

**PAPER ON THE EMPLOYEES' PERSPECTIVE
WHEN INJURY OCCURS AT THE WORKPLACE**

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INTRODUCTION

1. When workers suffer workplace injury it can have a devastating effect on their lives. For some workers it can be life changing, going from doing a well paid job to having to adjust their lives to live on the statutory workers compensation rate for someone whose injuries are long term and prevent them from returning to pre-employment or other duties.
2. As the Union's workers compensation officer I have seen many examples where the plight of injured workers can be exacerbated by the conduct of their employer and the insurer after an injury occurs.
3. Through this paper I hope to share some of the issues that can arise that can lead to problems with claims management from an injured workers perspective.
4. I will also try and provide some practical suggestions that might assist in avoiding problems.
5. Unions NSW has recently done a survey about workers compensation and return to work issues and the results indicate that for most workers the process operates fine, but our experience has been that for some long term incapacitated workers particularly issues can arise which can send claims off the rails.

PREVENTION OF WORKPLACE INJURY

6. Firstly, I would like to say something about the interrelation between good occupational health and safety management and workers compensation. Many workplace injuries are avoidable. Often employers look at the management of their occupational health and safety obligations in isolation of their workers compensation obligations. It seems almost trite to say, but the best way to avoid workers compensation disputes is to prevent an injury occurring in the first place
7. Requirements under the Occupational Health and Safety Act 2000 and related regulations if implemented can significantly reduce the risk of injury.
 - implementing risk assessment procedures. Actually looking at the work that is to be done, assessing the risk and potential hazards and eliminating or controlling those risks, does work to minimise the risk of injury at the workplace;
 - risk assessment should be done in consultation with employees. Seeking employee input into developing safe systems of work, including the establishment of an occupational health and safety committee at the workplace, does lead to good outcomes. Employees carry out the day to day work, they can provide the information that employers require to fulfil their occupational health and safety obligations and to reduce the risk of injury at the workplace.
 - systems should be reviewed and where necessary modified as the work environment changes. Again this should be done with consultation with your employees. Many employers view the obligation to consult as another added burden, but it can in my view give employees some ownership of the processes employed at work, make employees and employers alike safety conscious and can assist in injury prevention and ultimately reduce costs.

PREPARATION FOR THE POSSIBILITY OF A WORKERS COMPENSATION CLAIM

8. In terms of the workers compensation process, the first observation I would like to make is that problems can arise in dealing with a workers compensation claim because employers and employees are unprepared for the experience. A lack of knowledge as to respective obligations and unfamiliarity with the system can result in employers and employees, taking an antagonistic, almost "siege mentality" approach to dealing with the challenges of a workplace injury. The availability of information to employees and the familiarity of employers with the manner in which the workers compensation system operates in relation to claims process, payment of benefits and return to work can go a considerable way to avoiding disputation.

9. There are tools available in the Workers Compensation legislation which can be effectively utilised to demystify the process for employers and employees alike.
10. For example, **Section 43** of the *Workplace Injury Management and Workers Compensation Act 1998* (with some modifications in relation to self insurers) obliges insurers to have an injury management program, and provides:

43 Injury management programs

(1) An insurer must establish and maintain an injury management program and must revise its injury management program from time to time or when the Authority directs. An insurer must lodge a copy of its injury management program, and any revised injury management program, with the Authority.

(2) An insurer must give effect to its injury management program and for that purpose must comply with the obligations imposed on the insurer by or under the program.

(3) An insurer must take appropriate steps to ensure that each employer who is insured by the insurer is made aware of the employer's obligations under this Chapter and made and kept aware of the requirements of the insurer's injury management program. This subsection does not apply to a self-insurer.

(4) Within 3 working days after being notified of a significant injury to a worker, the insurer must initiate action under the insurer's injury management program and must (in accordance with that program) make contact with the worker, the employer (except when the insurer is a self-insurer) and (if appropriate and reasonably practicable) the worker's treating doctor. A "working day" is any day except a Saturday, Sunday or public holiday.

(5) An employer must comply with the obligations imposed on the employer by or under the insurer's injury management program. This subsection does not apply when the employer is a self-insurer.

11. As I understand the function of an injury management program it is a system to ensure that claims, when received, are dealt with promptly and effectively. An insurer is obliged to make the program known to an employer. When we speak to many employers, particularly small employers they are not familiar with this requirement. How many employers receive a copy of the injury management plan? How many insurers have taken employers and employees through it? How many of employers have discussions with their insurers as to the appropriateness of the plan for their workplace and what their obligations are under the plans?
12. My impression is these programs are mass produced documents and are established by insurers and WorkCover in a "one-size fits all" approach. Some employers do not pay attention to this until an injury occurs and a claim is made. It would assist both employers and employees if prior to any claims being made employers and employees are familiar with the processes that will apply in the event that a workers compensation claim is made. For example employers are required to have ohs policies and discrimination policies in the workplace, it would be useful for employers to also have a workers compensation policy which details the steps to be taken when an injury occurs. This would assist to remove some of the confusion that can arise and which can escalate tensions between an employer and employee when an injury does happen.
13. An injury management program should, I believe, comprehensively set out both the employees' and employer's rights and obligations. It should set out the roles of the insurer in processing a claim, making payments, providing and authorising medical and rehabilitation services. It should also set out the role of the nominated treating doctor.
14. I would encourage employers to make such information freely available to their employees so as to demystify the process. Some employers have a view that to provide employees with this type of information is to encourage claims. I don't accept this. Employees will eventually get the information they need to make a claim, from their unions, their lawyer and WorkCover. By that time much time has elapsed, the relationship between employer and employees damaged and the prospects of a person returning to work diminished. This may also mean higher premiums ultimately for employers. It is not worth it for all parties.

