

**WORKERS' COMPENSATION CONCILIATION AND REVIEW:  
A SURVEY OF TRADE UNION OFFICIAL ATTITUDES**

**Abstract**

In June the 1995 Dispute Resolution Review Committee (the Committee) of the Workers' Compensation and Rehabilitation Commission (the Commission) published a report entitled 1995 Review of Dispute Resolution. (WorkCover Review) The WorkCover Review had been prompted by the recommendations contained in the Report of the Standing committee on Legislation in Relation to the Workers' Compensation and Rehabilitation Amendment Act 1993. Recommendation 9 of the report provided;

*"That the Government commission an independent review of the Workers' Compensation and Rehabilitation Act 1981 as amended by the Amendment Act at the expiration of 12 months from the date upon which Part IIIA was proclaimed and that the report be tabled in the Parliament no later than 15 months after such proclamation date."* (my emphasis)

In order to satisfy that recommendation a sub-committee of the Commission was established comprising of representatives from the Insurance Council of Australia, Trades and Labour Council of Western Australia, Chamber of Commerce and Industry and the Commission. The Commission is the administrator of the current dispute resolution system and is often a party to proceeding in workers compensation matters. No representative of Law Society of Western Australia was part of the Committee although the Law Society made submissions to the Committee.

This paper relates to the results obtained from a questionnaire completed by legal practitioners, which surveyed the practitioners attitudes to the current system. The Committee did not survey trade union officials as users of the dispute resolution system. The results of this survey, which show a strong level of discontent with the system, contrast with the finding of the Committee.

**WORKERS' COMPENSATION CONCILIATION AND REVIEW:  
A SURVEY OF TRADE UNION OFFICIAL ATTITUDES**

**1. INTRODUCTION**

Since March 1994, as a consequence of amendments to the Workers' Compensation and Rehabilitation Act 1981 (the Act) legal practitioners have been almost completely excluded from the workers' compensation jurisdiction. The three stage dispute resolution process now operating in that jurisdiction, provides in the first instance for the parties to attend a conciliation meeting. Section 84Q(2) of the Act excludes legal practitioners from representing parties at conciliation other than where all parties agree to the attendance of legal practitioners and where the Conciliation Officer also agrees.

In the event that the parties do not reach agreement at conciliation or where the parties are otherwise unsatisfied with the conciliation, they are entitled to seek a review. At review, legal practitioners are entitled to attend on behalf of the parties but only where it is established that there is an issue of law. (See Section 84ZE).

A right of appeal exists from the decision of the Review Officer to a Compensation Magistrate on a question of law and there is an unrestricted right of legal practitioners to attend before the Compensation Magistrate.

The Law Society of Western Australia(Law Society), representing the interests of legal practitioners, made submissions to the West Australian Liberal Government in mid-1993 and during the parliamentary process late in 1993, urging that there be no reduction in the rights of workers and employers to obtain legal representation. The government response to these submissions was to highlight the self-interest of legal practitioners and to draw attention to

the cost of legal proceedings in the workers' compensation jurisdiction.<sup>1</sup> The amendments reducing the role of legal practitioners in the jurisdiction were said by the Government to be necessary in order to reduce costs of disputes and to increase the rate of dispute resolution.

The effect of the amendments has been to reduce the role of legal practitioners in the workers' compensation jurisdiction and there is now evidence that the vast bulk of legal practitioners operating in this jurisdiction have noted a significant decline in their workload.<sup>2</sup> Whether the decline in input by legal practitioners in the worker's compensation jurisdiction has had an impact on trade unions is yet to be ascertained.

In December 1995 a survey was distributed to trade unions and the results were collected and analysed by the Curtin University computing centre. The survey was prepared by the writer. A similar survey had been administered to members of the Law Society, having been the subject of comment by members of the Law Society Personal Injuries Committee.

The survey was in two parts, Part One dealing with aspects of the workload of trade union officials and the rate at which work was referred by trade unions to legal practitioners. In addition, Part One examined the attitudes of trade union officials towards legal representation and whether or not they considered it was necessary. Part Two surveyed the attitude of trade union officials to the necessary attributes of Conciliation Officers.

