

Assessing the impact of changes to worker's compensation law: An SA Unions research project.

Conducted on behalf of SA Unions

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Summary

On July 1st 2008 the South Australian parliament passed some significant amendments to the WorkCover Scheme. A further round of changes and the complete legislation will become law on April 1st 2009. This report outlines the information gathered through face to face interviews with several advocates and persons who represent workers in South Australia who are involved in a WorkCover claim for workers compensation.

Essentially, advocates have reported that the new laws are/will be:

- Reducing workers' choices when faced with a work cover claim.
- Allowing medical panels to override previous information and to be "judge and jury" for a worker during a review process. The worker will be prohibited from legal or moral representation and assistance during interviews claim, and for whom there is no recourse for the panel's final decision. The new law disallows transparency and accountability for these panels.
- Resulting in considerable financial hardship with the elimination of weekly income during a review process, a reduction in time before step-down process and a limit of 130 weeks before review of work capacity.
- Resulting in an increased number of pre-emptive redemptions, often to the financial and emotional detriment of workers.
- Reducing the amount of time for workers to rehabilitate and not taking into account the amount of time needed for proper rehabilitation and retraining where necessary.
- Resulting in a significant amount of severe emotional stress with many workers reporting suicidal ideation to their advocates

Introduction

The South Australian parliament has passed some significant amendments to the WorkCover Scheme. The amendments affect both the *Workers Rehabilitation and Compensation Act 1986* and the *WorkCover Corporation Act 1984*.

A number of amendments commenced on July 1st 2008 with another round of changes due to be implemented on April 1st.

SA Unions has commissioned University of South Australia to investigate the impact of these changes on workers, families and communities who are affected by the new laws as described by workers advocates and legal representatives.

Methodology

The central focus of the project was to interview those who could describe the experiences of the injured worker(s) without having to speak to the injured workers themselves, so to retain their anonymity. Therefore, the experience of the injured worker and the impact of the new laws were drawn from perspectives of a range of other key stakeholders. These included union representatives, union based workers compensation advocates and lawyers who represent the rights of injured workers.

Information attained described workers from a wide range of employment including, education, health, meat, metal, administration, semi skilled and skilled trades and forestry industries.

Data was derived primarily from face to face semi-structured interviews which also included a number of open-ended questions and prompts which invited participants to explore their own avenues of experience and perception. Sessions were recorded and tapes were filed with access only available to the research team. Interviews were conducted until "saturation levels" were attained, that is, until similar themes were emerging from all participants.

Thematic analysis of the interview data was then undertaken.

The research was undertaken by two researchers from the University of South Australia who have expertise in qualitative analysis of interview data. Researchers contacted 10 individuals who had previously agreed to participate in the survey. Participant interviews were conducted either at the University of South Australia or at the participant's place of employment.

Results

This section summarises some of the key recurring themes which emerged from interviews conducted with the workers advocates and lawyers. Composite case studies are presented where appropriate to illustrate specific issues and hypothetical situations are based on those recounted during interviews.

The following sections are presented below

1. The changes to the law
2. The major flaws in the law as perceived by the advocates
3. The impact of the changes on workers' financial, emotional and physical stability
4. The impact of the new laws on workers' behaviours
5. The advantages of the new laws
6. Recommendation for improving the new laws to benefit workers

1. The changes to the law

Whilst there have been some training and information about the new laws, there are still a lot of 'grey areas' and a great deal of uncertainty as described by all interviewed advocates.

Many advocates specifically stated that these new laws have not yet been tested, and there is no case law to enable judgments to be based on prior cases. This makes complete appraisal of the new laws problematic. In addition, the new laws are being implemented slowly and each new round of introduction brings with it new information and new uncertainties.

2. The major flaws in the law as perceived by the advocates.

Most advocates agreed on the most major flaws. These include:

