

# **Re-assessing the Impact of Changes to Workers' Compensation Law: A SA Unions Research Project**

## **Round two**

Conducted on behalf of SA Unions

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## Summary

On April 1<sup>st</sup> 2009, a report was compiled for SA Unions to present information gathered through face to face interviews with several union officials and lawyers ('Advocates') who represent South Australian workers with WorkCover claims. The present report is the second report in this series. The aim of this report is to ascertain how the changes to WorkCover laws have affected workers in South Australia over the last six months, since the last report.

The full impact of the legislative changes adopted by the Rann government in 2008 has yet to be realised. This is due largely to the phased introduction of the changes. Some, such as step-downs – reductions in weekly compensation payments – for new claims, came into effect on 1 July 2008. Others, such as the cessation of weekly payments whenever a claims dispute arises, came into operation on 1 January 2009; while yet others, notably the new work capacity review provisions, which enable weekly payments to be terminated altogether, only came into effect from 1 April 2009. Within this context, Advocates suggest that the new laws are:

- Imposing financial hardship on injured workers through the application of step-downs in weekly compensation payments of 10% after 13 weeks of incapacity and 20% after 26 weeks. The adverse impact of the new step-down arrangements have hit low paid workers the hardest and in some cases has resulted in injured workers receiving less than the minimum wage.
- Enabling the termination of weekly payments whenever WorkCover, or its agent, dispute aspects of a worker's claim. This is equivalent to a 100% step-down. These new provisions have an enormous potential to impose financial hardship and emotional distress on injured workers, since claims disputes often drag on for many months. As such, they also undermine workers' financial capacity to challenge WorkCover decisions and in the process increase the sense of powerlessness experienced by many injured workers.
- Disenfranchising many workers whose injuries result in permanent impairment from eligibility for Non-Economic Loss (NEL) payments.
- Placing increased pressure on workers to take redemption payments to finalise their claims.
- Undermining the fairness of the scheme through the introduction of Medical Panels that deny injured workers the right to representation and the ability to appeal decisions concerning their claims.

There were also criticisms raised concerning what Advocates regard as the dysfunctional operation of WorkCover's rehabilitation system. Although many of these criticisms predate the 2008 legislative changes, the management of rehabilitation by WorkCover and, its claims agent, Employers Mutual Limited ('EML') are viewed by Advocates as a major ongoing cause of the scheme's problems. Most also regard reform of the rehabilitation system as essential to the effective operation of the scheme.

## **Introduction**

The South Australian parliament passed significant amendments to the WorkCover Scheme in 2008. The amendments affect both the *Workers Rehabilitation and Compensation Act 1986* and the *WorkCover Corporation Act 1994*.

An initial report was delivered to SA Unions in April 2009 documenting the effects of the new laws on South Australian workers as seen and reported by workers' Advocates and union officials across South Australia.

The current report is a second round report that aims to document how the 2008 WorkCover amendments have affected South Australian workers over the last six months since April 2009.

SA Unions has commissioned the University of South Australia to re-investigate the impact of these changes on workers, families and communities after six months of implementation and to evaluate any changes since April 2009.

## **Methodology**

The central focus of the project was to interview those who could describe the experiences of injured workers without having to speak to them directly, so as to maintain their anonymity. Therefore, the experience of injured workers 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 officials and lawyers who represent the rights of injured workers.

Information obtained described blue and white collar workers, from predominantly semi skilled and skilled occupations, employed in a wide range of industries including education, health, meat processing, manufacturing, public administration, essential services and forestry.

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. Most sessions were recorded and tapes and hard copy documentation of interviews 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, one of whom was involved in the first round of interviews earlier in 2009. Researchers contacted 13 individuals who had previously agreed to participate in the survey and who were nominated by SA Unions. 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. Composite case studies, with names changed, are presented where appropriate, to illustrate specific issues based on those recounted during interviews.

The following sections are presented below:

1. How the new laws have affected the Advocates, their behaviour or how they work.
2. The major concerns about the new laws 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. Recommendations for improving the new laws to benefit workers.