15. Other proactive steps can be taken. In many industries, similar sorts of injuries are suffered. For example, in the building and construction industry one of the most predominant injuries seem to occur to backs. These can range from simple strains that clear up with a bit of rest to very serious complaints which require surgery and ultimately a change in career. More analysis of claims experience in industry as well as the workplace level should be undertaken to identify where there is systemic problems and some preventative action should be taken.
16. Some employers are also taking a pro-active approach to the provision of suitable duties, a matter I will have more to say about later. Some employers are carrying out workplace assessments of each and every job and from there developing a register of suitable duties associated with those jobs in the event that injuries occur. Such rehabilitation providers, as MEND a joint venture between the Union and the Master Builders Association, provide specialist services its employer clients in the building and construction industry in this area. In the event of a claim, a suitable duties list is provided to the worker's doctors to advise whether worker is capable of doing the suitable duties.
17. Another useful tool is the injury register. **Section 63 and s256** of the *Workplace Injury Management and Workers Compensation Act 1998* provides:

Section 63:

- (1) There is to be kept at every mine, quarry, factory, workshop, office or shop in some readily accessible place a register of injuries.
- (2) A **worker** employed at any such mine, quarry, factory, workshop, office or shop, or any person acting on the **worker's** behalf, may enter in the register of injuries particulars of any **injury** received by the **worker**.
- (3) The regulations may prescribe the form of a register of injuries and the particulars to be entered in the register.
- (4) If particulars of an **injury** are duly entered in a register of injuries as soon as possible after an **injury** happened, the entry is sufficient notice of the **injury** for the purposes of this Act.
- (5) If subsection (1) is contravened, the manager of the mine or quarry, or the occupier of the factory, workshop, office or shop, is guilty of an offence and liable to a penalty not exceeding 50 penalty units.

256 Register of injuries

- (1) A register of injuries must be kept in some readily accessible place at every mine, quarry, construction site, factory, workshop, office or shop.
- (2) A **worker** employed at any such mine, quarry, construction site, factory, workshop, office or shop, or any person acting on the **worker's** behalf, may enter in the register of injuries particulars of any **injury** received by the **worker**.
- (3) The regulations may prescribe the form of a register of injuries and the particulars to be entered in the register.
- (4) If particulars of an **injury** are duly entered in a register of injuries as soon as possible after an **injury** happened, the entry is sufficient notice of the **injury** for the purposes of this Act.
- (5) If subsection (1) is contravened, the manager of the mine or quarry, or the occupier of the construction site, factory, workshop, office or shop, is guilty of an offence.

Maximum penalty: 50 penalty units.

18. For some reason, some employers appear to take the approach that if a register is not provided people will not make claims. It is an employer's legal obligations to provide such a register. It is also a useful tool for employers to track injuries, even minor ones that may not require any medical attention or give rise to a claim, as it may be an indication to that there is a system breakdown, or that employees need additional training or supervision. It is a useful tool for employers in complying with their obligations to assess risk and identifying hazards in the workplace under the occupational health and safety regime. The register is a useful source of information.

19. For employees it can save considerable delay in the event of injury and having to make a claim. Often employees suffer an injury at work, but feel that they do not want to record the injury having occurred because they feel this may lead to disciplinary action or termination of employment. Other times it may be simply that they do not consider the injury serious enough. Minor injuries can turn into major ones and failing to record the injury can result in delay in claims processing as investigations are made to try and determine when and where an injury occurred and disputation can arise. Ultimately the claim may be accepted but the tensions that can arise can detrimentally affect the relationship between the employer and employee and impact adversely on the rest of the process.
20. Delays in the very beginning of the process often create tensions between an employer and employees which can then make other things such as the provision of suitable duties and return to work more difficult than they would otherwise be. From my experience acrimony between employers and employees plays a big part in the wheels falling off the workers compensation/injury management process.

WHEN AN INJURY OCCURS

21. Issues can also arise when an injury occurs that can de-rail the process from the beginning.
22. If a workplace injury occurs an employee is obliged to notify the employer as soon as possible that it has occurred. **Section 61** of the *Workplace Injury Management and Workers Compensation Act 1998* provides:

61 Notice of injury to be given to employer

(1) Compensation may not be recovered under this Act unless notice of the injury has been given to the employer as soon as possible after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury.

