

INQUIRY INTO 2022 REVIEW OF THE WORKERS COMPENSATION SCHEME

Organisation: Construction, Forestry, Maritime, Mining and Energy Union
(CFMMEU)

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The Hon Chris Rath MLC
Committee Chair
Standing Committee on Law and Justice
Parliament of New South Wales
Macquarie Street
Sydney
NSW 200

Dear Chair

Re: 2022 Review of the Workers Compensation Scheme: psychological claims

The Construction Forestry Maritime Mining and Energy Union (CFMMEU) welcomes the opportunity to provide submissions to the *2022 Review of the Workers Compensation Scheme 2021* (the 2022 Review). The CFMMEU represents members engaged in the building and construction industry in New South Wales. Nationally, SafeWork Australia reports that the construction industry accounts for 16.3% of all serious injury claims and averaging approximately 36 fatalities per year. A large proportion of our members are workers who come from non-English-speaking backgrounds with little or no education beyond the age of 15. The CFMMEU plays a key role in preventing injury at work sites and supporting members in terms of their well-being and in making and pursuing workers compensation claims and appeals.

The construction industry faces constant economic pressures as employers drive employees to increase production. This intensification of work impacts upon workers both in terms of physical and psychological injury. These pressures have been particularly acute during the Covid pandemic during which workers have faced difficulty obtaining access to psychological support services.

2021 Code of Practice: Managing Psychosocial Hazards at Work

In the context of these extraordinary pressures on workers' psychological well-being a focus on prevention and early intervention is more important than ever. The CFMMEU acknowledges the input provided by the New South Wales union movement in developing the *2021 Code of Practice: Managing Psychosocial Hazards at Work* (the Code of Practice). The Code of Practice is all the better for this work and does now provide helpful guidelines for employers and employees in identifying and reviewing psychosocial hazards and responding to psychosocial risks or incidents.

The need for a Proactive Regulator

While the introduction of the Code of Practice has been beneficial, such initiatives must be

accompanied by effective monitoring and compliance regimes. Our experience of the construction industry more generally is that SafeWork has been an absent regulator, with little action taken to enforce the *Work Health and Safety 2011* and *Work Health and Safety Regulation 2017*. The CFMMEU is concerned that SafeWork appears to value its educational advisory role more than its function as a regulator. The CFMMEU has raised repeatedly raised these concerns including during the *2017 Statutory Review of the State Insurance and Care Governance Act 2015*. At that time the Standing Committee issued the following recommendation:

“That the New South Wales Government note the evidence received in this review concerning the relationship between icare and SIRA, and SIRA and SafeWork NSW’s effectiveness in carrying out their enforcement and compliance functions, and keeping a watching brief on these issues for consideration as part of the five year statutory review of the *State Insurance and Care Governance Act 2015*.”

More recently, the CFMMEU has again raised these concerns in submissions to the *McDougall Review* observing that SafeWork has become complacent in its role as regulator. The CFMMEU McDougall Review submissions outlined a litany of instances involving non-attendance by SafeWork at serious workplace incidents and failures by SafeWork to act on significant safety concerns. The resultant McDougall Report recommended that the responsible Minister “should conduct, or commission a public review of that agency’s performance of its regulatory and education functions” and that report should be made available. The NSW Government has not yet acted on this initiative.

The CFMMEU remains concerned that SafeWork is not subject to parliamentary oversight, as is the case with SIRA. The CFMMEU submits that we will only achieve a properly functioning workers compensation system when independent oversight, such as that provided by the Standing Committee over SIRA, also applies to Safework. While reforms to the New South Wales workers compensation system are important, NSW construction workers need to be confident that the regulator is genuinely committed to prevention - to stop injuries occurring in the first place.