## **1. How the new laws have affected the Advocates, their behaviour or how they work.**

- 1.1 Increased work loads. Advocates find their assistance is in greater demand as workers are unclear of outcomes. Advocates spend more time going to Medical Panels, disputes and meetings. Some have found that the new laws have instigated more claims disputes and that employers are increasingly utilising this process as a means of resolution rather than negotiating with workers.
- 1.2 Shortened time frames. Given the step-downs, Advocates are feeling pressured to achieve adequate outcomes within a shorter time frame and are acting faster. This increases stress for both Advocates and workers.
- 1.3 There have been many claims to the WorkCover Ombudsman concerning the Medical Panels and the 5% eligibility threshold for Non-Economic Loss payments for permanent impairment.
- 1.4 Some claims dispute processes seem to have become more adversarial. As a result relations between Advocates and employers have become more antagonistic.
- 1.5 There is an increase in unionisation as workers realise that without representation and union advocacy they may be further disadvantaged where their claims are disputed.
- 1.6 The impact of the WorkCover changes has been less pronounced in the case of some self insurers where there are good working relations between employers and the relevant unions and a shared commitment in assisting injured workers to return to suitable employment.

## 2. The major concerns about the new laws as perceived by the Advocates

- 2.1. The operation of Medical Panels is viewed by Advocates as analogous to a kangaroo court. They do not safeguard the principles of western democracy in the sense of civil law, are grossly unjust, there are no transcripts and their decisions are binding. This undercuts democratic law and flagrantly goes against that the principle of fairness. They are also male dominated, may be intimidating to women and have limits on the time they can take to deliberate on complex and contentious issues. There are times when the information provided to the Medical Panels has been insufficient with decisions subsequently based on flawed information.

**Example: Fatima**, a 35 year old female, had a lower back and hip injury, the latter injury causing her to be incontinent. The information supplied by her employer did not include the hip injury and so the Medical Panel did not consider her incontinence problem and she was not allowed representation to inform the Panel of this. In addition, she was made to parade in front of all the male members of the panel. The 'token' female that attended this parade was the receptionist with no medical background. Fatima found this demeaning and embarrassing, particularly as a Muslim woman. Her incontinence was not taken into account in considering her case and she had no right of appeal over this, as decisions by the Medical Panels are final.

- 2.2. Major concerns raised to date have focused mainly on the 20% step-down that comes into effect after 26 weeks of incapacity. Some step-downs are resulting in weekly payments being lower than the minimum wage.
- 2.3. Many more seriously injured workers are living under the shadow of having their payments cut off after 130 weeks of incapacity, although thus far relatively few work capacity reviews have been conducted. The new step-down provisions are forcing some workers to return to work before they have recovered from their injury, thereby exacerbating the likelihood of further injury and time off work, and increased costs to the scheme.
- 2.4. The full impact of the step-downs and work capacity review provisions of the new legislation are not expected to be felt this year but Advocates anticipate significant impact. In addition there is no case law as yet.
- 2.5. There have been significant changes in relation to Non-Economic Loss (NEL) payments - lump sums paid for permanent impairment or loss of body parts - under the amended provisions of S. 43. It is considerably more difficult for workers to obtain lump sum



payments for permanent disability or impairment than was previously the case. The 5% Whole Person Impairment (WPI) threshold means that many injured workers with a permanent impairment are no longer eligible for NEL payments. The new guidelines used for the rating of WPI, which were introduced, can result in many injured workers sustaining permanent impairment receiving lower NEL payments. This is particularly evident with respect to workers with back injuries. Whereas previously many back injuries would have received a 30% rating, they may now attract a rating of only 6-7%. Not dissimilarly, workers who have required a disk fusion may get only a 7-10% rating whereas previously they would have got 25%. Similar remarks apply to the use of pre-existing injuries to discount NEL payments, with insurance doctors seeming to have “butchered” (Advocate’s words) the process and reducing it to a cost containment process. More generally, especially in the case of blue collar workers, who are more likely to have a back injury, there is also the issue of employment discrimination to contend with.

**Example: Mohammed**, is a 55 year old male with English as a second language who has a claim in relation to NEL compensation for a serious lower back injury. His claim was assessed by the GP prior to the implementation of the new laws on April 1<sup>st</sup> 2009 and his GP had given him a 20% incapacity rating for his injury. As no decision on his claim had been made prior to April 1<sup>st</sup> and following the subsequent changes to the NEL provisions, the same GP had to reassess the back injury. Under the new guidelines this assessment resulted in a 0% incapacity rating. When he disputed this finding his claim was referred to a Medical Panel. He had difficulty understanding the doctors at the Medical Panel and it took about 30 minutes before he even understood the process and questions. The Medical Panel has a time limit and this delay made decision making more hurried. Eventually the Panel decided he was able to return to work if managed “appropriately”. However, the employer disputed the word “appropriately” which would probably not have occurred if Mohammed had been entitled to legal representation when he attended the Medical Panel. As a result, Mohammed’s case is in dispute and he has no income.

