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Submission

To the

Transport and Industrial Relations Select Committee

On

The Injury Prevention, Rehabilitation and Compensation Amendment Bill 2009

November 2009

ACC Group Acclaim Otago (Inc) Aviation & Marine Engineers Association DPA (NZ) Inc. Equity Support Group Engineering, Printing and Manufacturing Union Finsec Maritime Union of NZ National Distribution Union NZ Association of Occupational Therapists NZ Council of Trade Unions NZ Dairy Workers NZ Dental Therapists' Association NZ Meatworkers & related Trades Union NZ Nurses Organisation NZ Register of Acupuncturists Osteopathic Society of NZ Podiatry NZ Public Service Association Rail and Maritime Transport Union Recreation NZ Service and Food Workers Union Nga Ringa Tota Inc

INJURY PREVENTION, REHABILITATION AND COMPENSATION AMENDMENT BILL 2009

SUBMISSION OF THE ACC FUTURES COALITION

1.0 INTRODUCTION

1.1 ACC Futures Coalition has been established to promote the current model of ACC in view of recent criticism of the scheme. Participating organisations in the coalition include Unions, treatment providers, and claimant representatives.

1.2 Before proceeding with our submissions regarding the Bill, we believe it is necessary to first remind ourselves of the principles upon which New Zealand's accident compensation scheme is based.

1.3 It is often overlooked that our accident compensation scheme came about as the result of a social contract made between the people of New Zealand, and the government in the late 1960s. In exchange for a no-fault, comprehensive statutory scheme, the people agreed to abandon their right to sue for personal injury which was covered by the scheme. The introduction of the scheme – and the social contract that it entailed – received bipartisan support in Parliament, and was ultimately enacted by the National Party.

1.4 The significance of the social contract cannot be overstated. In giving up the right to sue for covered injuries, the public necessarily gave up all the Court-ordered remedies which flow from civil suits. These included: complete compensation for lost earnings (both past and future), compensation for pain, suffering and loss of amenity, compensation for loss of congenial employment, compensation for handicap in the labour market, compensation for loss of pension, as well as compensation for the cost of treatment and/or rehabilitation.

1.5 The opportunity to access such remedies was forgone in favour of a scheme that was founded on the following 'five guiding principles':

1. Community responsibility. The Royal Commission of Inquiry (chaired by Sir Owen Woodhouse) pointed out that, as a society, we all benefit from the productive work of each member of the workforce. Therefore, our society ought to accept responsibility for those who are prevented from working through injury. Similarly, as we all enjoy community activities which inevitably result in injury to some, we should all share in the costs sustained by those unlucky few – 'the inherent cost of these community purposes should be borne on a basis of equity by the community'. This is true regardless of whose fault the injury was – if indeed it was anybody's fault at all.
2. Comprehensive entitlement. Entitlements should extend to all victims of injury by accident, regardless of fault, or where the accident occurred. The Commission regarded it as anomalous that entitlements under the Workers' Compensation Scheme had been limited to victims of workplace accidents, whilst victims of non-work accidents were left to fend for themselves. Regardless of where the accident occurred, it remains in the interests of the entire community to ensure that the victim is rehabilitated as soon as practicable.

3. Complete Rehabilitation. Because the costs of injuries are eventually (and inevitably) borne by the whole of the community, the overriding goal of the community should be 'to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time'.
4. Real Compensation. The Commission observed that modern households have several financial commitments, 'which do not disappear conveniently if one of the hazards of modern life suddenly produces physical misfortune'. As such, the Commission recommended that a social compensation system should 'rest upon assessment of actual loss, both physical and economic, followed by a shifting of that loss on a suitably generous basis'. The figure of 80% for earnings-related compensation was designed to offer real compensation, whilst leaving a proportion of loss with the injured person, in order to encourage personal initiative.
5. Administrative Efficiency. The Commission stressed the importance of funds being collected, and then distributed as benefits, in a manner which is speedy, consistent, and without contention.

