

**CFMEU (Construction Division) SUBMISSION TO THE  
GENERAL PURPOSE STANDING COMMITTEE**

**RE: INQUIRY INTO PERSONAL INJURY COMPENSATION  
LEGISLATION.**

The CFMEU is concerned about the current approach to injured workers in NSW. It is a tragedy that seriously injured workers in this State, are not receiving proper and adequate compensation and have been substantially disadvantaged by the retrospective amendments made to the Workers Compensation Act in 2001. In the construction industry, the CFMEU has had to deal with overwhelming numbers of its members who, as a result of the 2001 workers compensation amendments have been:

- denied access to any proper lump sum compensation for loss of wages and earning capacity as result of their injuries;
- been denied any sort of dignified exit from the workers compensation system or chance to bring closure on what is a life altering event in the case of serious injury;
- subjected to absurd and arbitrary outcomes as under the “American Medical Association Guidelines” (as amended by WorkCover) now being used as a binding yardstick to determine compensation rights and in the case of seriously injured worker effectively their whole future.

The CFMEU and its members (who form a large and diverse cross section of the community) believe the current legislation fails to adequately take into account the reality of what happens to a person who has suffered a serious injury at work and the effect it has on his or her family. A serious injury to one of our union members often means a nett wage loss of at least \$500.00 to \$1,000.00 net per week for the remainder of their working life and often that union member is the sole bread winner in the household. The loss of self esteem; the emotional and financial devastation an injured worker and his or her family experiences when forced by serious injury

to rely on workers compensation as a long term future is totally ignored by the present process. The present system simply fails to provide adequate compensation for loss of wages and earning capacity in cases of serious injury serious injury and fails effectively fails to provide a seriously hurt worker a real chance to restore his or her sense of standing within their family, friends and the wider community.

NSW workers now have to overcome the highest and most arbitrary threshold (15% whole person impairment as per the AMA 5<sup>th</sup> edition Workcover Amended Guidelines or more commonly known as the “15% WPI threshold”) compared to any other system of compensation in this state. The current threshold is so high that it has effectively abolished the rights of workers to bring a common law claim for loss of earning capacity and wages. The CFMEU questions why injured workers should be treated any differently from someone injured in a car accident or who may suffer an injury that is not work related or for that matter, why workers have less rights than high profile persons who are allegedly defamed. Currently, workers who suffer serious injuries, no matter how gross the negligence by his or her employer, are simply denied the same rights as a person who is hurt in a non work situation. There is no justification for this. The CFMEU strongly recommends the following reforms:

- The 15% WPI threshold presently used by Workcover is way too high and should be lowered so that at least a worker is no worse off than say a person who may have been injured in a non work situation.
- Workers be given the same rights as person hurt in non work situations that is, entitlement to have a Judge or a legally trained and experienced Arbitrator determine on the basis of evidence before them if a worker’s injury is sufficiently serious enough to allow them to claim their real wage loss as a result of the injury.
- Seriously hurt workers, who will obviously be disabled for the remainder of their working life, should be given a real choice to “exit” the workers compensation system once it is clear no further medical treatment or rehabilitation is likely to improve their situation, so as to bring some closure to this episode in their life and be allowed to move on without the psychological stigma or label of being on payments of weekly compensation. The present system only promotes insurers (who at the expense of

WorkCover and ultimately employers) continue on with unnecessary and expensive, medical consultations, “job log systems” and so called “rehabilitation” which are all unlikely to have any real success. The insurer can further under section 52A of the Workers Compensation Act stop payment altogether of any weekly compensation after two years on the basis a seriously injured worker cannot get work due to the “state of the labour market.” The seriously injured worker has little or no control over his or her future or life.

- Seriously injured workers who have clearly established long term disabilities should be entitled to a right to receive their payments of weekly compensation on a weekly basis, directly into their bank account as per their pre-injury situation before being injured. At present, the Union receives an inordinate number of complaints from injured workers who fail to receive their payments of weekly compensation on time with insurers cheques often being received many weeks late and in arrears for a number of weeks. Often workers find themselves under threat of mortgage default or eviction by the time insurers send a cheque out. The method of the payment system is totally inadequate and varies widely from insurer to insurer.
- The system should provide for proper legal representation of ordinary workers who, for a host of reasons, (often due to educational or their background), are disadvantaged and not in a position to enforce their supposed rights in the Workers Compensation Commission. Entitlements and legal rights are meaningless to workers without access to proper legal advice.

NSW workers who have been seriously hurt on the job deserve far better than the third rate justice and social security system currently meted out to them by the present WorkCover system.