- 2.6. The lack of access to weekly payments where claims disputes arise until such time as they are resolved is causing considerable angst. This has been described as “a tool to starve people to accept a redemption” (Advocate’s words).

**Example: Sian**, a woman in her mid forties with two children in private schooling suffered an injury to her shoulder and spine as a result of her coat sleeve being drawn into a woodworking machine. She was off work for over three months and despite advice from her medical practitioner that she had not recovered from the injury returned to work because of the 10% step-down that kicked in after 13 weeks. She chose this option rather than take her eldest child out of school during year 12.

**Example: Gupta**, is a 55 year old male worker who had been on workers' compensation for a chronic back injury. He had attempted to and succeeded in returning to work on more than one occasion, however, the ongoing nature of the injury meant that he was often unable to work. The claims agent put pressure on him to accept a redemption payment to finalise his claim. He refused this offer and was sent to the agent's nominated doctor who said he was fit for work, despite all evidence to the contrary, and subsequently had his weekly payments terminated. The worker challenged this decision in the Workers' Compensation Appeal Tribunal and won the case, even though this meant that for the five month period until the case was decided he was deprived of any weekly payments. This challenge resulted in the agent making a revised redemption offer that was \$100,000 higher.

2.7 The insurance and rehabilitation system was described as "a disgrace". Rehabilitation is viewed as frequently ineffective, slow and often not in the workers' interests. There is also a significant turnover in the Case Managers and this was regarded as undermining service delivery to injured workers. Advocates were also of the view that rehabilitation is often used as a tool to get injured workers off the scheme; not by assisting them to return to work but through redemptions and work capacity reviews. There also appears to have been a cultural change within WorkCover now that most workers with serious injuries can be "thrown off" the scheme after 130 weeks of incapacity. This culture has been paraphrased as "why spend so much on rehabilitation when you can get rid of injured workers after 130 weeks"

2.8 Advocates also thought it was inappropriate that EML Case Managers make decisions on rehabilitation matters. In contrast to rehabilitation professionals, they have no formal qualifications in this area and not infrequently adopt a short-term cost minimisation, rather than a return to work, approach to rehabilitation. This was contrasted with the approach adopted by many self insured employers, where it is the rehabilitation professionals not Case Managers, who make these decisions.

2.9 It is also widely perceived that there are now more rehabilitation disputes than was previously the case causing more delay and distress to workers.

2.10 Furthermore, in some cases there is a lack of independence in the relationship between the WorkCover and the rehabilitation providers. There are approximately 46 rehabilitation firms contracted to WorkCover, but only about 20 are used by (EML) as "preferred providers". This appears to have created a culture in which impartiality is compromised by the financial relationship between the providers and EML.

Rehabilitation providers are reported as being reluctant to challenge the approach of EML towards rehabilitation as they fear their services will not be engaged if they do so. It was felt strongly that rehabilitation providers need to be independent of EML in terms of decision-making on professional issues intended to assist injured workers return to work.

- 2.11 A further criticism of WorkCover and EML is that since primary responsibility for ensuring that employers provide suitable employment for workers able to return to work was delegated to EML, this important provision of the legislation has not been effectively managed either.
- 2.12 As such, monitoring of rehabilitation providers' performance by WorkCover is an ongoing problem. WorkCover still doesn't have a properly functioning rehabilitation unit and consequently does not adequately monitor rehabilitation provider performance. Advocates saw this as a major problem as rehabilitation is part of WorkCover's core business.
- 2.13 There is not enough assistance to retrain workers unable to return to their pre-injury employment. It was suggested that provision for retraining is minimal and, where it does occur, often inappropriate. Advocates also reported that, while there are many opportunities for retraining to be provided to assist injured workers to return to work, there is an extreme reticence on the part of WorkCover and EML to be proactive and/or creative in addressing retraining needs.

**Example:** Jeanne, is a 55 year old woman who sustained an injury to her left shoulder. She subsequently underwent surgery and was unable to return to her pre-injury employment. EML provided her with a one week basic computing course and sent her to a 2 day seminar on medical reception work (which had no hands on experience or training). She was then 'deemed' by EML to be capable of being able to work as a medical receptionist and her weekly payments were reduced from \$221 a week to zero. She was not qualified to get work as a medical receptionist.