---

<sup>1</sup> Pollard, J. (1993) Keirath accuses law firms Sunday Times August 14

<sup>2</sup> Workers' Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

## **2. OBJECTIVES**

The objectives of the survey were as follows:

1. To establish whether or not there had been any change in the workload of Trade union officials as a consequence of the amendments to the Act.
2. To ascertain the attitude of Trade union officials to the reduced rights of appearance of legal practitioners in the workers' compensation jurisdiction.
3. To consider the attitudes of trade union officials to the question of legal representation in the jurisdiction.
4. To ascertain whether trade union officials considered that they needed additional training in the workers' compensation area.
5. To consider what attributes trade union officials regard as essential for a Conciliation Officer.

These objectives were consistent with the changes to the legislation which had the following effects:

1. Reduction of the right of legal practitioners to appear in the jurisdiction.
2. Did not specify the qualifications and skills required of conciliation officers.
3. In practice, led to the appointment of Conciliation and Review Officers who, in most cases, were not legal practitioners.
4. Resulted in changes to cost structures restricting the right to costs of the successful party.

### **3. METHODOLOGY**

The survey was circulated to trade unions with the request that it be completed by trade union officials who most frequently visited the jurisdiction. Sixteen trade union officials responded to the questionnaire.

The first part of the questionnaire involved providing answers to questions by indicating whether the respondent disagreed, had no opinion, agreed or did not know about the subject matter. Part Two of the questionnaire required the respondent to consider whether the stated attributes of a conciliation officer were regarded as very important, important, of doubtful importance or not regarded as important by the respondent. The respondent to this part could also indicate that they had held no opinion on the matter.

In addition, the questionnaire allowed for open-ended responses to the questions, "what in your opinion are the positive features, if any, of the new system", and "what in your opinion are the negative features, if any, of the new system".

### **4. RESPONDENT PROFILE**

The survey did not ask the respondents to indicate information in relation to the size of the union or the age or sex of the respondent. The questionnaire was confidential although respondents could, if they chose, declare their identity. Most respondents did declare their identity.

### **5. SURVEY RESULTS**

#### **5.1 Work Load Change**

For ease of discussion the questions administered are dealt with in clusters. The first three questions attempted to deal with the issue of whether trade union officials were spending more time or less time in processing workers' compensation claims. Of the 16 respondents, 75% of the sample, indicated

they were spending more time in processing claims. Approximately 19% of respondents indicated they were spending less time processing claims and the balance were unable to indicate a response. Of those respondents who indicated they were spending more time with claims 50% thought that this was due to the fact that there were more claims. Nearly 60% of respondents who considered that they were spending more time on claims, thought this was due to an increase in complexity of the claims. Trade union officials were divided as to whether or not they considered an increase in workload was due to poor documentation by employers, with 36.4% indicating that they considered that employers were poorly documenting claims. On the other hand, 50% of trade union officials who had noted an increase in their workload, considered that this was due to claims not being properly documented by workers.

Of those who had responded by indicating that more time was spent on compensation claims, approximately 60% considered that this was due to the fact that injury claims were taking more time. Overall the results to the first three questions of the survey indicate that trade union officials were probably doing more work as a consequence of the amendments to the Act which reduced the input of legal practitioners. This was mostly attributable to the fact that claims for compensation were poorly documented by employers and workers.

## **5.2 Attendance At Work Cover Directorate**

The next three questions sought details from trade union officials as to whether or not they had attended conciliation and review hearings. 75% of trade union officials who responded to the survey indicated that they had attended conciliation meetings. 43.8% of trade union officials had also attended review hearings. This is consistent with the results obtained from the legal practitioner survey<sup>3</sup> which indicated that the role of legal

---

<sup>3</sup> Workers' Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

practitioners in the jurisdiction had been reduced, particularly at conciliation, but a strong level of legal practitioner input was still evident at review level.

70% of trade union officials indicated that they attended conciliation and review at least once a month.

