he had failed to fulfil his duties on his first day back. This is despite the worker having completed all of the allocated duties. An objective consideration of the instant circumstances for each worker leads to the inevitable conclusion that each worker was terminated because they had claimed their rightful entitlement to workers compensation, seemingly to the aggravation of the employer.

Proposal/s

- Increase monitoring and oversight of workplaces by regulators to ensure employers comply with workers' compensation and work health and safety obligations.
- Implement robust legislative protections to stop workers being terminated because they accessed workers' compensation.

23 September 2016

Yours sincerely,

Paul Noack
Acting State Secretary
The Australian Workers' Union NSW Branch