

WORKERS REHABILITATION AND COMPENSATION (SCHEME REVIEW)

AMENDMENT BILL

30 April 2008

The Hon. D.G.E. HOOD: The starting legal principle for workers compensation is a worker's right to sue in tort (in other words, to sue their employer) when and if injured if the employer failed to take all reasonable steps to prevent the injury. Granted, in creating a legislative scheme the trade-off is that it is no-fault, so the worker need not demonstrate that the employer has failed to take reasonable steps; liability is much easier to prove.

It is, therefore, highly relevant to note that removing common law claims, as the original WorkCover legislation provided and continues to provide today, actually serves to contain and regulate the government's liability to injured workers. Without this legislation the government's liability could be at large (in other words, much greater) if the findings of the common law courts were that employees had greater entitlements.

Sure, without the no-fault scheme, liability might not be found on so many occasions, but it would also be the case that, where liability were found, compensation payments could be a lot larger than is currently the case. Yet here in this bill we are being asked not to grant common law rights to injured workers but, rather, to curtail them even further than we already have.

North America has a much longer history of workers compensation than we do in Australia, with the USA and then Canada legislating to protect injured workers and also contain employers' exposure to common law claims, since the early 1900s. It should be noted that all 50 US states have workers compensation schemes and only 12 of those have state-run schemes, most of which are only to insure state employees and serve as an example to private sector insurance funds.

Very few US states—and I mean very few—have state-run monopolies. Yet here in South Australia, since a few years ago, we have followed the example

of the few (certainly not the majority) of the US state-run monopoly funds. Strangely too, our fund insures much of the private sector but relatively little of the public sector.

I think it is fair to say that the response to the unfunded liability situation is lacking in one significant area in this bill. Family First has researched this situation thoroughly. We have listened to the record number of people who have lobbied us and written to us about this bill, and I am confident that WorkCover is in deep trouble, and it has become so particularly in the last few years.

The record stands for itself, I think, considering the unfunded liability and funding ratio for WorkCover which have spiralled out of control in recent times. Further evidence of WorkCover's woes is the comparatively healthy position—using the very same legislation that we are being asked to significantly amend today—that the self-insurers find themselves in, that is, without using the services of WorkCover SA at all.

We have been told that our laws are generous, and I say 'good on us' if that is the case, and the self-insurers and previous government have demonstrated that these laws might appear generous compared to other states. These laws can and do work well when run properly. The real problem, to be clear, in Family First's view, is the management of the organisation.

We point no specific finger of blame at individuals on the board; other organisations, be it Employers Mutual Limited (EML) or the WorkCover Board itself; or the minister. I know there is a school of thought that the minister should take the blame, but I do not always see it that way. At the end of the day, WorkCover has been mismanaged, regardless of who is to blame.

We hear it from injured workers, unions and worker representatives and we know it from experience: injured workers cannot be swept away under the blanket and forgotten, and I think that at the next election there will certainly be a number of workers who will be taking that into account. It sits very poorly

with Family First that mismanagement results in punishment for the people the system is meant to serve. We feel it is terribly unjust.

Much has been made of the malingerers, those people who hang around on weekly payments and do nothing or, worse still, feign an injury, yet WorkCover itself informs us that only about 2 per cent of claimants are suspected of committing fraud, so there is some distance between the fraudsters and, I suggest, the large majority of 98 per cent of people who are unfortunately injured doing legitimate work and therefore claiming benefits that they are entitled to.

If management, or whoever was responsible, had done the job properly or, to be fair, if WorkCover had been properly funded to do its job—and there may be some elements of both in this—WorkCover, through investigation teams and existing legislative process, could have flushed these people out more effectively than they already have. Even so, as I say, it is only a group representing 2 per cent of the entire group.

There has been an inverse relationship between participation in rehabilitation insofar as WorkCover is concerned—I believe the self-insurers do not have the same problem—and the likelihood of a worker's return to work to pre-injury levels. Again, the government and Business SA's answer seems to be to label injured workers (in some cases) as malingerers, when the truth of the matter is that WorkCover and the rehabilitation consultants simply have not done their job or, to be fair, perhaps have not been able to do their job or have faced hurdles in doing their job properly.

Again, the self-insurers have shown that there is a way that can work in this regard. However, to use this excuse of those malingering on weekly payments as justification for hitting all workers for management's failures is like cancelling train services because some people evade fares or imposing a night curfew because some people play up in the evenings and doing nothing to reform poor policing and management. Or, again, it is like leaving the sheep in the pen and building bigger fences but failing to deal with the foxes inside.