### **3. The impact of the changes on workers' financial, emotional and physical stability**

- 3.1. The financial ramifications of the step-downs are far reaching. The step-downs make it difficult for workers to make ends meet and are particularly hard on workers with low wages. Already there are reports of some workers affected by step-downs now having to live below the minimum wage. There have also been reports of workers being<sup>11</sup>

unable to pay rent and mortgages who are now at risk of potential eviction or foreclosure due to loss of income, particularly when the 20% reduction of weekly payments kicks in. The problem is further highlighted by the fact that while the scheme has a ceiling on the amount of weekly payments that can be received, there is no floor beneath which they *cannot* fall.

**Example: Sacha**, a young recently married mother in her early 30's, just bought a house when she injured her back badly at work. Her partner is only temporarily employed and she is very close to the first step-down. She is very stressed, because of the huge financial strain under which she will be placed and this will increase if she is not rehabilitated. Her employer initially encouraged her to take a redundancy saying they could not find her any suitable employment, (except for occasional light duties in an area that she was most unhappy in and was not suited to). She wants to work and refused the redundancy at which point her employer found her a job that was suitable. She wonders why there was no motivation to find this job in the first place

- 3.2. The new discontinuance provisions are an increasing source of hardship as injured workers are denied their weekly payments where claims disputes arise. Payments are only reinstituted if the dispute is resolved in the worker's favour and this often takes many months. This can have a disastrous effect on the family budget. In addition, the disproportionate bargaining power between WorkCover and injured workers that now exists when disputes occur means that some decisions are made not impartially on the basis of merit, but on whether they benefit WorkCover's bottom line; and in the knowledge that it is now much more difficult for workers to challenge WorkCover decisions when their payments have been cut off. This disparity in bargaining power has also resulted in some claims decisions being 'manufactured' so as to discontinue payments and use this as a means of exerting pressure on injured workers – eg. to accept a redemption offer.
- 3.3. Workers report feeling more desperate and under increasing emotional stress; a situation that is made worse by the inadequacy of the rehabilitation services, which are now reportedly worse than before. Desperation has been described by Advocates as increasingly common. Indeed, there has been an increase in suicides and suicide ideation as reported by one Advocate where the major employer is particularly adversarial.
- 3.4. The level of disillusionment has increased as a result of these changes. Many workers with serious injury feel even more powerless and have given up believing that the system will provide justice. They have no trust in the new system.

**Example: Peter**, a male truck driver in his late forties suffered a serious lower back injury during the course of his employment. He subsequently found employment as a security officer but because of the ongoing nature of his injury he again went on compensation. Despite supporting evidence from his doctor EML discontinued his weekly payments in June 2009. He appealed this decision but five months later it still had not been determined and he now expects to be evicted because he can no longer afford to pay the rent

#### **4. The impact of the new laws on workers' behaviours**

- 4.1. Step-downs have placed pressure on workers to return to work earlier than otherwise might have been the case. Some of those returning to work are still carrying an injury but have returned to work because of the financial pressures involved. The new step-down provisions are also discouraging some workers from lodging claims.
- 4.2. Coupled with poor rehabilitation in a lot of cases, step-downs result in injured workers returning to work too early or doing a job for which they have little suitability or training. This often means they subsequently accept a redemption offer.
- 4.3. A worker's choice of whether to take a redemption payment rather than dispute a claim can be additionally affected by other factors in the new climate. If a worker is nearing retirement, does not have a career path to pursue and has paid off their mortgage, then potentially accepting a redemption payment may be more acceptable. However, if the same injury occurs with a younger worker, who has considerable financial obligations (eg. house, car, and children in school) a redemption would be a very difficult decision.
- 4.4. Previously, any ongoing workers' compensation claim and/or any change to work capacity could be continued on the same claim. The current law now makes this much more difficult and workers are encouraged to lodge a new claim whenever there is any change in their capacity for work. This has resulted in excessive red tape and is "driving people mad" (Advocate's own words).

#### **5. The advantages of the new laws**

The following comments were made by Advocates in regard to the new laws:

- 5.1. In principle, the introduction of provisional liability is an improvement.
- 5.2. NEL payments have been increased for the tiny minority of catastrophically injured

workers.

- 5.3. Payments for death and the associated payments for dependants are higher than previously.
- 5.4. The determination of average weekly earnings has improved in some areas, such as the calculation of overtime, and as a result disputation in this area has been reduced.
- 5.5. The backdating of the indexation of weekly payments, as per S. 39, to the date of increases in a worker's average weekly earnings as reflected in Enterprise Agreements/Awards is fairer than the previous arrangements.
- 5.6. Recoverable costs associated with the dispute resolution process for union Advocates have increased.
- 5.7. The removal of the arbitration step from the dispute resolution system.