- 2.1 The new law advocates that once a worker is on workers compensation payments, these payments are to reduce to 90% after 13 weeks and 80% after 26 weeks. Therefore, after 6 months an injured worker will be receiving 80% of salary rather than for a year as was the case with the previous legislation. These step-downs are seen as a major flaw that will result in financial hardship during a time when support. Both emotional and financial, is needed.
- 2.2 The new limit on income maintenance is 130 weeks (2.5 years). After this time a major review of income maintenance and work capacity will be instigated. This is considerably less than previously. This will be particularly difficult for workers with a psychological workplace claim given the difficulty of overcoming psychological illness in such a short time. Workers may be encouraged to take an early redemption rather than step-downs. However, redemptions are in themselves not encouraged.
- 2.3 The work capacity review system and the medical panel that will review work capacity are a new addition and do not favour the worker. Previously a worker could challenge a decision by his employer or by the medical insurer and this process would be overseen by a legal representative in a legal process during which the worker had rights of advocacy and legal representation. This process has been replaced by a medical panel. The medical panel reviews a case based on information provided on the day of review and can over rule any previous medical information. The worker is obliged to attend the panel and may not have legal representation although they can have advice from union advocates prior to the review but not during the review. The decision of the medical panel is final. Only the process of procedural fairness can be further challenged in a Supreme Court, but the medical and work capacity decision of the medical panel remains unchallenged. Several questions have been asked by advocates in relation to these reviews.
 - Who can review the medical review panel? Why is their decision final?
 - How is it that the worker may not have representation during the panel review as is the case in any other jurisdiction? Where else are individuals refused the right to counsel?
 - Is this process an incentive to return to work?

- How intimidating may this process be, particularly for older, psychologically injured, migrant or less educated workers?
- What will happen to workers who do not have adequate advice prior to the panel, those workers who are not unionised and/or have less information and support?

Julie is a nurse and suffers depression which has arisen from a workplace bullying incident. It comes and goes without warning. Some days she is fine whilst other times she can barely make it through a day. Julie might be having a good day at the time of the medical panel assessment. Based on this one meeting, they could rule that she has work capacity, against all advice in her medical files. If Julie is having a bad day, no-one will be able to advise her at all during the assessment. She has seen 5 different medical specialists in the past 6 months. She knows that WorkCover have also been gathering medical records for the April 1st changes and she's worried. Julie's depressive episodes have become more frequent as April 1st comes closer and she just doesn't know what is going to happen to her. Julie has worked long enough as a nurse to know that doctors see themselves as superior to nurses. She's really nervous that being a nurse will go against her at the medical review panel.

Mary has been suffering from a mood disorder since a tree fell on her at work. She didn't have maximum capacity to return to work because she didn't receive sufficient rehabilitation and has been working in a reduced voluntary capacity. She is worried that based on her volunteer work, the medical panel will find that she has demonstrated capacity. However, she can hardly pick up a pen some days. She told her advocate that she has considered walking in front of a train.

2.4 The elimination of income maintenance during a review process. Previously workers were entitled to income during a review process but this has been revoked. Workers will be severely disadvantaged by lack of income during an often arduous and lengthy process. In addition, the lack of case law for this legislation suggests that reviews will be frequent, particularly initially, and many advocates expect there to be a significant increase in the numbers of workers without income. The impact on their lives will be substantial. Workers may be encouraged or obliged to take an early, potentially less comprehensive redemption and get "off the system" (advocate's words) rather than endure a review process. In fact, advocates may need to push for people to return to work earlier than they should increasing the likelihood of injuries becoming chronic, with ongoing costs to the worker and Medicare.

Levi needed to pay for physio for his knee so he could have the best chance for rehabilitation. However, he didn't receive any wages during his dispute so he couldn't afford the full recommended programme. His dispute was complicated by the fact Workcover found a medical record that he had sprained his knee in primary school, and this information was given to the medical panel even though

it had nothing to do with the current injury. He was consumed by frustration because he just wanted to get back to his working life as usual. He finally took a redemption payout – not because his knee was better but because he needed the money. His knee is still a problem but he can't claim anything ever again. He spends a lot more money on doctor's bills now than he did before and has become overweight and inactive due to his injury. He has lost interest in life.

2.5 Changes to section 43 will result in some forms of permanent capacity (for example loss of half a finger) will not be deemed sufficient to arrive at a threshold of 5% reduction in the whole of person work capacity. This diminishes the psychological and physical impact of a permanent injury.

- Why is a permanent scar from a burn or a permanent loss of a digit less important and its impact less recognised?

***Dharma** is really self conscious about the ugly scarring on her hands from a burn she got at work. She's been told that she probably won't get any compensation for the scars because they won't account for more than 5% of whole person impairment. She's angry that her scars could be trivialised like that.*

2.6. Advocates are concerned that workers will have less choice when confronted by the compensation process. With the reduction in income maintenance after 13 weeks, the withdrawal of income during a review process and the potential for being judged by a medical panel rather than a legal court may reduce the options workers have in deciding how best to engage in the system. One advocate reported that she feared for her clients who are cut off from funding and thought they may have to leave their homes and families and live on the street. She fears for them and the community.