The WorkCover board and EML might consider that harsh, but it is not necessarily them that I am likening to foxes. It is simply astonishing to Family First that injured workers or, if you like, in my analogies the commuters, the revellers or the sheep, wearing all of the consequences for poor management of this scheme.

To illustrate our beef with this management, let us cast our minds back to 31 March 2006, just over two years ago. EML took over claims management then from Vero and Allianz and became the monopoly provider of the service. We have now passed the two-year anniversary, and I am making reference to those two years for an important reason. In a media release issued by WorkCover SA dated 7 March 2006, just prior to the last state election, it stated (in black and white):

As WorkCover's sole claims agent, EML expects to cut the claims liability by up to \$100 million a year after only two years under the new contract.

That was their claim. What have they achieved? When you consider that in mid-2006 the unfunded liability was at \$694 million and we are told that it is now close to \$1 billion in unfunded liability, that is a very far cry from a \$200 million reduction in two years. To emphasise the point, EML's bold claim was that it would have the unfunded liability down to roughly \$500 million by now but, instead, it is double that. That is surely the main problem.

EML's inexperienced case managers (and I am told that is the case) and their poor management of rehabilitation has seen it make a thorough mess of this and, as I said at the outset, a ruin of what ought to be a generous and fair workers compensation scheme. On a related note, it seems to me that if you do not change the management that has made the mess but change the legislation, surely we can conceivably find ourselves in the same situation in a few years' time. Will we be asked in 2011 to make even more draconian cuts because management have failed to implement these changes that are going to pass this parliament now?

The Clayton review relies too heavily on the assumption that some watchdog and accountability functions will somehow ensure that management will apply the new scheme effectively and produce the financial results that will see the scheme ultimately fully funded. Indeed, Alan Clayton expressed some reservation about the capacity of his recommendations, which are not fully reflected in this bill. He expressed reservations that his recommendations could deliver the reduction in premiums, as set out on page 200 of the report.

Looking at the way WorkCover is being managed now, I believe it is a little presumptuous to assume that it will manage this bill and its massive changes any better than it has managed the existing system. So, I think Mr Clayton is right to express reservations about projected savings due to changes.

The step-downs are the largest and most controversial feature of this legislation. For the record, we were originally looking at a step-down to 80 per cent of average weekly earnings after 13 weeks but the government says it will now be 90 per cent after 13 weeks and 80 per cent after 26 weeks. The original 80 per cent step-down at 13 weeks was going to deliver 0.11 of 1 per cent of wages reductions in WorkCover levies. That will be even less of a saving thanks to the step-down of the step-down, so to speak.

The 2½ year reviews, by contrast, deliver a 0.69 of 1 per cent of wages saving; significantly, 0.69 of 1 per cent out of a total of 0.79 per cent of wages saving on WorkCover levies. Granted, the step-downs will deliver the second-largest percentage of wages saving after the 2½ year reviews; still, a clearly significant component of this bill from the precious economic aspect in levy reductions, is the 2½ year reviews and, coupled with that, the introduction of medical panels. I think it is important to record that data (which honourable members can read for themselves on page 200 of the Clayton report) to put the step-downs into the all-important economic perspective.

We have not had a chance to participate in this debate until now and much of the heat in the debate concerns the step-down proposals, and much has been said already. The fact is that a person might not yet have had the opportunity

to see a specialist, let alone have surgery and recover from that injury within 13 weeks or even the 26-week period.

Some people in this debate have mentioned the shortage of medical professionals available to service injured workers. Again, that is arguably a failure of the system or management to provide these services or fund them at a rate attractive enough for professionals to do the job.

Family circumstances or an aggravation of the injury might be a reason why 13 weeks is simply not long enough. Why should those workers suffer? Why should those workers, after only 13 weeks, through no fault of their own, see a reduction in their benefits? Indeed, the same is the case after 26 weeks. In many cases they would not have been able to see a specialist or certainly not have surgery during that time.

The simple fact is that it can take longer than 13 weeks to recover from a work injury due purely to circumstances beyond injured worker's control. Yet, after 13 weeks there will be a cut—originally 80 per cent, but now 90 per cent—in their average weekly earnings. I find it fascinating that honourable members might say that they care about mortgage stress, that they weep with hurting working families as the banks threaten to foreclose on them and, yet, after 13 weeks a faultless injured worker will suffer new mortgage stress because they have 10 per cent less of their income than they were getting before. That is not a fair system.