Enclosed herewith are just a few of many real life cases this Union comes across every day. Hopefully, these examples will make clear to the Standing Committee the unfairness and some of the absurdities in the present system and how it effects and average worker and his family. The surnames in the following examples have been deleted to maintain their privacy however we would be pleased to arrange a meeting between the Standing Committee and any

number of these workers and provide further documents such as medical reports that would assist the Committee.

The CFMEU looks forward to meeting with the Standing Committee in person and providing the Committee with an opportunity to hear first hand the experiences of the many ordinary people who have been affected by the 2001 workers compensation amendments.

Andrew Ferguson  
State Secretary  
CFMEU (Construction & General Division)

### CASE 1 - IAN

- 44-year-old construction labourer earning about on average \$800.00 nett per week before injury at work.
- In July, 2001 he suffered serious injury to the L5/S1 disc in his spine whilst attempting to push over 500kg of besser blocks up a hill.
- He underwent an L5/S1 laminectomy to remove the protruding disc. He still has substantial pain radiating down his leg and as a result of the operation, the strength and structural integrity of his spine is substantially compromised. He realistically has no physical capacity to return to his pre-injury work doing heavy labouring and it is unlikely there is any further medical treatment to able to improve his condition.
- How it has affected his life: He and his wife are at present trying to live off payments of statutory workers compensation of about \$330.00 gross per week (less tax). He has been forced to move out of Sydney where he has lived most of his life. He is attempting to find light suitable work but his prospects are poor given his past employment background and education.
- Under the retrospective workers compensation amendments of 2001, this worker has been assessed by the WorkCover AMS doctor as having 12% whole person impairment. This assessment by the WorkCover AMS doctor is binding – it is virtually impossible to appeal it. The practical effect under the legislation is that he will receive a lump sum probably in the order of about \$25,000.00 for his injuries and pain and suffering. He will not receive any work injury damages for the huge economic loss he has suffered and will be left to survive on statutory payments of weekly compensation in the order of \$330.00 gross per week until age 66.
- He does not even have the right to negotiate with the insurer for a buyout (referred to as a “commutation” in the legislation) of his statutory payments of weekly compensation. He is further exposed to the farce of having to continuously obtain

“WorkCover Certificates” from his doctor to prove to the insurer he is incapacitated for work so that he may continue obtaining payments of statutory weekly compensation. This cost to the WorkCover system will continue until he reaches age 66.

## **CASE 2 - GRANT**

- 40 year old construction worker earning about \$900.00 nett per week before an accident at work.
- On 15 May, 2002 he fell through a glass awning at work. He fractured his wrist and vertebrae in his spine. He has had substantial medical treatment. There is clear independent expert opinion that his employer was negligently responsible for the accident.
- Present situation: he is presently being rehabilitated and attempting to return to light duties however all medical opinion confirms that his future capacity for work in the construction industry has been severely compromised.
- Legal outcome: It is unlikely he will get over the “15% whole person impairment” threshold introduced by the 2001 Workers Compensation Amendments. This will effectively mean he will not be allowed to sue his employer for damages despite the employer’s gross negligence.
- He will not be entitled to any lump sum in respect of his loss of earning capacity. He will not even have the right to commute his entitlements to weekly compensation from the workers compensation insurer for a lump sum.

### **CASE 3 - SCOTT**

- 36 year old builder's labourer earning about \$650.00 per week before injury.
- He suffered injury to L4/5 disc in his spine on 13 February, 2001 after being asked by his employer to repetitively move 80 to 160 kilo hebel blocks. Presently, he suffers extreme pain in his lower back radiating down to his legs. His treating specialist has recommended removal of the damaged L4/5 disc in his spine and a spinal fusion to stabilise his spine.
- He is presently totally unfit for employment and even after he has the operation as recommended by his treating specialist, he will be unfit for any manual or labouring type work.
- The WorkCover AMS doctor has determined that he has a whole person impairment of only 13%. The decision of the WorkCover AMS doctor is binding and virtually impossible to appeal. The assessment of 13% WPI means he will probably receive a lump sum in the order of \$25,000.00 to \$30,000.00 for his pain and suffering and impairment however, he will have no right to receive any work injury damages for his loss of future earning capacity despite his relatively young age, despite clear negligence by his employer and despite there being no real prospect of him returning to any meaningful sort of work.
- He will continue to have to see his doctor to obtain "WorkCover Certificates" for the next 30 odd years of his working life in order for him to continue receiving payments of weekly compensation from the insurer. He is effectively probably worse off under the WorkCover system of payments of statutory weekly compensation than he would be under the Centrelink social security system.