1.6 When considering the proposed changes to the legislative scheme, we believe that these guiding principles must be borne in mind.

1.7 Finally, we note that Treasury considers that the Regulatory Impact Statement (RIS) for the Bill does not meet the RIS requirements. It does not contain the required information and the analysis is incomplete in a number of areas, including the administrative and compliance costs of introducing experience rating and risk sharing in the Work Account. Much has been made recently of the need for quality regulation and this statement indicates that the undue haste with which this Bill is being processed could lead to unforeseen outcomes.

2.0 FULL FUNDING AND THE IPRC AMENDMENT BILL

2.1 The Injury Prevention Rehabilitation and Compensation (IPRC) Amendment Bill is one of the responses of the Government to the claims that there is a 'blow-out' in ACC's finances. The Minister has stated that the Corporation is in an 'unsustainable' financial situation and has even claimed in the House that the "… reality is that ACC is effectively insolvent."[1] It is our view that ACC is in a fundamentally sound situation and the pressure to increase levies and cut entitlements through this bill (and through other initiatives) is largely driven by the Government's commitment to fully fund the scheme.

2.2 In the 2008/9 year the Corporation collected $4.2 billion in levies and paid out $3.1 billion in claims, including the benefits arising from historical or residual claims. It currently has over $10 billion in investments and has achieved a 3.2% return over the last financial year when many private sector investors were making significant losses. ACC is therefore currently in sound financial shape.

2.3 The commitment to fully fund the cost of current claims by 2019 is the problem. Full funding was introduced in 1998 as an adjunct to the privatisation of the work account. It is a model

[1] Hansard, 4 March 2009

designed for private insurers who are obliged to maintain sufficient funds to cover their liabilities in the event that they might disappear. A social insurer, owned by the government, does not need to provide for the potential disappearance of the scheme provider – the government will never disappear.

2.4 The full funding model requires a set of actuarial assumptions, many (if not most) of which are likely to be proven wrong over time. The long-term nature of many of these liabilities means that the likelihood of the assumptions and estimates being wrong is very high. The overriding assumption appears to be that the actuarial unders and overs will balance each other out over time. It may be that over time adjustments will be made but the problem is that in the interim levies will be substantially increased and cover and entitlements reduced, possibly unnecessarily. An ACC spokesperson was quoted recently in the Listener as saying "…if it does turn out that they are over-estimating the cost, there's no harm done" and that "in a sense that's fine, we can lower the levies.[2]" That is not good enough.

2.5 The current board has adopted a new set of assumptions that have contributed to the paper loss of $4.5 billion that has been publicised by the Minister. These assumptions include $1.3 billion for revised economic assumptions, $500 million for increasing the risk margin, $1.3 billion for claims experience and monitoring changes and $1.3 billion in "future cabinet and regulated rate increases". It is these changes in assumptions that are driving the levy increases.

2.6 ACC was initially established on a pay-as-you-go-basis and there is sound reason for returning to that approach. We have already noted some of the issues with fully funding but it is important to reflect on the social insurance nature of the scheme and its interconnection with the governments health and welfare programme. As Sir Owen Woodhouse advised the ACC Futures Seminar last year, the scheme was always "social welfare in its intent and purpose"[3]. There is no fundamental difference between ACC and any other aspect of Government social expenditure except that it looks like an insurance scheme. We do not fully fund education, health or New Zealand Superannuation and there is no need to fully fund ACC.

2.7 We note the recent paper[4] by Michael Littlewood which argued that a PAYG approach was more appropriate for ACC than the fully funded model. He concludes that a PAYG approach to levy-setting should be "simpler, more transparent and less risky financially."