Spouses are likely to have to seek work (or additional work) or things may need to be sold or refinanced as soon as a work injury occurs if the prognosis is that there will be a lay-off period of longer than 13 weeks. I find it remarkable that this chamber and, indeed, this parliament is prepared to go along with that.

I know that we will be pointed eastward, to the comparative legislation in Sydney and Melbourne, and I am sure that Alan Clayton's words of generosity will be repeated to us. However, I have to come back to WorkCover's previous

healthy funding position and the funding position of self-insurers. If they can do it, why can't we?

Let me also say of the self-insureds, that Family First is very concerned about the alleged behaviour of WorkCover in terms of exit payments sought from large employers waiting to get out of WorkCover. There is a matter on that issue apparently before the courts, and we wait with bated breath, so to speak. However, certainly the self-insurers of South Australia are not altogether happy with the government's amendment to raise the exit fee calculations to legislative status without reviewing the content of those exit fee calculations.

They complain of a failure by the government or WorkCover to consult on that amendment. Also, it is not too long ago to recall an inappropriate letter that WorkCover sent out, threatening an injured worker, which the minister had to apologise for and retract—and rightly so. Those acts, or alleged acts, coupled with what we know and are hearing about WorkCover management, suggests a culture that is not really suffering any consequences for its mismanagement when, of course, they should be.

To conclude on the subject of step-downs, I think it is incredible that, in the federal election, much was said about caring for working families but it seems here that we only care about uninjured working families and not families with a work-injured mum or dad or provider.

I want to talk about redemptions because, to me, they are a pathway to resolving the unfunded liability situation. By getting people off the WorkCover books through redemptions, the unfunded liability shifts downwards straightaway. Whilst I am sure there are injured workers (perhaps encouraged by their lawyers) who hang in there for a better redemption offer, the vast majority do not want to be on weekly payments and want to get off the system. Certainly, that is the experience in the self-insured system.

Injured workers are stigmatised and treated with scepticism by case managers and the community alike. A number of them even begin to doubt

themselves, I am told. Men and women certainly enjoy work, as a rule. People enjoy work and gain satisfaction from the toil of their labour, so to speak. To sit about uninjured is not only a rejection of involvement in the community and things that make people happy and satisfy them; it can actually lead to conditions such as depression and other mental illnesses, as we have seen and heard from injured workers.

Recently, I asked a question of the Minister for Mental Health and Substance Abuse about a person who was suicidal; and this information came to light when the person wrote to us about this bill. It is quite accurate to say that this bill will put potentially suicidal injured workers at even greater risk.

Redemption offers the opportunity to put an end to the depression and stigma of WorkCover and make a fresh start, whether or not the price is right, so to speak. I understand that in recent times WorkCover has had little interest in redemptions or has been making paltry offers, perhaps in desperation of its budget circumstances. Nonetheless, the universal criticism of WorkCover is that EML has made very poor use of redemptions in order to get people off the system.

We have been told, quite remarkably, that the changes to redemptions are only to change the alleged culture of hanging in there for a payout. If WorkCover made a rigid policy on redemptions—again, if it had managed the WorkCover system properly—there would not be this alleged culture and these allegations would not be made. It is quite surprising to hear WorkCover complaining of such a culture when it is solely responsible for controlling whether such a culture exists within its own organisation.

In the debate about this bill not enough has been made about its retrospective application. Retrospectivity will allow the unfunded liability to be cut back sooner, that is true, because some people, by definition, are past the 130-week period and will be cut off automatically. No doubt, those people would have read the writing on the wall and would be making lifestyle and financial plans, based on the date this bill is proclaimed. Their future lies in the hands of WorkCover's assessing that the worker lacks current work capacity and is

likely to continue indefinitely to lack that capacity. For reasons I have outlined above, injured workers have little confidence in WorkCover's deciding in their favour—and that is a potential tragedy. There will be some people amongst that group rorting the system, but the vast majority will be doing the right thing.

Before leaving the question of retrospectivity, I seek clarification from the government (perhaps in the summing-up phase) as to whether the reduction to 90 per cent after 13 weeks and 80 per cent after 26 weeks will have retrospective application. It has been put to us that this component, arguably, will not be retrospective. I have been told in briefings that this will not be the case, but I seek this point to be on the record for certainty's sake.

I turn to the question of investigations. I believe that injured workers have been let down here, as well. No injured worker likes to be accused of rorting the system. It is terrible to be accused of rorting the system. Injured workers as much as anyone else want to see the malingerers and the fraudsters kicked out of the system so they are not falsely accused. I have heard injured workers' frustration at others who are defrauding the system, but in their view WorkCover does nothing about it.

