

“Someone has to pay”

The impact on injured workers of changes to NSW Workers compensation: June 2012 legislative amendments

Report No.1 for Unions NSW

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Unions NSW brief summary of key comments and conclusions

1. The rapid turnaround of the crisis that justified the cuts to the workers compensation system in NSW in 2012 has been achieved through a dramatic reduction in the compensation for injured workers. It also raises questions about the actuarial assumptions underpinning the original deficit calculation and the validity of the Government’s response.
2. The 12.5% cut in insurance premiums for employers since the changes were introduced, occurred with no Government review of the impact of the changes on injured workers.
3. By focussing on cutting injured workers benefits the changes:
 - o did not reflect the reasons for the increase in the deficit identified by the NSW Auditor General and the Joint Select Committee’s 2012 report to Parliament;
 - o failed to address the long-standing problems of the system identified by the Industry Commission Australia in 1994, Grellman in 1997 and the Productivity Commission in 2004; and
 - o ignored the fact scheme expenditure and expenditure on payments and services to injured workers has not increased in NSW over the last decade.
4. As a result of the 2012 changes, vulnerable individuals who were already suffering the effects of work injury or illness are now experiencing increased trauma, distress, depression, financial hardship and unnecessarily prolonged pain when their treatments are delayed. The resulting impact on a victim’s partner, children and other loved ones is also unconscionable.
5. The costs of injuries are increasingly shifting from the workers compensation scheme and employers to workers and their families.
6. WorkCover has withheld comprehensive work injury and illness data from the NSW public since 2010. This inhibits debate about workers compensation arrangements in NSW. The detail of the scheme agents contracts is also withheld (no contract has ever been terminated).
7. The changes are without doubt retrospective:

- o Work capacity decisions (WCDs) can be applied to overrule decisions about weekly payments that were made by the Workers Compensation Commission before the 2012 changes.
 - o Workers injured before the legislation changed don't have liability denied according to the new rules about journey claims or heart attacks for example, but the new system of payments applies to them, with many having their payments cut off.
8. The most significant impact on injured workers from the changes is the introduction of work capacity decisions (WCDs), whereby an insurer can reduce weekly payments by the value of a hypothetical wage for a hypothetical job that the insurance case worker assesses the worker as having the capacity to perform, regardless of whether such a position is available or likely to be offered to the worker, where such a position might be located, or whether the medical practitioner deems the worker fit for that duty.
 9. The WIRO Kim Garling states: *"...unless you're in a coma, you have work capacity."*
 10. The WCD process is morally hazardous given that the insurers have a conflict of interest between meeting insured workers' needs and maximising profits.
 11. Lawyers are not entitled to be paid for any advice or assistance given to workers in relation to the WCD process yet payment for legal advice to insurers is not prohibited however and they are known to employ lawyers.
 12. While seriously injured workers (those with 30% WPI) are exempt from having a work capacity assessment, there have only been 994 workers in this category since 1987.
 13. The significant increase to weekly payment statutory limits offers a theoretical improvement in the financial support available to injured workers however, insurers are using other elements of the system to reduce payments.
 14. For workers injured prior to 1 October 2012, the change to cut off medical treatments 12 months after the termination of weekly benefits will take effect from 31 December 2013. This means for every worker whose weekly payments were cut off during 2013, their medical payments will cease on the first anniversary of those payments being cut. The earliest this could happen is 1 January 2014.
 15. Early indications are that:
 - o workers requiring medication or medical equipment, such as opioids, hearing aids or prosthetic limbs, will struggle financially to purchase this;
 - o workers who require ongoing treatments, like physiotherapy, to keep themselves fit for work will need to fund these treatments themselves or risk becoming unfit for work;
 - o workers who require operations, such as knee reconstructions, are experiencing difficulties in having these operations approved by the insurer before their entitlement period ends.
 16. Capping medical benefits conflicts with Industry Commission recommendations from 1994.

17. The evidence shows medical treatment requirements of injured workers generally continue well beyond 12 months. These costs will now be borne by the Medicare system and the workers themselves.
18. Eliminating journey claims from the scheme will have a minimal impact on the scheme or employers. They amount to only 2.6% of claims, which is only \$70 million, with \$35 million of that recovered against third party insurers.
19. The changes place significant obligations on workers without imposing reciprocal obligations on employers to provide suitable employment opportunities.
20. Workers are forced to look for work with any employer, yet the evidence shows workers are roughly twice as likely to return to work if they remain with the same employer than a new one.
21. The changes cut off benefits in order to encourage return to work, yet there was no evidence provided to the Joint Select Committee of a connection between reducing financial benefits and return to work rates.
22. The changes don't address the serious problems with the rehabilitation system for workers compensation in NSW. Compared to Victoria, rehabilitation costs significantly more per worker and there are significantly less injured workers participating in rehabilitation.
23. Evidence reveals terminated workers suffer stigma and discrimination from potential employers.
24. Examples of conflicts of interest in the workers compensation system include:
 - a. WorkCover is both the nominal insurer, with commercial incentives to minimise insurance claim payments, and a regulator, with the responsibility to monitor insurers and enforce contracts.
 - b. Contracted insurers and licensed self-insurers have an inherent conflict of interest as their responsibilities to compensate injured workers and assist them to recover and return to work are overshadowed by their mandate to maximise profits. This conflict has risen to the fore with the new system of WCDs.
 - c. Independent medical examiners and rehabilitation providers are paid by the insurers. They have incentives to assist insurers to minimise expenditures for services and payments to injured workers. They do not, however, have incentives to minimise expenditures for their own services, nor do they have incentives to assist the worker to recover. These conflicts of interest have been exacerbated by the changes.
25. Enforcement of WHS in NSW is often criticised for being under-resourced and comparatively weak. The Victorian regulator directs a greater proportion of its budget to enforcement activities (43% to 12%) and has half as many worksites per inspectors (1086 vs 2296).
26. There was also a decline in the number of penalty notices issued in 2011/2012.
27. Future reports from Macquarie University Centre for Workforce Futures will report against nine benchmarks.