2.8 However we also note that that the history of ACC levy setting has been fraught with political difficulties[5] and submit that the time has come for a multi-party agreement that endures in order to protect this important scheme. There is much work to be done on this but as a starting point we would suggest a PAYG model supported by reserves sufficient to

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[2] 'Future Shock: what's the real reason taxpayers are being landed with massive ACC increases?' *NZ Listener,* Vol. 22 No. 3624, 24 October 2009, p. 5

[3] http://www.accfutures.org.nz/assets/downloads/Sir-Owen-Woodhouse_speech.pdf#view=fit

[4] *PensionCommentary 2009-1*, 19 August 2009, http://www.business.auckland.ac.nz/Portals/4/Research/ResearchCentresGroups/RPRC%20commentary/PC2009-1-WhyShouldTheACCbePre-funded12.10.09.pdf

[5] For a summary history see Susan St. John, *Pension Commentary 2009-2,* 15 November 2009

cover somewhere between 6 months to 2 years expenditure, as may be agreed. Levies would be set annually to maintain reserves at that level. We note that the draft legislation in the Law Commission report on ACC in 1988 had this to say about reserves:

1. In estimating its income needs for any financial year, the Corporation shall set aside a sum amounting to not less than half its estimated expenditure for that financial year as a reserve fund.

2. The Corporation may draw on that reserve fund as a source of working capital and to meet any unforeseen contingency.[6]

3.0 SUBMISSIONS ON THE BILL

3.1 Changes to Vocational Independence – clauses 4 & 9 of the Bill, clause 25 of Schedule 1

Changes

3.1.1 Clause 4(2) amends the definition of 'vocational independence'. Currently, this is defined as *'a claimants' capacity ... to engage in work a) for which he or she is suited by reason of experience, education, or training, or any combination of those things; and b) for 35 hours or more a week.* Clause 4(2) omits '35 hours' and substitutes '30 hours'.

3.1.2 As part of the vocational independence process, various 'suitable' job options are identified by occupational assessors. Currently, occupational assessors are required to take into account a claimant's level of pre-injury earnings, by identifying alternative job options which are 'suitable' for that claimant. Clause 9 of the Bill, and clause 25 of Schedule 1, make it optional for occupational assessors to take a claimant's level of pre-injury earnings into account.

Submissions

3.1.3 We believe that the vocational independence process ('the VI process') – even in its current form – significantly undermines the guiding principles of complete rehabilitation and real compensation. It is worth noting that no such process was envisaged in the Woodhouse Report, nor was it present in the initial accident compensation legislation (having been introduced via the Accident Rehabilitation and Compensation Insurance Act 1992, then known as the 'work capacity' procedure).

3.1.4 Under the current VI process, ACC is able to suspend a claimant's entitlement to both earnings-related compensation and vocational rehabilitation, on the basis that the claimant has been assessed as theoretically being able to work in an alternative job (even 1 possible option will do) for 35 hours per week. The loss of entitlement to earnings-related compensation and vocational rehabilitation is sanctioned despite the fact that the claimant remains incapacitated.

[6] Personal Injury : Prevention and Recovery : Report on the Accident Compensation Scheme - NZLC R 4, Published 9 May 1988

3.1.5 In practice, this is used as a tool to disentitle long term claimants. Even with the current requirement that occupational assessors must take into account a claimant's pre-injury level of earnings, job options are regularly identified which are not commensurate with the claimant's prior position. As a consequence, the provision of vocational rehabilitation is kept to a minimum.

3.1.6 The current legislation explicitly allows assessors to put forward alternative job options which are not actually available in the job market (s 108(2)(b)). Furthermore, once claimants have been made vocationally independent, ACC is under no obligation to ensure that employment is actually obtained. Therefore, ACC is able to cut short both compensation and rehabilitation without ensuring that employment in the nominated position(s) is achieved – or was even achievable at all.

3.1.7 The shortcomings of the VI process were highlighted in a 2007 study entitled 'Vocational Independence: outcomes for ACC claimants'.[7] This was a follow-up study of 160 claimants who had been deemed to have achieved vocational independence. The study found:

- Only 19% of the participating claimants had actually achieved full time employment, in a job that had been identified as suitable for them;
- 46% of the claimants were not working – 23% having ended up on benefits.
- 59% of the claimants had experienced a reduction in income, when compared with their pre-injury employment. A mere 1% experienced an increase in income. This is very significant, given that these claimants no longer have the right to sue in order to obtain damages for loss of potential earnings. This is one way in which the VI process represents an erosion of the social contract.