(2) Notwithstanding subsection (1), the absence of, or any defect or inaccuracy in, any such notice is not a bar to the recovery of compensation if it is found in proceedings to recover that compensation:

(a) that the person against whom the proceedings are taken has not been prejudiced in respect of the proceedings, or

(b) that the absence of, or defect or inaccuracy in, the notice was occasioned by ignorance, mistake, absence from the State or other reasonable cause, or

(c) that the person against whom the proceedings are taken had knowledge of the injury from any source at or about the time when the injury happened, or

(d) where the employer is the owner of a mine or quarry, or the occupier of a factory, workshop, office or shop:

(i) that the summary referred to in section 231 has not been posted up in accordance with that section or the employer has otherwise contravened that section, or

(ii) that the injury has been reported by or on behalf of the employer to an inspector of mines or factories, shops and industries, or

(iii) that the injury has been treated in a first aid room at the mine, quarry, factory, workshop, office or shop, or

(e) that the injury has been reported by the employer to the Authority in accordance with this Act.

23. Once an injury is notified some of the problems faced by injured workers include:

ENCOURAGING WORKER NOT TO MAKE A CLAIM

24. In some workplaces there is a culture that notice of injury and the making of claims should be discouraged. Some employers even threaten workers with dismissal if they make a claim. I have also come across workers who have had their employers paying their wages and medical costs for a period and then when this arrangement no longer suits the employer for it to stop, sometimes many months after a workplace injury. This is often done in the belief that workers compensation costs will be avoided. Its false economy.
25. The result of such conduct is that a claim will eventually be made. When an employee finally does make a claim there are all manner of delays as the insurer tries to investigate and

process the claims. In the meantime employees are deprived of access to rehabilitation services, specialist medical care and other compensation benefits. Such an approach also increases the likelihood of that employee not returning to work either with their current employer or someone else.

26. The provisions of the Workplace Injury Management and Workers Compensation Act 1998 which relate to claims processing were designed in 1998 by industry stakeholders after advice that best practice requires early intervention in injury management. Early intervention can only occur if workers are able to notify their injuries without fear of reprisal from their employers.

FAILING TO NOTIFY THE INSURER OF AN INJURY OR CLAIM

27. In my experience some employers also fail to notify their insurance company of an accident and fail to forward details of a claim in a timely fashion to their insurer. An employer is legally obliged to notify the insurance company of an injury.
28. **Section 44** of the *Workplace Injury Management and Workers Compensation Act 1998* provides for Early notification of workplace injury. Again there is some aspects of this that do not apply to self insurers:

44 Early notification of workplace injury

(1) An **injured worker** must notify the **employer** that the **worker** has received a **workplace injury** as soon as possible after the **injury** happens.

(2) The **employer** of an **injured worker** must notify the **insurer** or the **Authority** within 48 hours after becoming aware that a **worker** has received a **workplace injury** in the manner prescribed by the regulations.

(3) If an **employer** has given notice to the **insurer** in accordance with subsection (2) of a **workplace injury** to a **worker**, the **insurer** must forward that notice to the **Authority** in accordance with the regulations.

(3A) If an **employer** has given notice to the **Authority** in accordance with subsection (2) of a **workplace injury** to a **worker**:

(a) the **Authority** must as soon as practicable forward that notice to the **insurer**, and

(b) the notice given to the **Authority** is taken to be notice given to the **insurer** for the purposes of the **employer's policy of insurance**.

(4) Subsection (2) do not apply when the **insurer** is a self-insurer.

(5) The regulations under section 160 of **the 1987 Act** may make provision for the prescribed excess amount applicable to an **employer** under that section to vary according to the time within which the **employer** notifies the **insurer** concerned that a **worker** has received a **workplace injury**.

Note: The obligations imposed by this section are in addition to those imposed by sections 61–69.

29. However, s44 requires an employer to inform their insurer within 48 hours of a workplace injury. As I understand it this notice can be given in many forms such as by phone and facsimile.
30. Again the reasoning behind this provision was to encourage early intervention and for claims management to occur in a more timely fashion, the experience being that many employers were not reporting injuries, or not doing so in timely fashion, which can adversely affect claims process and increase individual claims costs and industry wide costs. WorkCover in recent forums that I have been to have reported that there is a marked improvement in early notification and this is very good to see.

FAILURE TO ESTABLISH AND ABIDE BY INJURY MANAGEMENT PLAN

31. The Act, also requires in the event that a worker suffers a significant injury (one where a worker is likely to be off work for more than 7 days), that an injury management plan be established. Many employers seem not to have in place such a plan, or are not aware of their plan, or do not abide by it.

32. **Section 45** of the *Workplace Injury Management and Workers Compensation Act 1998* provides:

Injury management plan for worker with significant injury

45 **Injury management plan** for **worker** with **significant injury**

- (1) When it appears that a **workplace injury** is a **significant injury**, an **insurer** who is or may be liable to pay **compensation** to the **injured worker** must establish an **injury management plan** for the **injured worker**.
- (2) The **injury management plan** must be established in consultation with the **employer** (except when the **insurer** is a self-insurer), the treating **doctor** and the **worker** concerned, to the maximum extent that their co-operation and participation allow.
- (3) The **insurer** must provide both the **employer** and the **injured worker** with information with respect to the **injury management plan**.
- (4) The information that the **insurer** must provide to the **injured worker** includes a statement to the effect that the **worker** may have no entitlement to **weekly payments** of **compensation** if the **worker** fails unreasonably to comply with the requirements of this Chapter after being requested to do so by the **insurer**.
- (5) The **insurer** must keep the **employer** of a **worker** who has received a **significant injury** informed of significant steps taken or proposed to be taken under the **injury management plan** for the **worker**. This subsection does not apply when the **insurer** is a self-insurer.
- (6) An **insurer** must as far as possible ensure that vocational retraining provided or arranged for an **injured worker** under an **injury management plan** is such as may reasonably be thought likely to lead to a real prospect of employment or an appropriate increase in earnings for the **injured worker**.
- (7) An **insurer** must give effect to an **injury management plan** established for an **injured worker** and for that purpose must comply with the obligations imposed on the **insurer** by or under the plan.