### **CASE 4 - NEIL**

- 35 year old removalist earning about \$600.00 per week nett before his injury.
- He was hurt at work whilst carrying a piano in the course of his employment in 2002. He has suffered substantial injury to his spine including damage to the L3/4 and L4/5 discs. The practical affect of this is that he has constant pain and his doctors have certified him as being totally unfit for his pre-injury employment.
- He has commenced proceedings in the Workers Compensation Commission and the WorkCover AMS doctor (whose decision is binding) has assessed him as having only a 6% whole of person impairment. This means he will be entitled to only \$7,500.0 lump sum compensation for his impairment. He will not be entitled to any lump sum for pain and suffering.
- As a result of the binding medical panel 6% assessment, he is not entitled to make any claim against his employer for the unsafe system of work or damages for his loss of future earning capacity. He is not entitled to negotiate with the workers compensation insurer to obtain some sort of commutation of his rights to future weekly compensation despite his relatively young age.

### **CASE 5 - TOMO**

- 61 year old carpenter who immigrated to Australia in the 1960's and has spent his working life since then in the building industry.
- In 2001 at age 57, he suffered a serious injury at work to his right shoulder whilst attempting to hold a 4.5 metre timber beam being passed down to him.
- He has had major surgery on his right shoulder including a subacromial decompression and extensive hydro cortisone treatment. His pathology includes significant rotor cuff tear in his right shoulder. His dominant arm is his right arm.
- All doctors and treating specialists who have seen him agree that he is totally unfit for any heavy manual work involving his right arm. His educational background is limited having left school at about age 16. He speaks English however he has a very limited command of reading and/or writing in English.
- He lawyers obtained a lump sum of \$30,000.00 for him from the workers compensation insurer in respect of the loss of use of his right arm and pain and suffering. The Workers Compensation Commission AMS doctor determined that he has only an 11% whole of person impairment. This decision is binding on the worker. The worker is effectively unemployable given his background, age and disability to his right arm. He and his wife are forced to live off statutory payments of weekly compensation in the sum of \$415.00 gross per week (less tax) until age 66. Prior to his accident in 2001 when he hurt his right arm, he was earning about \$900.00 to \$1200.00 gross per week.
- The Workers Compensation Commission finding of 11% WPI means he will not be entitled to any damages for his loss of earning capacity or even a buyout of his rights to weekly compensation. Up until recently, the worker had been required to continue to see his doctor for "WorkCover Certificates" although there is no prospect of any further medical treatment that will improve his condition so that he may continue to

receive his payments of weekly workers compensation. He is also required, in accordance with a request made by the insurer, to continue to fill out statutory declarations and “job logs” of attempts he is making to find “suitable light work”.

- It is now over 4 years since the original injury and despite the worker having undergone substantial medical treatment, surgery and rehabilitation, the insurer has now requested that he attend a new “rehabilitation course”. The insurer is requiring the worker to travel 50 kilometres back and forth from his home each day to attend this “rehabilitation course” where they are attempting to teach him computer skills. He has been doing this course now for 10 weeks straight and has been told that there is another 10 weeks of this course to go. The worker is doing his best but is frustrated by the process given that he has already gone through rehabilitation and made numerous bona fide attempts to find work.
- The worker has been effectively told that if he does not attend this 20 week course, his statutory weekly compensation will be stopped. The worker is not entitled to receive any Centrelink payments under a disability support pension or Newstart allowance as he has entitlements under law to weekly workers compensation (which he can’t buyout due the 15% WPI threshold). The worker is effectively worse off under the workers compensation system than under the Commonwealth social security system.
- The worker’s treating general practitioner has serious reservations and doubts about the value and costs of this most “recent” rehabilitation program given that it is over 4 years since the accident, the workers age, his educational and occupational background and the substantial extent of his injury.
- The worker and his doctors do not believe there is any further treatment that will improve his condition. The worker is pessimistic about the chances of anyone realistically offering him a job given his present situation.
- How much is this 20 week rehabilitation program for 61 year worker former carpenter with limited English and loss of use of right arm costing the Workcover system (the insurer is not paying for it)? Who is it assisting?

### **CASE 6 - RAUL**

- 56 year old formworker who spent most of his working life in the building industry. On 20 October, 2002 he suffered an injury to his lower back whilst stripping formwork. The injury put him out of work for about 18 months.
- Workers Compensation Commission AMS doctor had assessed the injury as a being 6.75% whole of person impairment which should have entitled worker to a lump sum of \$8,437.50. The worker should have also received weekly compensation for his 18 months off work.
- The insurance company denied the claim and it was referred to an arbitrator in Workers Compensation Commission who should of sorted this relatively simple claim easily and quickly but it ran to a full hearing in the Workers Compensation Commission and is now pending appeal for a presidential member of the Workers Compensation Commission.
- There are numerous cases of the Workers Compensation Commission appointing Arbitrators without any real experience or understanding of the medical and legal issues involved with workers compensation claims. This matter is a good and not untypical example of what happens when the determination process is left to inexperienced persons. The Arbitrator in this matter managed to:
  - (a) totally ignore the Workers Compensation Act Legislation of 2001 and even the Commission's own AMS doctor who says the worker had a 6.75% WPI and ordered the worker be paid nothing for lump sums in respect of disability and impairment;
  - (b) in respect of weekly compensation, decided the worker was only entitled to \$116.00 per week.