3.1.8 The authors of the study recommended the following changes to the process, in order to assist in achieving realistic outcomes for claimants:

- Assessment of transferable cognitive skills. [Currently, occupational assessors do not actually test the skills which they deem clients to possess];
- Observation by medical assessors of claimants performing simulated work tasks for an extended period of time;
- Utilisation of work trials to verify hours of work that a claimant is capable of working;
- Identification of a minimum of 3 job options;
- Identification of rehabilitation and retraining that directly addresses local labour market conditions; and
- Assessment of the impact that pain has on the claimants' ability to perform cognitive tasks.

3.1.9 The changes to the VI process proposed by the Bill make a bad situation even worse. If occupational assessors are not required to take into account a claimant's pre-injury earnings, it is unlikely that they will. This will allow assessors to identify low-skilled jobs as 'suitable' for highly-skilled claimants, which will in turn allow ACC to curtail the provision of vocational rehabilitation to those claimants.

[7] Hazel Armstrong and Rob Laurs, Wellington, February 2007

3.1.10 The reduction from 35 to 30 hours per week will make it even easier for ACC to prematurely suspend the provision of compensation of rehabilitation. The only justification which has been offered for this reduction is that it makes the definition of full time work consistent with that used by other government organisations. However, we submit that (especially in these times) an assertion that the average full-time employee works for 30 hours per week simply cannot be defended. The fact that this threshold is said to justify the complete cessation of earnings-related compensation and vocational rehabilitation, exacerbates the illegitimacy of the VI process.

3.1.11 For these reasons, we submit that these changes must be rejected. Furthermore, we submit that the recommendations listed in above paragraph 2.1.8 be considered for enactment in the upcoming legislation.

3.2 Threshold for cover for hearing loss – clause 6 of the Bill

Changes

3.2.1 Clause 6 amends the current definition of 'personal injury', by stating that personal injury does not include any degree of hearing loss that is less than 6% of binaural hearing loss.

3.2.2 Put shortly, this will rule out cover for claimants whose (otherwise coverable) level of hearing loss is less than 6%.

Submissions

3.2.3 This proposed amendment is of particular significance for 2 reasons. Obviously it will be of great detriment to claimants with a coverable hearing loss of than 6%. More broadly, it would be the first time that a rigid, numeric threshold for cover has been enacted in the life of the scheme.

3.2.4 It is evident that the government believes a hearing loss of less than 6% to be insignificant. However, this is untrue. The New Zealand Audiological Society is in the process of preparing case studies, which show that a hearing loss of less than 6% is neither trivial, nor minor.

3.2.5 It has been estimated that ACC would save $3-4 million as a result of this amendment. Bearing in mind that the test for entitlements for hearing loss (even in its current form) is particularly stringent,[8] the fact that ACC are currently paying $3-4 million worth of entitlements for hearing losses of less than 6% is confirmation that losses at such levels are indeed significant.

3.2.6 The example of hearing loss claimants brings the operation of the community responsibility principle into sharp relief. Today's hearing loss claimants are yesterday's workers who built our office buildings, houses and infrastructure. Society continues to benefit from their labours – and yet the Bill seeks to shift the cost of those labours away from society and onto the (now retired) individual. For these reasons, we submit that this proposed amendment must be rejected.

[8] 42% of covered claimants are declined hearing aids

3.2.7 More broadly, this amendment would introduce a specific, rigid threshold for cover. Whilst the scheme currently includes specific thresholds in relation to certain *entitlements* (e.g. lump sum compensation for whole person impairment), no such thresholds exist for the granting of *cover.*

3.2.8 We believe that the setting of a threshold for cover would set a dangerous precedent. If a person does not have cover, he or she is outside the scheme, and therefore cannot even be considered for any entitlements. As cover thresholds automatically and completely prevent those that fall below the threshold from accessing any entitlements whatsoever, the issue of where these thresholds should be placed becomes very delicate.