33. To compliment this, employers are also required to implement return to work plans. These are often developed by a return to work coordinator (in those workplaces where a return to work coordinator is compulsory) or with the assistance of a rehabilitation provider. The first comment I would like to make here is that where an employer has a return to work coordinator they should ensure they undertake the accredited WorkCover course and are familiar with the provisions of the Act and the processes which apply to their workplace in managing a claim. Many employers delegate this role to their payroll people who are not necessarily trained or experienced, or have the time, to develop a plan, consult with the doctor and employee and implement and review the plan. A return to work plan can only work if it is properly developed, implemented and reviewed. It is also strongly suggested that any return to work plan should be in writing, signed off by the relevant parties, employer, employees and treating doctor and where appropriate union representatives, so that everyone is aware what is required of them. It should clearly set out the steps to be taken, the goals to be achieved and the timeframe in which it will be reviewed.

34. The Act sets out what the legal obligations of both the employer and the employee in this area. **Section 46** of *Workplace Injury Management and Workers Compensation Act 1998* obliges an employer to cooperate in any injury management plan:

46 Employer's injury management plan obligations

- (1) The **employer** must participate and co-operate in the establishment of an **injury management plan** required to be established for an **injured worker**.
- (2) The **employer** must comply with obligations imposed on the **employer** by or under an **injury management plan** for an **injured worker**.
- (3) This section does not apply when the **employer** is a self-insurer.

35. **Section 47** of *Workplace Injury Management and Workers Compensation Act 1998* sets out the employee's obligation to cooperate:

Worker's injury management plan obligations

47 Worker's injury management plan obligations

- (1) An **injured worker** must participate and co-operate in the establishment of an **injury management plan** required to be established for the **worker**.
- (2) The **worker** must comply with obligations imposed on the **worker** by or under an **injury management plan** for the **worker**.
- (3) The **worker** must, when requested to do so by the **insurer**, nominate as the **worker's** treating **doctor** for the purposes of an **injury management plan** for the **worker** a medical practitioner who is prepared to participate in the development of, and in the arrangements under, the plan.
- (4) A medical practice can be nominated as treating **doctor** for the purposes of subsection (3). Such a nomination operates as a nomination of the members of the practice who treat the **worker** from time to time and a reference in this Chapter to the **nominated treating doctor** is a reference to those members of the practice.
- (5) The **worker** must authorise the **worker's** **nominated treating doctor** to provide relevant information to the **insurer** or the **employer** for the purposes of an **injury management plan** for the **worker**.
- (6) An **injury management plan** must provide for the procedure for changing the **worker's** **nominated treating doctor**.

36. What some of the Union's members' experience has been is that what is set down in an injury management and/or return to work plan is often not adhered to with employers, or site foreman, requesting that an employee carry out duties that fall outside of the plan. Workers will mostly do what they are directed to do, but what happens, which I see often in my industry, is a person can sustain a new injury, or an aggravation of the injury. Workers sometimes complain to me that some of their rehabilitation providers are very pushy about them getting back to work, and at times people have felt forced to return to work too early.
37. A re-injury or aggravation might have them off work again, for what can be a longer period than they would otherwise have been, or do even greater physical harm. Any changes to a plan should be done in consultation with an employee and their treating doctor. If someone is on a return to work plan then their line management should be involved and advised about the plan and it should be adhered to.

THE FAILURE TO PAY WEEKLY BENEFITS ON TIME

38. One of the major complaints I often receive from injured workers is the delay in receiving workers compensation benefits. This has been markedly improved by the introduction of the provisional liability sections of the Act. However, from time to time I still need to chase up employers to pay their employees. Often the explanation given is the insurer has not made the payment to the employer. A delay in receiving weekly compensation is a sure way for the relationship between an employee and employer to deteriorate and deteriorate quickly. With people committed to mortgage payments etc a delay in receiving their weekly workers compensation can have devastating effect.
39. This can also have an extremely negative impact when return-to-work options have to be discussed and implemented.
40. Workers by and large do not want to be off work due to an injury. They would rather be at work earning good wages and not stuck at home earning much less on workers compensation, particularly in the building industry where workers can be earning very good money. Being in this situation can place great strains on a workers family financially and socially. They are probably already feeling very stressed and vulnerable about their situation, particularly if the injury is a serious one requiring hospitalisation, surgery or ultimately a career change.
41. In such circumstances, to have their payments then delayed just adds fuel to the fire.