### **5.3 Referral to Legal Practitioners**

Trade union officials were asked to indicate how often they sought the advice of a lawyer before attending conciliation or review. Approximately 90% of trade union officials sought the advice of lawyers before conciliation and review. The frequency with which advice was sought was however more scattered. Approximately 9% of trade union officials sought advice in every case. 27.3% of trade union officials sought advice for one in five cases and approximately 45% sought advice for one in ten cases.

33% of lawyers' opinions were paid for by a retainer system, 20% were paid on the basis that payment was for each opinion and 40% of matters upon which advice was sought were paid for through some other system.

Traditionally trade unions have had some connection with firms dealing with workers' compensation matters. Under the dispute resolution system which operated prior to March 1994, when the Workers' Compensation Board was operating, trade unions were able to refer matters to law firms, generally on the basis that trade union members would not be charged by those firms. In general terms, the law firms would obtain their costs from the insurer in the event that the claim was successful. In some cases workers were charged either at a reduced rate or not at all where the claim was not successful.

The system, which existed prior to March 1994 allowed workers who were successful to obtain costs on a party/party basis from insurers. If the worker was unsuccessful with a claim for compensation, they were generally not required to pay the respondent's costs, the exception being where the claim was brought on a basis which was fraudulent or frivolous. Since March 1994

the Workers' Compensation Board has been abolished and the Work Cover Conciliation and Review Directorate provides a two tier dispute resolution system.

The provision for costs has been modified so that no costs are payable at conciliation or review. This means that notwithstanding that the worker may be successful in obtaining an award of compensation, the worker is not entitled to payment of legal costs from the insurer. (See Sections 84X and 84ZL). The consequence of these changes is that workers have to bear the costs themselves or, in the case of trade union members, seek assistance from the trade union. This in turn has placed a burden upon workers pursuing compensation claims and has caused some adjustment to trade union behaviour when referring matters to legal practitioners<sup>4</sup>.

#### **5.4 Results of Conciliation and Review**

The Act now provides that the conciliation and review process must be performed in a manner which is fair, just, economical, informal and quick. (See Section 3(d) of the Act). Trade union officials were asked to indicate whether they thought these characteristics were present in the current system. Approximately 50% of respondents disagreed with the statement that conciliation and review was fair. A further 14.3% held no opinion on this issue, with 28.6% of respondents being of the opinion that the process was fair. Similar results were noted to the question of whether or not conciliation and review was just. 42.9% disagreed with the statement that conciliation and review was just, with 28.6% of respondents holding no opinion and

---

<sup>4</sup> A similar trend was noted in South Australia following the introduction of the *Workers Rehabilitation and Compensation Act 1986*. (SA) Wilson, D.(1992) *Winning Workers Can Be Losers* Law Society Bulletin 14(1) 12 noted that, with provisions that did not allow for recovery of costs by a worker, even in the event that the worker was successful, the worker could still be put to considerable expense, by having to pay legal fees. This seems contrary to the general thrust of the legislation, which is required to be economical.



21.4% of respondents agreeing that conciliation and review was just. 7.1% of respondents did not know. These results suggest that a substantial proportion of trade union officials do not consider that the conciliation and review process is fair or just. Similar results were noted in the legal practitioner survey.<sup>5</sup>

Trade union officials were also asked to consider whether they thought that the conciliation and review process was economical, informal or quick. As to the economy of the system, the results were ambivalent, with 31.3% disagreeing and 37.5% agreeing that the system was economical, 18.8% had no opinion and 12.5% did not know.

The ambivalent response to the question of dispute resolution economy, is not surprising given that the actual dispute resolution process is provided free of any filing fees. In addition, as noted above, the worker does not have to pay costs if unsuccessful. Trade union officials assist workers as part of their usual duties, so the cost of the trade union officials attendance is not brought home to the worker. The trade union officials time is not costed into the system, but the evidence shows that increasing time is being spent by officials in this work. It appears that insurance claims officers are also noting an increase in time spent in dispute resolution as a consequence of their attendance at conciliation and review.<sup>6</sup> It has not been possible to calculate what the "time costs" of trade union officials and insurance claims is, as compared to the costs of legal practitioners representing workers and insurers under the previous system.