3.2.9 Currently, even personal injuries that are very minor are granted cover. It is important to point out that cover does not guarantee entitlements. Cover is merely the first step – once this is granted, the provision of various entitlements is decided by reference to the appropriate tests within the legislation.

3.2.10 Therefore, very minor injuries (e.g. grazes, bruising) might not attract any entitlements at all, even though they are covered. However, this is as a result of an assessment of the individual claimant's need for a particular entitlement – rather than a blanket rejection on the basis that the injury has been pre-classified as 'minor'.

3.2.11 The current system is preferable, as it does not automatically exclude claimants who may have an otherwise legitimate – and provable – need for entitlements. For this reason, we submit that this proposed amendment is unsound in principle, and therefore must be rejected.

3.3 **Cover for Work-Related Gradual Process Injuries – clause 7 of the Bill**

Changes

3.3.1 Clause 7 essentially reinstates the 3-part test for causation of gradual process claims ('the 3-part test'), which was present in the legislation prior to the 2008 amendment.

3.3.2 Under the 3-part test, a claimant had to show that:

1. He/she performed an employment task, or was employed in an environment, that contained a property or characteristic that caused, or contributed to the cause of, his/her personal injury; and
2. The causative property/characteristic was not found to any material extent in his/her non-work activities or environment; and
3. The risk of suffering his/her personal injury is significantly greater:
   a. for people who perform the employment task, when compared with people who do not; or
   b. for people who are employed in that type of environment, when compared with people who are not.

3.3.3 In 2008, the law was amended. The second part of the test was changed to state that, if the causative property/characteristic was present in the claimant's non-work activities or

environment, cover would still be granted so long as it was more likely that the personal injury was caused by the claimant's workplace exposure.

3.3.4 The 2008 amendment also removed the onus on the claimant to satisfy the third part of the test – i.e. 'the significantly greater risk test'. Instead, the law allowed ACC to decline gradual process claims if *it* could prove that this test was not satisfied.

Submissions

3.3.5 Cover for occupational disease has always been a central feature of the accident compensation scheme. However, it should be noted that the 3-part test was not a feature of the scheme until the enactment of the 1992 Act. Until then, cover for gradual process claims was decided solely on the basis of a causative link (i.e. the first part of the test).

3.3.6 We submit that the second and third parts of the test operate as artificial barriers to cover. These barriers can result in a claimant who has proved that his/her injury was caused by workplace exposure, being denied cover nonetheless. If workplace causation can be proven to the requisite standard, there is no principled reason to rule out cover on the basis that the claimant was not at a significantly greater risk, or that the causative workplace property/characteristic existed in the claimant's non-work environment.

3.3.7 The 2008 amendments ameliorated this situation, to a degree. Under the initial 3-part test (which the Bill seeks to reintroduce), cover could be denied if the causative property/characteristic was present to a material extent in the claimant's non-work life. The mere presence of the property/characteristic was enough – the law did not require any consideration of the degree to which the claimant's non-work exposure actually caused his/her personal injury (if at all). The 2008 amendment remedied this anomaly.

3.3.8 The 2008 amendment also shifted the onus onto ACC to prove that the 'significantly greater test' was not satisfied, before it was able to deny cover. We submit that this is much fairer than expecting claimants to somehow prove that their jobs placed them at a significantly greater risk.

3.3.9 Because this proposed amendment seeks to strengthen the artificial and unprincipled barriers to cover for gradual process claimants, it undermines the principles of comprehensive entitlement, complete rehabilitation and real compensation. Because of this, we submit that it ought to be rejected, and the status quo retained.