I ask the government to give a detailed summary of the funding provided for prosecution activity and the investigation history for fraud and malingering in the WorkCover system. If they are making much of malingerers being the reason that we have to introduce new step-downs in weekly payments, I hope they can make the case that there has been a dramatic increase in fraudsters and malingerers detected by their investigation unit in order to justify the change. I suspect that that is not the case.

While I am putting forward questions for the summing up, Family First would be grateful for the public release of the actuarial opinion provided on the Clayton report. My recollection is that this has not been disclosed. If I recall correctly, the Clayton report was not released before the last federal election in November 2007, when it was originally scheduled for release, largely because the government wanted to have actuarial advice to hand. I would be

grateful to have that actuarial advice, in particular to see the extent in dollar terms to which each of Mr Clayton's recommendations contributes to fixing up the WorkCover problem.

I have raised some doubts so far about the economic arguments of this bill. Economics are not everything. As someone with an economics degree, I certainly understand that economists disagree with each other all the time. Changing a culture takes more than legislative change, and changing a culture can produce more than economic outcomes. There are also social outcomes that are beneficial and, ultimately, Family First believes in treating people decently. Sometimes that costs money. We have been told that we must cut workers' entitlements in order to remain competitive with the eastern states. This is said to be an economic argument for the benefit of the state. But there is another way one can look at it by two names—downward harmonisation or, more roughly, a race to the bottom.

In order to compete economically, we will cut the entitlements of injured workers—and that is a concerning state of affairs. This bill and its sister bill will result in greater industrial action down the track. I foresee that police officers may strike or threaten to strike if there are not sufficient protections in place for police because, if they get injured, they know they will have their pay cut after just 13 weeks. Why would a fireman go into a building or beyond the call of duty to help someone if he or she knows that they will not be properly looked after if they are injured in their work? It takes incredible heroism to undertake tasks such as that, but I think that by introducing this bill we are asking for more heroism and less self-interest for our emergency services personnel. When I say 'self-interest' I mean their interest in providing for their families. They will not be looked after as they are looked after under the current scheme.

People working in mental health may strike, for example, if they do not feel safe when doing their job. Through industrial action—which the unions have foreshadowed already—we may well see this bill costing South Australian taxpayers more, not less, in lost productivity and the outcomes negotiated after industrial action. This would be a tragic outcome.

I want to thank all the people who visited me and the Hon. Andrew Evans, wrote to us or lobbied us. I want to make it plain to those people that their views were heard loud and clear. Some campaigners saw this coming from a long way off and were lobbying us for some time about the unfunded liability. It may be little comfort to them, but I congratulate them for their articulate and passionate pleas for action. Family First certainly agrees with their general position.

I also thank Dr Zoë Gill from the Parliamentary Library for her excellent summary of the various stakeholder positions and the history of this bill. It has made our task easier and the history aspect, in particular, made most educating reading about changes to WorkCover that have been proposed in the past. The positions that the major parties have held in the past (as demonstrated by Dr Gill and other sources) have played a large role in informing us on the decision to make in relation to this bill.

I will conclude now on the important question; that is, how Family First will vote in relation to this bill. I may have sounded harsh on the government with some of my comments on this bill. I know that some members on the government side of the chamber will feel dejected when this legislation passes, as it does not reflect their personal views—and they personally have told me that. I feel for them. But, as always, one only votes as they feel so compelled. In our party, people never have to vote against their conscience. I think that should be the case for all members of parliament, no matter what the situation.

I will not spend a lot of time talking about that but, primarily, this bill hurts working families. I will borrow a phrase from the newly elected Prime Minister: it throws fairness out the back door. I believe the government and the opposition have made tough choices. I understand the economic arguments, but we believe these choices are wrong. The bravest choice would be to take drastic and, arguably, much more decisive action; that is, to change the culture and behaviour of the management of WorkCover and take a leaf out of the self-insurers' book, and indeed a lesson from history on how this scheme can be run effectively in order to get the scheme back on track.

Sometimes you have to spend money to make long-term savings, and investing and using the legislation properly would in our view have been a better choice than to spend relatively little by comparison and simply further damage injured workers for such a bill. This is a human cost that Family First is not willing to pay.

Family First rejects this bill and does not support the second reading. We saw advertisements in the newspaper funded by Business SA and other industry groups and have heard calls for this bill to be passed urgently as every day's delay is allegedly costing this state economically. As I have said, the unions will have much to say about that in the coming weeks and months ahead. We have made our decision: Family First opposes the bill because it abandons families when they are most in need and because it does little to address the real problems of WorkCover, which are its mismanagement.