42. There are provisions in the Act, including the provisional liability provisions that mandate certain conduct by employers and insurers in this area and should be built into an employers system for managing claims. Such as section 69 of the *Workplace Injury Management and Workers Compensation Act 1998* which sets out an employers obligation to forward information to an insurer within 7 days and must as soon as practical pay workers compensation benefits:

69 Action by employer in respect of claims (cf former s 93)

(1) An employer (not being a self-insurer):

(a) who receives a claim for compensation or any other documentation in respect of such a claim—must, within 7 days after receipt of the claim or documentation, forward it to the insurer who the employer believes is liable to indemnify the employer in respect of the claim, or

(b) who receives a request from that insurer for further specified information in respect of the claim or documentation—must, within 7 days after receipt of the request, furnish that insurer with such of the specified information as is in the employer's possession or reasonably obtainable by the employer, or

(c) who has received compensation money under this Act from an insurer—must, as soon as practicable, pay the money to the person entitled to the compensation.

Maximum penalty: 50 penalty units.

43. **Section 84**, provides that weekly compensation is made in a timely fashion:

84 Times for payment of weekly compensation

(1) A weekly payment of compensation is payable:

(a) at the employer's usual times of payment of wages to the worker,

(b) at fortnightly or other shorter intervals, or

(c) at such other intervals as are agreed on between the employer and the worker.

(2) In this section:

"weekly payment of compensation" includes compensation payable under section 25 (1) (b) in respect of a dependent child of a deceased worker.

44. S74A provides that insurer is required to pay compensation promptly.
45. Much antagonism can be avoided by payments being made on time. I have had workers come to seek the advice of the Union because their employer changes the mode of payment from an EFT system to the sending of cheques when a worker is not ordinarily paid in cheque. Some workers placed in that position are forced to cash cheques at loan offices, paying part of their compensation in commission to loan sharks, because they cannot wait for their cheque to clear to meet financial obligations. One worker contacted me because he was forced by his employer to travel from Newcastle to Sydney to pick up his cheque, where he previously was paid by EFT. Such conduct by employers is inflammatory and intimidating and can soon contribute to a complete breakdown of the relationship between an employer and an employee.
46. Such conduct is perceived by an employee as punishment for being injured or for making a claim. Fostering a culture of blame as against the employee for their injury is not conducive to a smooth return to work.
47. The introduction by insurers to payments by EFT would go a considerable way in reducing disputation. I will say more about insurers later.

FORCING EMPLOYEES TO USE COMPANY DOCTORS

48. Another way that employers can trample on the rights of workers is to deprive them from seeking the advice and attention of a medical practitioner of their own choice. It is the employee's right to choose who their nominated treating doctor shall be and an employer should not infringe upon that right.

49. Some employers also seek to impose themselves on the relationship between a workers and their doctor. The workers compensation legislation allows for employers to obtain relevant medical advice in relation to return to work issues. This should be done in accordance with the injury management plan so that the rights of workers and employers are protected.
50. Obviously an employer, through their insurer, is also entitled to seek a second opinion as they often do, and it should be through this process that medical inquiries should be made by the insurer and the employer. This maintains the integrity of the system.

THE FAILURE TO PROVIDE SUITABLE DUTIES

51. One of the biggest issues that leads to dispute is in the provision, or lack thereof, of suitable duties. The Workplace Injury Management and Workers Compensation Act also obliges employers to provide suitable duties. **Section 49** provides:

Employer must provide suitable work

49 Employer must provide suitable work

(1) If a **worker** who has been totally or partially incapacitated for work as a result of an **injury** is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the **employer** liable to pay **compensation** to the **worker** under this Act in respect of the **injury** must at the request of the **worker** provide suitable employment for the **worker**.

(2) The employment that the **employer** must provide is employment that is both suitable employment (as defined in section 43A of the **1987 Act**) and (subject to that qualification) so far as reasonably practicable the same as, or equivalent to, the employment in which the **worker** was at the time of the **injury**.

(3) This section does not apply if:

- (a) it is not reasonably practicable to provide employment in accordance with this section, or
- (b) the **worker** voluntarily left the employment of that **employer** after the **injury** happened (whether before or after the commencement of the **incapacity** for work), or
- (c) the **employer** terminated the **worker's** employment after the **injury** happened, other than for the reason that the **worker** was not fit for employment as a result of the **injury**.

Note: See also Part 7 Chapter 2 of the **Industrial Relations Act 1996** for provisions for protection of employment of **injured workers**.

52. For their part an employee must according to s48 of the *Workplace Injury Management and Workers Compensation Act*:

Injured worker's obligation to return to work

48 Injured worker's obligation to return to work

An **injured worker** must make all reasonable efforts to return to work with his or her pre-injury **employer** (that is, the **employer** liable to pay **compensation** to the **worker**) as soon as possible, having regard to the nature of the **injury**.

53. The *Workplace Injury Management and Workers Compensation Act* does have some "big stick elements" where parties fail to meet their obligations. **Section 56** of the Act provides for increased premiums as a result of increased claims cost due to an employer's failure to meet their obligations:

56 Compliance by employer

(1) Any increased **costs** associated with a failure by an **employer** to comply with a requirement of this Chapter can be taken into account (in conformity with the requirements of this Act with respect to the determination of premiums) in the calculation of a **claims** experience factor for the **employer** for use in the determination of the premium payable for an **insurance** policy by the **employer**.