***Jane** has recently taken a redemption against her advocate's advice. The amount she received hardly covers the income she's lost so far, let alone the cost of rehabilitation and the potential wait to find another position. Apparently she could have pushed for an amount that would accommodate her costs better and make it easier for her to find another job but she wanted to get it over and done with now before April 1st. She's not sure what she'll do if she can't find another position. It will be harder for her now that she's been on Workcover. She feels she has little choice now. She didn't want to be injured at work.*

2.7. The income maintenance payment calculation has been changed. The new laws calculate the income on what was received in the previous 12 months, whereas previous legislation was based on what the worker was projected to earn in the next 12 months. This may disadvantage workers.

Philip was 47 when he resigned from one job where he was earning \$700.00 per week. He then got a new job in a new business (1 month old) at half that weekly wage. Two weeks into the job he injured himself at work. His weekly wage for compensation could not be based on his previous job, as prescribed in the new legislation, because he resigned. Nor could it be calculated on his new job because the new legislation states it must be based on previous 12 months data or on co-workers earnings over 12 months (rather than on the future earning capacity as stated in the previous legislation). They could not base it on colleague's earning either because it was a new business and everyone in the business had been there only one month. The new laws are very unclear in this situation so automatically, Philip's weekly earning will need to be reviewed during which time he will receive no salary. His case is now going to a full court bench hearing which is time consuming and stressful. Phillip is desperate, knows he cannot survive on nothing and has suggested to his union advocate he may commit suicide.

3. The impact of the changes on workers' lives

There are two main themes that have emerged from discussion around the impact of the new laws on workers' lives. These are the financial impact and the psychological impact. The financial impact is clear and has been discussed above, with the elimination of income during the review process and the step-downs 6 months earlier than previously.

Gavin and his wife had been living in their semi-rural acreage for most of their married lives. Gavin was suffering mental issues from a workplace incident. He is terrified at the prospect of confronting the medical panel and is unclear whether he should take a redemption or to wait. He is loathe to wait because a loss of income would ensure he loses his house, already under stress from a loss of income. His advocate feels that as a potentially long term claimant, he will be worse off with this system.

Rethinking their lives and hopes for their families is now more common than before, according to advocates.

Andrew can't afford to send his third son Michael to a private school anymore. Michael's two older brothers were both high achievers at that school and were both prefects and he was following in their footsteps. Michael will now have to move to another school part way through year 11.

Many workers are frightened about the uncertainty in which they find themselves regarding their current claims. Workers report that they expect WorkCover processes to become increasingly difficult, stressful and intimidating. They are concerned about the medical panels and the lack of transparency within them and the lack of opportunity to dispute. Workers who are not unionised, older workers, migrants, those less educated, will be more at risk according to all the advocates interviewed. At particular risk are workers whose claims are psychological. Uncertainty, the review process and lack of choice are likely to significantly exacerbate already existing psychological vulnerability. Several advocates have noted conversations with their workers suggesting severe psychological trauma, stress, depression and anxiety regarding these new processes that are deemed to be "not worker friendly" (advocate's words). One advocate has noted that "a few" (advocate's words) of her clients had already talked about suicide and last week one was interrupted during an attempt. The "big unknown" (advocate's words) has affected him significantly.

John is recovering from a shoulder injury he sustained in his role as a turner and fitter. John is only 35 and he wants to be a turner and fitter until he retires. He can only work for a few hours at a time before his shoulder gets worse. He wants to make sure he doesn't cause any further damage by over doing it, and was hoping that he could go back to work for a few hours at a time at first and build up to full days. However, his rehab consultant says it would be much easier for him to get a position in the workforce if he agreed to do a full working day. John doesn't know if he should risk going back to work full-time where he might damage his shoulder more, or if he should risk facing a medical panel which might result in him losing all of his income. John called his advocate Angela and said he's really worried about the changes and being able to support his family. He confides in Angela that he's been 'taking it out on his wife and kids'. He's worried about what he might do to them and he's been thinking about harming himself instead. Not only has the 'big unknown' (advocate's words) affected him, now Angela is worried about what he might do.

4. The impact of the new laws on worker's behaviours

As the first stage of the legislation was only introduced in July 2008, potential effects of the new laws are still not completely clear. However, there have been some cases of changes in the way workers or their advocates have acted that may not be in their best interests. In addition, advocates have discussed areas in which they foresee changes to the way workers will behave after April 1st 2009.