Prevention and early intervention

The interplay between work-related psychological injury, and psychological illness associated with other causes is particularly complex within the terms of the New South Wales workers compensation scheme. The structure of the workers compensation system encourages employers and insurers to expend time and resources in the forensic examination of the causes of psychological injury so as to avoid liability and associated costs. From an employer perspective psychological injury concerns are often “resolved” through shaping disciplinary procedures as reasonable management action, justifying termination of employment. In the insurance sector claims are often denied through the characterisation of the psychological injury as having arisen from personal, domestic or other broader health or social concerns rather than work-related causes. In the real world causes of psychological injury and illness can be complex, involving a mixture of work and non-work-related causes. The “case management” approach to psychological injury often takes over such that prevention and early intervention initiatives are overlooked. This can delay intervention in terms of treatment and support and in the worst case results in the worker being terminated and /or exacerbates the illness any capacity.

Proposed improved provisional liability arrangements for psychological claims

In recognition of the complexity of psychological claims and the wide acceptance of the necessity and benefit of early intervention, the Victorian Government has taken steps to provide appropriate support for those suffering psychological claims.

The Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021

(Vic Act) took effect on 1 July 2021. The purpose of the Vic Act is to provide “access to provisional payments for reasonable treatment and services for work-related mental injuries, while they await the outcome of their claim. When claims are rejected, workers and volunteers can continue to receive provisional payments for up to 13 weeks.”¹

Importantly, the new scheme contained in the Vic Act provides income and medical support for the first 13 weeks regardless of liability. If a claim is rejected, the scheme continues to pay, thereby recognising the importance of receiving adequate support to ensure a swift and sustainable recovery. It is an ambitious scheme but is likely to have a positive effect on the return to work figures in relation to psychological claims, benefiting not just the injured worker but also the employer.

A scheme such as the one contained in the Vic Act is consistent with the objectives of the NSW workers compensation system, in particular the requirement to provide prompt treatment of injuries, effective and proactive management of injuries, and necessary medical and vocational rehabilitation following injuries in order to assist injured workers and to promote return to work as soon as possible.²

A focus on well being

The CFMMEU approach is to keep a firm focus on well-being right from the start, regardless of the cause of the psychological concern. Early intervention as opposed to endless medico-legal case management results in improved health outcomes, reduces time lost at work and builds better functioning workplaces. It is with this purpose in mind that the NSW Building Trades Group of unions support Foundation House and the CFMMEU supports Foundo Blue programs. Foundation House has an unsurpassed reputation as an industry based drug and alcohol foundation with return to work as a key objective. Foundo Blue now provides exemplary mental health and suicide prevention services for the construction industry. Foundo Blue provides general awareness training together with workshops addressing alcohol and other drugs, gambling, safe talk and suicide prevention. A 24 hour counselling assistance is available and most importantly, on site incident support. Through the “blue hat” program many construction workplaces across NSW now engage workers who are easily identifiable and approachable as first points of contact for employees with mental health concerns. Many lives have been saved, jobs maintained, families supported and otherwise compensable injuries avoided or overcome through these programs.

In contrast to the daunting and stigmatising process of workers submitting workers compensation claims or utilising an employer funded employee assistance program (EAP), Foundo Blue is worker driven. In the context of delays and access to psychological services encountered during the COVID pandemic our experience has been that the direct referrals available through the Foundo Blue program have in many cases been a lifeline for our members. Such programs should be supported economically by the Government.

Working provides dignity and meaning to life

Being at work is not just about making a living, it is an essential form of social interaction providing meaning to workers’ lives. Lengthy periods of incapacity and time away from exacerbate the underlying causes of psychological illness - the longer an employee is away from work the less likely they are to return to the workplace.

The NSW Government needs to do more through our NSW workers compensation system to reduce

¹ <https://www.worksafe.vic.gov.au/victorias-new-provisional-payments-better-support-mental-injuries>

² Section s 3(b) of 1998 Act.

the level of medico-legal case management associated with psychological injuries and illness. Prevention and early intervention is the key to achieving healthier and more productive workplaces. The CFMMEU will keep working with our members to achieve those goals.

Yours faithfully

Darren Greenfield
General Secretary