3.4 Disentitlement – Wilfully self-inflicted injury and suicide – clause 10 of the Bill

Changes

3.4.1 Currently, people who intentionally cause injury to themselves or commit suicide are covered under the scheme, and receive entitlements. Under clause 10 of the Bill (which seeks to 'largely reinstate' the pre-2001 position), these claimants will be covered but automatically disentitled (except for treatment costs).

3.4.2 Claimants will not be disentitled, however, if their self-inflicted injuries/suicide was a result of a mental injury, which itself was covered. Importantly, cover for mental injury is limited to:

a) mental injury resulting from a physical injury;
b) mental injury resulting from certain criminal acts (sex crimes); or
c) mental injury caused by experiencing, seeing or hearing (directly) an event at work, which would reasonably be expected to cause mental injury to people generally.

Submissions

3.4.3 The accident compensation scheme has, in the past, curtailed entitlements for wilfully self-inflicted injuries and suicides. However, we submit that this is an unprincipled approach, and that the current legal position allowing the payment of entitlements to such claimants should be maintained. Alternatively, and at the very least, we submit that the unduly restrictive changes proposed by the Bill should be ameliorated.

3.4.4 The 1974 and 1982 Acts provided for the disentitlement of claimants with wilfully self-inflicted injuries and suicides, in relation to compensation and rehabilitation only. Under both those Acts, the ACC was given a discretion allowing it to provide entitlements to the dependants of the injured or deceased claimant, should such provision be required. The law also allowed ACC a discretion to provide the claimant with rehabilitation, if it so decided. The prohibition on entitlements did not apply in cases of suicide, if the suicide was the result of a covered mental injury.

3.4.5 Under the 1992 and 1998 Acts, the prohibition on entitlements was extended to cover all forms of entitlement other than treatment. Furthermore, the discretion to provide the claimant with rehabilitation, or to provide entitlements to the dependants of the injured/decease claimant, were scrapped. Claimants would only avoid disentitlement if the personal injury or suicide was the result of a covered mental injury. The current Bill would see a return to this position.

3.4.6 With the enactment of the 2001 Act, the position changed with respect to the exception to disentitlement for self-inflicted injury/suicide. Such claimants would no longer be disentitled if the personal injury/suicide was due to 'mental injury' – i.e. the requirement that the mental injury be covered was removed. This made a significant difference, given that the scheme only covers mental injuries caused in very few circumstances.

3.4.7 Finally, with the 2008 amendment, the disentitlement provision was scrapped altogether.

3.4.8 Against this brief background, it can be seen that the Bill proposes to not only reintroduce the disentitlement provision, but to restore this provision to its most restrictive form. We argue against this proposed amendment for the following reasons:

- At the very heart of our scheme lies the concept of 'no-fault'. In formulating the scheme, the focus of the Commission was on the effects of injury, and the fact that the entire community has a vested interest in rehabilitating injured people. As the

Commission pointed out, this is true regardless of the cause of the injury, or who was at fault.

- The proposed amendment leaves ACC with no power at all to provide for the dependants of claimants who are disentitled – no matter how genuine and deserving the need of those dependants is. Due to the fact that the claimants remain covered, there is no ability for the claimant or his/her dependants to bring a civil claim. This is grossly unfair and completely contrary to the scheme's guiding principles.
- The one exception to disentitlement is if the personal injury/suicide was due to a covered mental injury. However, mental injuries are only coverable in very limited circumstances. Most instances of mental injury will not be covered – this is not due to a lack of severity, but instead is due to the simple fact that most mental injury does not occur in the circumstances set out in above paragraph 2.4.2.

3.4.9 Our primary submission is that the status quo ought to be retained – i.e. there ought to be no disentitlement provision for wilfully self-inflicted injury/suicide. Such a disentitling provision ignores the fact that it is in everybody's best interests to rehabilitate an injured person as quickly as possible, regardless of the way in which that person was injured.

3.4.10 At the very least, we submit that any amendment to the law must include:

a) A provision requiring ACC to provide the appropriate entitlements to the dependants of the particular claimant; and
b) A provision whereby ACC is granted the ability to provide entitlements to the claimant, if the interests of justice so require; and
c) An exception to disentitlement based on mental injury (whether or not that mental injury is covered).