As to the informality of the system, 62.5% of trade union officials agreed that the system was informal. 26.7% disagreed that the system was quick with

---

<sup>5</sup> Workers' Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

<sup>6</sup> Workers' Compensation Conciliation and Review: A Survey of Insurance Claims Officer Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

46.7% agreeing that the system was quick. 20% held no opinion and 6.7% did not know.

The overall result to this cluster of questions suggests the trade union officials are not convinced that the system is fair and just. There is general agreement that the system is informal but the results relating to economy and speed are ambivalent.

### **5.5 Legal Representation At Conciliation and Review**

Trade union officials were asked whether they thought it was appropriate for workers to be represented at conciliation. An overwhelming 80% of respondents indicated that they thought workers should be represented at conciliation. Respondents were then asked to indicate, of the following, which factors they thought were a factors which was relevant to that opinion;

- a) Workers should not be disadvantaged.
- b) The worker may not understand proceedings.
- c) The worker may not have sufficient English skills.
- d) Young workers have insufficient knowledge of the proceedings.
- e) Women are disadvantaged.
- f) Insurance claims officers are experienced in the process.
- g) Conciliation review processes are stressful upon workers.
- h) As a matter of natural justice workers should have representation.

Of the above factors, there was at least 75% approval for those matters as factors which bore upon the worker's right to have legal representation. In some cases the rate of agreement was as high as 87.5%. In relation to the question of whether or not women were disadvantaged by the process, 64.3% of respondents to this question indicated that they thought there was some disadvantage to women in the conciliation and review process. Only two trade union officials indicated that they thought workers should not be legally represented at conciliation. Of those who indicated that legal representation

should not be provided, the major reason for this view was that the proceedings would be more expensive. Other factors such as;

- a) Representation would make proceedings slower.
- b) Representation would make proceedings more complicated.
- c) Representation would make settlement more difficult.
- d) Representation would make it more difficult for workers to put case.
- e) Representation would increase the preparation required; were not considered to be significant.

One can conclude that most trade union officials are concerned that workers are not entitled to representation at conciliation and of those who consider that legal representation should not be allowed, the major reason for this is that it is perceived that this would increase the expense of the process.

#### **5.6 Referral to Practitioners For Further Action**

Trade union officials were asked whether or not a case was referred to a lawyer if the matter was not satisfactorily disposed of at conciliation. 56.3% of respondents indicated that the matter was referred to a lawyer after conciliation with 37.5% indicating that the matter was not referred to a lawyer after conciliation. Respondents were then asked to indicate the reasons why a referral to a lawyer were made.

These included a number of factors including:

- a) The review process was more complex.
- b) Matters of law arise at review.
- c) Witnesses were required at review.
- d) There was more likelihood of the matter involving common law.
- e) The matter involved payment of a lump sum.

In general, the responses to these factors indicated that these were important factors when considering a referral to a lawyer. One hundred percent of respondents indicated that a review hearing would be more complex. 87.5% of respondents considered that a matter of law was likely to arise at review

and that witnesses would be required at review, and that further, referral was necessary in 87.5% of cases where a common law element was involved.

Trade union officials were asked to indicate whether the amount of work that they were referring to lawyers had changed since the dispute resolution system had been changed in March 1994. Half of the respondents indicated that they were referring less work to lawyers, with approximately one quarter, indicating about the same amount of work had been referred. 20% indicated that they were referring more work to lawyers. Of those who indicated they were referring more work to lawyers, that is only three respondents, one respondent indicated an increase of 30% referrals and two respondents indicated an increase of 50% of referrals to lawyers.

Of those who indicated that there was less work being referred to lawyers, 75% of respondents indicated that this could be quantified at 50% less work.