(2) The regulations may make provision for or with respect to the payment by an **employer** who fails to comply with a requirement of this Chapter of an amount by way of a premium surcharge.

(3) The amount of any such premium surcharge payable under the regulations need not be referable to any increase in **costs** attributable to or associated with the **employer's** failure to comply.

(4) The amount of a premium surcharge payable under the regulations is to be added to, and becomes payable as part of, the premium payable by the **employer** for the issue or renewal of a **policy of insurance** as provided by the regulations.

(5) It is a condition of any **policy of insurance** issued under **the 1987 Act** that the **employer** must comply with the requirements of this Chapter, but only if the **insurer** has taken appropriate steps to ensure that the **employer** is made aware of those obligations.

54. **Section 57** provides for imposition of a penalty on employees that unreasonably fails to meet their obligations:

Compliance by worker

57 Compliance by worker

(1) If a **worker** fails unreasonably to comply with a requirement of this Chapter after being requested to do so by the **insurer**, the **worker** has no entitlement to **weekly payments** of **compensation** during any period that the failure continues, subject to subsection (2).

(2) A **worker's** entitlement to **weekly payments** does not cease under this section until the **insurer** has given the **worker** written notice to that effect, together with a statement of the reasons for the entitlement ceasing and the action that the **insurer** considers the **worker** must take to be entitled to the resumption of **weekly payments**.

(3) The resumption of **weekly payments** does not entitle the **worker** to **weekly payments** for the period in respect of which the **worker** had no entitlement to **weekly payments**.

Note: See also provisions for discontinuation of **weekly payments** in **the 1987 Act** (ss 52A, 54).

55. In providing suitable duties s43A of the Workers Compensation Act 1987 sets out what should be had regard to:

43A Suitable employment

(1) For the purposes of sections 38, 38A and 40:

"suitable employment" , in relation to a worker, means employment in work for which the worker is suited, having regard to the following:

- (a) the nature of the worker's incapacity and pre-injury employment,
- (b) the worker's age, education, skills and work experience,
- (c) the worker's place of residence,
- (d) the details given in the medical certificate supplied by the worker,
- (e) the provisions of any **injury** management plan for the worker,
- (f) any **suitable employment** for which the worker has received rehabilitation training,
- (g) the length of time the worker has been seeking **suitable employment**,
- (h) any other relevant circumstances.

(2) In the case of employment provided by the worker's employer, **suitable employment** includes:

(a) employment in respect of which:

- (i) the number of hours each day or week that the worker performs work, or
- (ii) the range of duties the worker performs,

is suitably increased in stages (in accordance with a rehabilitation plan or return-to-work plan or otherwise), and

(b) if the employer does not provide employment involving the performance of work duties—suitable training of a vocationally useful kind provided:

- (i) by the employer at the workplace or elsewhere, or
- (ii) by any other person or body under arrangements made with the employer,

but only if the employer pays an appropriate wage or salary to the worker in respect of the time the worker attends the training concerned.

(3) However, in any such case, [suitable employment](#) does not include:

(a) employment that is merely of a token nature and does not involve useful work having regard to the employer's trade or business, or

(b) employment that is demeaning in nature, having regard to subsection (1) (a) and (b) and to the worker's other employment prospects.

(4) A worker is to be regarded as suitably employed if:

(a) the worker's employer provides the worker with, or the worker obtains, [suitable employment](#), or

(b) the worker has been reinstated to the worker's former employment under Part 7 of Chapter 2 of the [Industrial Relations Act 1996](#) .

56. The first issue is that many employers remain unwilling to provide suitable duties or to take on workers with injuries. This can be because it's seen as an unwanted disruption to the operation of their business to concern about future liability. It is recognised that sometimes it is just not possible because of the nature of the injury, the level of a worker's physical restrictions, or the nature of the employer's undertaking that suitable employment is not feasible. Certainly in the building industry small subcontractors particularly in the very heavy trades sometimes find it difficult to provide suitable duties. There may be need for reform of the system to give employers some better incentive to provide suitable duties.
57. Many employers do take the first available opportunity to terminate an injured worker's employment rather than participate in any attempt at a return to work. The return to work provisions in the workers compensation legislation has improved this behaviour.
58. An employer is also prohibited, under the Industrial Relations Act 1996 to terminate an employee because of their injury within 6 months of incapacity. Often some employer's refuse to provide suitable duties, are not willing to participate in a return to work program and terminate a person at the first possible moment. It would be far more beneficial for the employee and the employer that at least within the first 6 months both parties should participate in a return to work program were applicable. It will soon become clear to employees and employers as to what the prospects of a full return to work are and to work towards this if possible, or to look at other options, such as retraining, if not.
59. However, often employers refuse access to suitable employment as a matter of course without even seeking the assistance of a rehabilitation provider for example to assist in the identification of suitable duties at a workplace. In seeking the views of a rehabilitation provider in preparing this paper I was advised that all the research shows that if injured workers have access to a workplace and are provided with suitable employment they are less prone to pain behaviour and their chance of successfully returning to pre-injury duties is increased. I have certainly seen many employers in the building and construction industry who have made the effort to provide suitable duties to their employees with reasonably successful outcomes. I have also seen workers source for themselves suitable employment, for example a long term member of ours who could no longer do manual work was able to up-skill and is now working as an estimator in the industry. So it is possible to achieve.
60. But, I have also seen a large number of workers who are basically not given the opportunity at all even where it is practical for the employer to provide suitable duties. The approach to workers compensation claims is to terminate employees at the first available opportunity either at the 26 week mark or earlier if they can. For workers on labour hire arrangements this is a problem as many workers are told by their employers that there are no alternative positions available.
61. It is recognised that one of the biggest, if not the biggest, cost driver in the scheme is workers on long term payments. The costs to the scheme are ultimately born by all employers in the form of higher premiums, or by employees in the form of government cuts to benefits. Some of this in my view could be addressed with employers making available alternative employment.
62. Some larger employers who do have the capacity to retrain a worker are often reluctant to this, necessitating the union to seek reinstatement or relief through the Industrial Relations