3.5 <u>Disentitlement for certain imprisoned offenders – clause 11 of the Bill</u>

<u>Changes</u>

3.5.1 Under the current law, if a claimant's personal injury was caused during the commission of a crime for which the claimant is sentenced to imprisonment, the ACC may apply to the District Court for a determination as to whether the provision of entitlements should be prohibited, on the grounds that such provision would be 'repugnant to justice'. The legislation includes a list of factors which the Court must take into account, when deciding upon this issue.

3.5.2 Under the changes proposed by the Bill, the ACC would be forced to disentitle all claimants who:

- Suffered their personal injury during the commission of an offence which is punishable by 2 or more years in prison; and
- Are sentenced to imprisonment.

3.5.3 Under the Bill, the District Court would play no role in this process. Furthermore, the 'repugnant to justice' requirement has also been removed.

3.5.4 Clause 11 of the Bill also gives the Minister the power to exempt a claimant from disentitlement under this provision. However, the proposed amendment also states that 'nothing in this section gives a claimant the right to apply for an exemption'.

Submission

3.5.5 The disentitlement of claimants on the grounds that provision of entitlements would be repugnant to justice has long been a feature of the scheme. However, (like disentitlement based on self-inflicted injury/suicide) it is a difficult concept.

3.5.6 The disentitlement of a covered claimant is a major step – at what point do the interests of justice justify the disentitlement of a covered claimant? Who makes this decision, and what factors ought to be taken into account?

3.5.7 Clearly, safeguards are required in order to ensure the principled operation of such a provision. Such a safeguard was introduced by the 1992 Act, which required the ACC to make an application to the District Court, when faced with a claimant who was hurt during the commission of a crime, and who received a prison sentence. The Court would then determine whether the provision of entitlements would be 'repugnant to justice'. The 1998 Act continued this system, and brought in a list of factors which the Court was required to take into account. This reflects the current legislative position.

3.5.8 We submit that these current legislative safeguards are both necessary, and appropriate. District Court Judges are obviously very well qualified to determine whether the provision of entitlements in any given case would be 'repugnant to justice'. Decisions issued by Judges are likely to be independent, and thoroughly considered. Furthermore, the listed factors which the Court must take into account include such things as the harm caused by the offence, the claimant's personal culpability, the extent to which the claimant has already been punished, and the claimant's need of any particular entitlement. Such factors are plainly designed to ensure that the disentitling provision is not applied in an unduly ruthless way.

3.5.9 Furthermore, the fact that decisions are currently made by the District Court ensures both transparency and consistency. Judges are required to provide written, publicly available reasons in support of their decisions.

3.5.10 In our submission, the proposed amendment is unduly harsh. Instead of making an application to the District Court (if it so desired), ACC would simply be compelled to disentitle all claimants who came within the stated criteria.

3.5.11 It is quite clear that the proposed amendment is not concerned with the overriding question of justice. There is no requirement that the disentitlement be justified on the grounds that provision of entitlements would be repugnant to justice. Similarly, all the factors which the District Court must currently take into account have been removed. If a claimant's personal injury was caused during the commission of a crime which is punishable by 2 years and in prison, and the claimant is sentenced to prison, disentitlement must follow – regardless of any mitigating factors.

3.5.12 The only safeguard present in the proposed amendment is the ability of the Minister to exempt a claimant from disentitlement, if he or she 'is satisfied that there are exceptional circumstances relating to the claimant'. However, we submit that this safeguard is unsatisfactory:

- The amendment expressly provides that no right is given to the claimant to actually make an application to the Minister for an exemption. This begs the question of how the Minister will ever be made aware of claimants who are deserving of an exemption.
- This exemption process will have neither the transparency nor the consistency inherent in an application to the District Court. There is no guidance as to what might constitute 'extenuating circumstances'. There are no factors which the Minister will be required to take into consideration. The Minister will not be required to issue written reasons for his or her decision.