These results are consistent with the survey carried out on legal practitioners showing a significant decrease in the amount of work referred to lawyers.<sup>7</sup>

## **5.7 Complexity of the Law**

The next cluster of questions sought responses generally, in relation to the information required to make claims, and whether or not workers and employers were providing sufficient information to commence claims. When asked whether employers and insurers were requiring more information before a claim was approved under the current system than under the previous system, 50% of respondents indicated agreement, that is, that more information was required. 71% of respondents indicated that they thought that this was due to an increase in complexity of the law with 57.1% of respondents indicating they thought the law was more difficult. There was some indication from the survey that trade union officials required more

---

<sup>7</sup> Workers' Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

information because this was sought by Conciliation and Review Officers, coupled with the fact that less referrals were being made to lawyers who would normally gather this information. 87.5% of respondents agreed that the current system of dispute resolution creates more work for trade union officials and 100% of respondents consider that trade union officials needed further training in workers' compensation matters to be able to work in the area.

93.8% of trade union officials considered that it would be necessary to have a claims officer within each union to cope with workers' compensation claims.

## **5.8 Some Effects of the New Dispute Resolution System**

68.8% of respondents consider that the current dispute resolution system did not encourage workers to claim compensation. Those respondents were asked to consider a number of factors which might bear upon this opinion including:

- a) Workers are not happy to go to conciliation unassisted.
- b) Workers want lawyers to help.
- c) Workers with stress claims are scared of the process.
- d) It's too much trouble for workers.
- e) Migrant workers have trouble with paper work.

In each case, there was significant support for these factors, particularly in relation to the fact that trade union officials thought that workers were unhappy to go to conciliation unassisted, that they were scared of proceeding with stress claims and that the process presented difficulties for workers and in particular, migrant workers. There was an ambivalent response in relation to whether it was thought that workers needed help from lawyers. 40% of trade union officials considered that workers would need assistance from lawyers but 30% disagreed with this proposition. 20% did not know and 10% had formed no opinion.

One can conclude from these responses that trade union officials are concerned that workers are unrepresented and are to some extent not confident of their ability to be able to represent workers at conciliation. Trade union officials are also concerned that workers who attend conciliation unassisted, will be at some disadvantage and that the current dispute resolution system, because it does restrict representation, may inhibit claims made by workers.

## **5.9 Qualities of Conciliation Officers**

Part Two of the survey required trade union officials to consider the attributes which might be necessary for a competent conciliation officer. In general terms respondents were asked to consider the personal attributes of the conciliation officers such as physical fitness, age, political affiliation, sex, nationality, marital status and religion. Respondents had to indicate whether or not they thought these attributes were important, of doubtful importance, or of no importance. Respondents were entitled to indicate that they had no opinion on the matter. In general terms, trade union officials did not consider that any of the above personal attributes were important aspects of the conciliator's characteristics. Generally speaking, most respondents consider these attributes were of doubtful importance, or of no importance at all. The question of political affiliation provided the only response of interest with approximately 37.6% considering this characteristic to be important or very important. This was the only factor which drew any discernible view.

Respondents were then asked to consider the knowledge and experience characteristics of the conciliation officer. These included knowledge of compensation problems, compensation law, trade union matters, insurance matters, psychology and mediation training. All respondents consider that a knowledge of compensation issues and compensation law was very important or an important characteristic of a conciliation officer. 75% of respondents considered a knowledge of trade union matters was important or very important. 93.8% of respondents considered that a knowledge of insurance matters was important. 56.3% of respondents considered that a

knowledge of psychology was important or very important. There was overwhelming support for the view that conciliation and mediation training was very important or important.

Respondents were required to consider the experience and background of a conciliation officer and were asked to assess whether industry, management, labour, government negotiation and mediation experience were important. 68% of respondents considered that experience in industry was very important or important, but only 25% of respondents considered that active management experience was necessary. Active labour experience however was considered to be important by 50% of respondents but active government experience was not considered to be important with only 25% of respondents considering it so. 100% of respondents considered that active negotiation experience was important or very important. Education was regarded by 81.3% of respondents to be an important or very important factor. Prior mediation or court experience was also considered to be important or very important by 87.5% of respondents.

Trade union officials were asked to consider whether a Conciliation Officer should be legally qualified. 25% of respondents considered this an important or very important characteristic but 56.3% of respondents considered that it was of doubtful importance or not important at all. 18.8% of respondents had no opinion. The result of this question is interesting because it contrasts considerably with the attitude of legal practitioners. 72% of legal practitioners surveyed considered that the legal qualifications of a conciliator were important or very important. The results of this question confirms a gulf between the perceptions of trade union officials and legal practitioners<sup>8</sup>.