- The Arbitrator in this particular matter, had virtually a full day hearing the matter and then delivered his decision over two days from 2.00 pm to 7.30 pm on 20 January, 2005 (5.5 hours) and then continued delivering judgment on 25 January, 2005 from 10.00 am to 12.00 pm (a further 2 hours). The worker is Spanish speaking and has a very limited command of the English language. Were it not for the assistance provided by the Union's lawyers, this worker would have no chance of lodging an appeal. The union's lawyers will be paid for only the first four(4) hours of the arbitration hearing. There is no transcript of the Arbitrator's decision available.
- The worker's Solicitors have lodged an appeal against this ridiculous decision but of course this is still pending, waiting to be heard. The remuneration that is paid to the lawyers for going through appeal process will not cover the true legal costs involved. It is only because the worker is a Union member that he has been able to obtain full legal advice to go through the appeal process.
- It would be interesting to know how the Department of School Education managed to pay for its barristers including a Queens Counsel in a recent high profile case involving a school teacher that it appealed in the Workers Compensation Commission? The Union's lawyers in our member's appeal will only be paid a few hundred dollars if the worker's appeal is successful. Neither the Union or the worker in this case can afford to pay for barristers to make sure workers rights are not trampled by poor and arbitrary decisions by the Workers Compensation Commission.
- Despite the "faster, fairer, simpler" new Workers Compensation system, it is now almost three years since this worker suffered his injury in October, 2002 and although the injury was a rather relatively straight forward matter, the matter has still not been resolved.

**CASE 7 - BRUCE**

- 48 year old scaffolder, married, earning in excess of \$1,000.00 per week nett before his injury.
- 31 August, 2001 he suffered serious multiple injuries when a large stack of scaffolding fell on him. Employer had allowed the scaffolding to be stacked way beyond safe limits. WorkCover prosecuted the employer for a gross breach of the Occupational Health & Safety Laws. The worker suffered serious multiple injuries to his neck, back, knee, arms and shoulders as a result of the scaffolding falling on him.
- The workers compensation insurer has accepted liability for the workers injuries and paid him a lump sum of \$22,500.00 for his disabilities and pain and suffering. Workers compensation continues to pay him full statutory weekly workers compensation of about \$330.00 gross per week.
- Worker has made an application to the Workers Compensation Commission to see if he is over the 15% whole person impairment threshold which would allow him to sue the employer for negligence and hence claim his real wage loss as a result of the accident, that is about \$700.00 nett per week.
- Workers application for this AMS assessment is still pending however it is unlikely he will be assessed as being over the 15% whole person impairment. It is most likely he will remain stuck on statutory payments of weekly compensation of \$330.00 for the remainder of his working life with only limited prospects of ever returning to any other suitable employment.

### **CASE 8 - DANIEL**

- 33 year old construction labourer with dependant child, earning about \$1,000.00 to \$1,500.00 gross per week before his work accident.
- He was involved in an horrific accident in February, 2005 on a building site which involved the collapse of some concrete planks he and a fellow worker were standing on. The concrete planks were over an 8 metre span and collapsed. Beneath them was their supervisor who died instantly when the concrete plank decapitated his head.
- The worker saw the concrete plank take off the supervisor's head and landed next to the decapitated body. The worker fell about three metres onto the concrete below on his back.
- He is currently receiving:
  - (a) medical treatment to investigate a suspected fractured vertebrae in his spine;
  - (b) counselling for symptoms of what would appear to be a post traumatic stress disorder
- Despite the horrific events and circumstances in which the worker has found himself, it is highly unlikely his injuries will meet the 15% whole of person impairment threshold based on experience of our injured members since the 2001 changes in order to make a claim for damages.
- The absurdity of this legislation is that when the Workers Compensation Commission Approved Medical Specialist (AMS) comes to make his binding assessment of this workers % WPI, he will not be able to combine what ever psychological injury or damage the worker has suffered with the actual physical injury, say the fractured vertebrae, to determine if he is over the "15% threshold".
- Assuming the above injured worker's most likely outcome is that the workers compensation insurer will only be liable to pay him probably be a small lump sum, (maybe not even \$20,000 on past experience) for the physical disability arising from

the fractured vertebrae and nothing for any psychological damage he suffered unless he is completely incapable of caring for himself on the basis of his psychological or psychiatric injury.