## **6. Recommendation for improving the new laws to benefit workers**

All comments below were elicited from interviews with Advocates, who expressed a range of views on how the scheme could be improved.

- 6.1. The WorkCover system is now the worst it's ever been. The pre-2008 WorkCover legislation wasn't really the problem; it was more a question of the scheme's administration. Thus, apart from the beneficial changes cited above, the legislation should be returned to what it was. Alternatively, the current scheme could be replaced with a hybrid of the 1971 and 1987 schemes.
- 6.2. In the short term there are a number of reforms which could be undertaken to make the scheme fairer.
  - 6.2.1. Under the current law weekly payments to workers cease during disputes and can be the cause of great financial hardship. We have distressing reports of eviction, foreclosure and even suicide. There is an urgent need for weekly payments during disputes to be reinstated.

- 6.2.2. The current work capacity review provisions are draconian and should be abolished; or, if this is not possible, restructured so as to enable seriously injured workers, not just those deemed to be indefinitely totally incapacitated, to continue to receive weekly payments.
- 6.2.3. Medical Panels should also be abolished as they do not safeguard the principles of western democracy in the sense of civil law and are described as grossly unjust. If they are to be retained, they should be reconstituted so as to allow for representation, the presentation of evidence on workers' behalf, and the right of appeal.
- 6.2.4. The provisions governing NEL payments should revert to the previous system; or, if this is not possible, the current guidelines for rating WPI should be reviewed so that fairness rather than cost cutting becomes the focus of S. 43. The 5% whole of body threshold needs to be withdrawn. Any whole of body assessment is difficult but 5% is too hard to achieve for many workers with a permanent impairment.
- 6.2.5. The administration of the scheme's provisional liability arrangements needs to be improved so that they conform to the stated intention of these provisions – i.e., a fairer and more streamlined determination of claims and the earlier commencement of rehabilitation where this is required.
- 6.2.6. WorkCover should be better managed. One crucial step was described as the need to discontinue the outsourcing of claims management so that WorkCover can resume full responsibility for this aspect of its core business.
- 6.2.7. Existing rehabilitation arrangements have failed to deliver on behalf of injured workers and need to be restructured and more effectively targeted. Consultation with injured workers regarding return to work plans is often minimal and workers, not infrequently, are not provided with return to work plans when they are drawn up.
- 6.2.8. Rehabilitation providers need to be independent of EML.

- 6.2.9. Rehabilitation must to be applied more creatively to assist injured workers return to work, This includes the necessity for WorkCover to have a clear focus on retraining, particularly for seriously injured workers who are unable to return to their pre-injury duties and or employers.
- 6.2.10. The laws are not well understood and are very complex. They should be simplified and Advocates and workers trained or informed of their content and the repercussions.
- 6.2.11. The Ombudsman's functions and powers should be restructured to enable complaints to be dealt with more effectively than they are at present.
- 6.2.12. There should be increased use of TV ads on preventing work related injury and disease.
- 6.2.13. The common law right to sue your employer for negligence resulting in injury should be brought back. Every other state in Australia has this capacity but South Australia does not. In 1992 these provisions were withdrawn as a 'trade off' for the pension scheme. Now as a result of the new laws, we have neither a pension scheme nor provision to sue a negligent employer. The way to remedy this inequity is to make negligent employers accountable.



## Conclusions

Two of the principal aims of the WorkCover legislation are to provide “fair compensation for employment-related disabilities” and to facilitate “the effective rehabilitation of disabled workers and their early return to work”.

However, information derived from this round of interviews with those who advocate for injured workers suggests there are major flaws in the 2008 changes to the legislation and that these changes are seriously compromising these objectives. These flaws include but are not restricted to, the operation of the medical panels viewed as unlawful, step-downs, Non-Economic Loss payments, loss of income during disputes, and inadequate rehabilitation services. The new legislation has done little to protect and retrain injured workers. In addition there are reports of increasing financial hardship and disillusionment rather than encouragement and support to assist injured workers return to work. These adverse effects are reportedly increasing as each successive stage of the new legislation has been rolled out.

Overwhelmingly, Advocates reported that the current WorkCover scheme is inequitable, has imposed unnecessary financial burdens on injured workers and does not sufficiently support their rehabilitation, either physically or psychologically. There is grave concern for the wellbeing of the injured workers in many of the cases presented in this report.