Already discussed is the increased number of workers who had decided to take a redemption rather than foresee a protracted review process and the potential for total loss of income during that process. In fact, many workers and their advocates have been attempting to finalise claims and processes prior to April 1st 2009. Other suggest that some workers are not submitting a claim AT ALL and "would rather just give up" (advocate's words).

There have also been reports that people are/will be less likely to report because the system is too complex, punitive, and lengthy rather than supportive. One advocate suggested that this new system is :

"essentially starving people out from lodging claims and disputes" (advocate's words)

Some advocates reported that their workers preferring to redeem sick pay and annual leave entitlements rather than submit a claim that is lengthy. The process is increasingly lengthy if the worker chooses to utilise insurers other than the preferred insurer (EML) and in one case an advocate reported that a worker had chosen the preferred insurer for this reason only, despite wanting to utilise a private insurer.

5. The advantages of the new laws

Some advocates have noted that there are some advantages to the new laws. The new laws have withdrawn the stringent test needed before overtime can be included in the calculation of average weekly earnings. Similarly contributions made to superannuation are also to be included. These changes have been deemed advantageous.

6. Recommendations for improving the new laws to benefit workers

Advocates were asked how the new laws could be improved. As expected, the comments recovered and documented here reflect closely changes to those major flaws that had previously been identified. These include:

- 6.1 Increased transparency of the medical panels and legal representation for workers. Some advocates have suggested complete withdrawal of the medical panel and a return to the previous judicially based system.
- 6.2 To withdraw the step-downs which are not an incentive to return to work, they only serve as an incentive to "get people off the system" (advocate's words). A step-up approach for a gradual return to work was suggested by one advocate.
- 6.3 Reinstatement of income maintenance during the review process. "The financial hardship and the pressure that workers are under during this process is simply unacceptable" (advocate's words).
- 6.4 Increased scrutiny of the changes with increased information. Even the language in the new legislation is unclear and open to interpretation according to two advocates.
- 6.5 To withdraw the 130 week rule. Proper training programs for injured workers to retrain them need time. This new system needs more time to ensure this is done correctly.
- 6.6 Reinstate 100% salary while injured workers are recovering from a workplace injury.
- 6.7 Reduce the incentive for employers to have a bonus for less WorkCover claims as this is reported to result in a reduced number of claims and entitlements for workers.
- 6.8 To improve advocacy and independent advice from organisations other than WorkCover as this is considered by many as a conflict of interest.
- 6.9 Reassess the whole person capacity/impairment rule.
- 6.10 Increase penalties for those employers not finding suitable duties. Penalties have never been applied according to one advocate.
- 6.11 Further conversations and face to face interviews to be conducted with the participants in this project on a regular basis in order to monitor the impact of the changes over time. The true impact of these changes will become increasingly apparent in the coming months.
- 6.12 To encourage WorkCover to also undertake a similar, independent and ongoing review of the impact of these changes on the workers.

Conclusions

Two of the principal aims of the current workers compensation legislation are “to assist in significantly increasing return to work rates” and “to ensure injured workers receive fair and equitable financial and other support”. Indeed, studies have supported the notion that a rapid return to work is the most beneficial for injured workers.

The above information, based on interviews with those who advocate for injured workers and with illustrative composite case studies, suggests that the current laws and operation of the scheme in South Australia for Workers Compensation may well increase return to work rates but for the reasons of excessive financial burden and the complexities and inequities of the review system, rather than due to the positive effects of the workers compensation legalisation. Overwhelmingly, all interviewees reported that the current legislation is inequitable, unfair, has the capacity to create financial burden and does not support the injured worker in rehabilitation, either physically or psychologically. There is grave concern for the wellbeing in many of the cases presented in this report.

Advocate Jill is worried that the changes might result in suicides, especially for her long-term clients who think they will be targeted. A few of her clients have spoken about suicide and last week one of them was stopped in the act of taking his own life. Her colleague Sue is already dealing with two clients who have both tried to commit suicide.

Megan cried through her whole tribunal session. She just couldn't take it anymore. She never imagined being on the system for 2 years. She had read all the documents that had been sent to her but she didn't understand them. Miranda is not sure if she'll be able to keep quite whilst accompanying her client during a medical review. If she can't support her client, she'll feel like she's not doing what she's supposed to do and that she's letting her client down. But what if she interrupts and makes it worse?