Commission. We've also run disability discrimination cases successfully in this area. However, workers do not necessarily want to resort to litigation to assert their rights.

63. The provision of training opportunities, such as in the building and construction industry the employer facilitating the provision of new training for new competency certificates, or the completion of an occupational health and safety training course, with access to the workplace to practise new skills can make the difference between someone being off work indefinitely to having someone who returns to work as a productive member of the workforce. This may not result ultimately in employment with pre-injury employer because of a lack of suitable positions, but might give an injured worker enough of an opportunity to increase skills to then have the confidence find new more suitable and hopefully, long term employment.
64. We would like to see more involvement of principal contractors in this regards.

PROVIDING SUITABLE DUTIES BUT PUNISHING THE WORKER

65. The other experience of injured workers that can be the cause of dispute is where suitable duties are provided but are of a demeaning nature. For example, I have had workers come and see me, who are highly skilled employees, who are given cleaning duties, such as cleaning toilets, or are given tasks such as counting rivets for hours on end. Or the duties isolate the employee from the rest of the workforce as if they are being punished. It exacerbates the stigma which can attach to workers who are on workers compensation.
66. The workers compensation legislation specifically prohibits the provision of duties that are token or demeaning in nature.
67. I believe that some employers do provide light duties that are designed to frustrate and aggravate employees to a point that they will just quit. This is often accompanied by an attitude that the employee is to blame for the injury. Self esteem and psychological well being are important for an injured worker's recovery and taking a negative or aggressive approach usually exacerbates injury symptoms rather than improves them. A more supportive approach can lead to a quicker return to work.
68. The other complaint that I have received is where line management put pressure on their employees to exceed the tasks set out in the injury management and return to work plans. There is no point having the paper work right if it is not applied in practice. If there is a genuine belief that a worker had reached a stated goal, then any change to a plan should be done in consultation with the employee, on advice from their doctors and seeking the assistance of a rehabilitation provider. This will mean everybody knows what the expectations are, there is a no room for confusions and possible conflict and minimises the chances of worker re-injuring themselves.
69. There is one final small point which, from my experience also can result in increased tensions between and employer and employee which can often be avoided if a less aggressive stance is taken by employer. That is where employers insist that employees who are at work doing suitable duties attend medical or physiotherapy or other services, like going to the gym, related to their recovery, on their own time. This can cause great resentment as workers take the view, which is not entirely unreasonable, that having to attend such appointments is a valid part of their rehabilitation and should be done during work hours. By insisting that employees do these other things outside of work hours can increase the stress that workers are often suffering when incapacitated for work. It can also place greater burden on them physically and mentally and adversely affect their family life.
70. It is understood that an employer has business obligations. However, unnecessarily antagonising an injured worker, and not at least trying to accommodate them in terms of their need to go the gym or attend a medical appointment is not going to assist in returning them to productive work quicker, but may in fact extend the period in which the employee is off work.
71. On a related issue, sometimes employers take a very aggressive approach to Union involvement in an individual case, or seek to punish employees who seek the assistance of their union, sometimes, threatening them with dismissal. You are aware that your employees

have the right to seek information, advice and assistance from their trade union. This might be through a site delegate or union organiser. Some unions, such as the CFMEU, have a specialist workers compensation officer. Don't feel that just because the Union gets involved it's some sort of attack. I can say with some confidence that Union representatives want to help their injured members to ensure their rights are protected, not to disadvantage the employer. Union representatives can help to diffuse a dispute situation, particularly where workers compensation disputes get personal. Union representative can assist productively in getting an injury management plan back on track by fostering discussion between an employer and employees and assisting in an implementation of a return to work plan.

72. Union representatives, like workplace delegates, are also useful because of their direct knowledge about work practices in identifying suitable duties. I would urge you to tap into these sources rather than discouraging them at your workplaces.
73. Ultimately, an employer may not be able to provide long term suitable employment, particularly if an employee's medical advice is that a career change is necessary, however, an opportunity to test out a worker's capacity in a supervised and safe environment can mean that such appraisals can be made within timely fashion and assist a worker in making the necessary adjustments should they need to consider other employment options.