Finally, respondents were asked to consider a host of personal characteristics such as trustworthiness, fairness and impartiality, general reliability, patience

---

<sup>8</sup> Workers' Compensation Conciliation and Review: A Survey of Legal Practitioner Attitudes. In press Curtin Business Law School Working Paper Series June 1996.

and understanding, ability to grasp ideas, ability to listen, tact and persuasiveness, self-control, dignity and respect, intelligence, co-operative attitude, sense of humour, firmness of action, originality of ideas, sympathy and modesty. The general result of these personal attributes was that trade union officials on the whole considered them to be very important or important characteristics.

From the trade union official's point of view, the ideal conciliator emerges from the opinions elicited in Part Two of the survey. Trade union officials believe that conciliators should be persons trained in mediation and negotiation, have experience in industry and be familiar with compensation laws. It is not necessary that they be legally qualified in order to perform this role. Insurance experience was probably more important than trade union experience and the conciliator should have a range of virtues as outlined in the personal characteristics above.

It has previously been noted that the Act does not set out any qualifying requirements for a conciliation and review officer. It is not necessary for those officers to be legal practitioners, nor for them to have mediation skills. Mediation training for conciliation and review officers has been undertaken following their appointment and in addition conciliation review officers have received some instruction in the rules of evidence and procedure.

## **6. CONCLUSIONS**

The results of the survey show that trade union officials make less use of legal practitioners in pursuing workers' compensation claims. This is a direct result of the fact that referral to solicitors may be unnecessary where the process of claims is commenced by conciliation and where legal practitioners are unable to attend conciliation. Legal practitioners are more likely to be used where the matter is referred to review and generally at this stage an opinion will be sought from a lawyer. Trade union officials have noted an increase in their workload and are concerned that workers may be unrepresented at conciliation. Officials consider that they require increased



training and expertise in order to perform the role of adviser and representative adequately. Trade union officials are not convinced that the system is fair and just although they acknowledge that it is informal and sometimes quick.

Open-ended responses asking for details of the positive and negative features of the system drew mainly negative responses such as:

- a) Workers can be disadvantaged due to lack of representation.
- b) Workers do not understand the system or changes to the legislation.
- c) The process is costly to unions because resources and training are required to administer the system.
- d) Limitations on stress claims are unfair.
- e) Many workers do not realise they do not have journey cover, particularly those who are not members of unions.
- f) The conciliation and review process is fickle because there is not set procedure and conciliation and review officers have different approaches.
- g) Insurers can manipulate the system by not agreeing to legal representation.
- h) Conciliation officers can push for resolution of claims which may not be in the best interest of workers.
- i) The conciliation process can encourage insurance companies to dispute claims because of the advantages that they have at conciliation.
- j) Insurer's claims officers have an advantage because of their experience with workers' compensation claims.
- k) The return to work process is difficult for small employers.
- l) The cost of obtaining medical reports is borne by the workers and insurers can better afford these costs.
- m) The inability to settle claims for people less than 55 years of age is a limitation on the system.
- n) The location of the Directorate makes it difficult for country workers.

Those who responded positively to the current system indicated:

- a) That the conciliation and review process may be beneficial as it requires the employer's insurer to respond to claims more quickly.
- b) That the time frames for resolving claims if adhered to are useful.
- c) That the unions are now required to provide a service to union members and are therefore obtaining experience in the area and this may be cheaper for workers.
- d) The costs of the system are reduced.

Overall, one can discern from the results and the comments made in the survey that there are significant concerns expressed by trade union officials which relate to their capacity to be able to service their members, either through advising them or representing them and having faith in the system to provide a fair and just result. The results of this survey confirm some aspects of the WorkCover Review , namely that there is some perception that workers who are unrepresented are at a disadvantage in conciliation proceeding. The results of this survey differ from the WorkCover Review results in relation to the issues of procedural fairness and the behaviour of the Conciliation and Review Officers, with the evidence in this case, pointing to a less enthusiastic embrace of the current system by the Trade Union Movement.