CONDUCT OF THE INSURER

74. The conduct of some insurers has been an issue of increasing concern to the Union movement. Some insurance claims officers treat workers with complete disrespect.
75. I have had recently been involved with members where claims officers arbitrarily suspend benefits because in their view a worker has not complied with their obligations. This was done without going through the steps set on in the s57 of the Act. I had to recently intervene on behalf of a worker who had not received payments for 3 months. The claims officer advised this was done because the worker had not returned his "job logs". This was quite outrageous as the insurer was well aware that this particular worker had recently suffered a marriage breakdown and been hospitalised as well. The claims officer's response, when it was raised with her that there is nothing in the act which condoned her decisions to arbitrarily cut of our member's benefits without notice, was to tell me to "Tell your client to comply and all will be ok". Needless to say a cheque for unpaid benefits was forthcoming.
76. The use of threats of cutting benefits and actually cutting benefits is unacceptable in the Union's view. There are provisions in the Act which can be exercised to suspend benefits in certain circumstances, but these should be utilised as a last resort and where other measures are exhausted. Our recent experience has been that many claims officers use threats of the suspension of benefits to intimidate people to comply. This is not the way the system should operate.
77. Not all claims officers are like this of course and there are many good people managing these claims who do assist workers who find themselves a difficult position because of the way that an injury can affect a person's life particularly if a person is long term incapacitated. Some of the problems I believe also associated with there being no real exit system in place for people who do suffer serious injury and cannot realistically be returned to work.
78. There are also features of the system which have emerged that in some cases lead to absurd results. One of them is the demand by insurers that workers, in the absence of any other rehabilitation efforts are forced to fill out "job logs" to guarantee their workers compensation payments. I have recently become aware of one of our members who is 61 years old, suffering a serious back injury, who has limited English skills who has for 40 years worked as a manual workers and has to get his daughter to help him ring employers and fill out these "job seeking logs" to ensure he receives his benefits. The reality is he will not be able to secure employment because of the seriousness of his injury, his lack of transferable skills, his difficulty with language and putting him through the added stress of filling out job logs is inhumane.
79. Another member who was injured 4 years ago, also of non-English speaking background and who spent decades working as building worker and who has undergone substantial medical

treatment, surgery and rehabilitation, has now been required by the insurer to 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. There needs to be some realisation that in some cases people will not be able to return to work.

80. The Union welcome meaningful rehabilitation for injured workers. Our injured members would rather be out in the workforce earning good wages. Effective rehabilitation should include retraining or up-skilling as, well as providing, through properly accredited rehabilitation providers meaningful job search assistance. Having someone fill out a piece of paper every month to ensure they get paid is not meaningful or effective in getting people back to work. It must also be accompanied by a willingness for employers to take people on. The reality is that employers are by and large unwilling to take on someone who has been incapacitated long term so to use the threat of benefits stopping in that climate is unjust.
81. Some insurers also delay in making important decisions. Recently we had to organise a rally outside an insurer’s premises to have the insurer make a decision to approve a workers much needed operation. The worker was a process worker in a bedding manufacturer from a non-English speaking background. She had in her whole time in Australia only ever worked as sewer for this one employer. The insurer in that case reduced her s40 benefits to about \$89.95/week on the basis that some 20 years earlier, in the Philippines, this worker had worked as a clerk. The decision was made that she could go out and get a clerk’s job. This was a most unreasonable and unrealistic proposition which is being challenged. However, in the meantime this worker had her electricity cut off, could not meet her daily expenses and was essentially left suffering in pain. This is not an atypical example.
82. Other insurers seem take an interminable amount of time to reimburse workers travel and medical expenses. Injured workers are often living week to week on their meagre benefits. The failure to promptly reimburse them can put in a dire financial position. It can only make recovery harder.
83. The Union is concerned that in this area there is much unnecessary suffering by injured workers and many insurers need to improve their systems to make the system a fairer one.
84. 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. As stated above 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.

OTHER SYSTEMIC PROBLEMS -LUMP SUM COMPENSATION AND COMMON LAW

85. Finally I wish to make some quick comment on the issue of lumps sums and common law. This is a topic of current interest. The CFMEU is concerned that seriously injured workers 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.
86. 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.
87. A serious injury to one of our union members often means a net 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.
88. The present system simply fails to provide adequate compensation for loss of wages and earning capacity in cases of 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.
89. NSW workers now have to overcome the highest and most arbitrary threshold (15% whole person impairment as per the AMA 5th 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.
90. The Union 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.
91. We want to see some reform in this area including;
- A lowering of the 15% WPI threshold. 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) to 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.

- 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 representation.

CONCLUSION

92. These are just few of the observations that I, as a CFMEU representative, have made in relation to workers compensation and that I have gleaned from speaking to many of our members over the years.
93. You may not necessarily agree with all or any of them. I also understand that the legislative requirements can sometimes be confusing and I hope that some of my suggestions assist you to avoid unnecessary disputation in the workplace.
94. The CFMEU is concerned that the so called “reform” has put workers, particularly those who are seriously injured in a very precarious situation. More needs to be done to address the injustice and unfairness that does exist in the system.