3.5.13 For these reasons, we believe that the proposed amendment is unduly harsh and inflexible. The current law allows for the disentitling of claimants in appropriate circumstances, but at the same time protects against unjust results. We submit that the proposed amendment be rejected, and that the status quo be retained.

3.6 Experience Rating and Risk Sharing – clause 14 of the Bill

Changes

3.6.1 Clause 14 allows for Regulations which would establish experience rating and risk sharing in respect of the work account. Clause 14 states that such systems 'may include no-claims bonuses, higher or lower levies, and claim thresholds'.

Submissions

3.6.2 We oppose this amendment on the basis that it is likely to have adverse results for workers.

3.6.3 Proponents of this amendment will argue that it provides employers with an incentive to keep claim numbers down. On its face, this seems positive for employees.

3.6.4 Unfortunately, however, keeping claim numbers down is not necessarily the same thing as keeping injury numbers down. Experience rating has been criticised on the basis that it gives rise to the likelihood that employers will seek to access the benefits of the experience rating systems by encouraging workers not to lodge claims, or to disguise workplace injuries as non-work injuries. If experience rating is also linked to the total cost of an employer's claims, this will give rise to the likelihood of undue pressure being placed on workers to return to work, before they are ready.

3.6.5 This is supported by research which has been carried out into the effects of experience rating. In a Canadian study of 450 firms in Quebec, it was found that experience-rating was associated with aggressive case management procedures, 'that is, practices for reducing compensation costs by means other than disease and injury prevention, such as hastening

the injured workers' rehabilitation and challenging claims'.[9] Research has also found that experience-rated employers are significantly more likely to appeal claims, and that the likelihood of appeals increases along with increases in the financial incentives to the employer.[10]

3.6.6 Furthermore, the results of a study into the impact of experience rating on discriminatory hiring practices (based on New Zealand data), showed:[11]

> ... a direct relationship between experience-rating and hiring discrimination. This indicates that employers are proactive, rather than simply reactive, in the management of compensation claims: they try to prevent future claims by discriminating rather than merely limiting the impact of such claims, subsequent to an injury occurring. Second, they show that employer attempts to limit such claims are not restricted to just morally questionable activities, but potentially extend to the unlawful as well. Third they identify a hitherto unrecognised group of potential victims of experience rating, the disabled, whereas past research has focused only on the negative consequences of claims management for the newly injured.

3.6.7 The authors of this study concluded that '[l]ike earlier studies, the results of this one should heighten concerns about the appropriateness of using experience-rating as an approach to injury prevention'.

3.6.8 These problems are likely to be exacerbated by the involvement of private insurance companies. In light of this amendment, private insurers will have even more incentive to engage in aggressive cover and case management practices, in order to keep costs down for their clients. This, in turn, is likely to force more employees into taking review applications in order to obtain cover and entitlement for workplace injuries.

3.6.9 The use of experience rating provides employers with no incentive to protect workers against occupational disease. Because of the latency period for work-related gradual process conditions (which can run to decades, in some circumstances), there is often a significant gap between the worker's exposure, and the diagnosis of his or her condition. It is common that, by the time the worker is diagnosed, he or she has long since left the employment which gave rise to the condition.

3.6.10 As shown by the research referred to above, the appropriateness of using experience rating as an approach to injury prevention is questionable, at best. We submit that experience rating is not the most effective way in which to encourage and ensure safe workplace practices.[12] Experience rating is likely to fragment industry-wide injury prevention efforts, by rating risk down to the level of individual employers. We believe that a more effective

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[9] Thomason, Terry, and Silvanna Pozzebon. "Determinants of Firm Workplace Health and Safety and Claims Management Practices", Industrial Labour Review 55, 2 (2002): 286-307

[10] Hyatt, Douglas, and Boris Kralj. "The Impact of Workers' Compensation Experience Rating on Employer Appeals Activity". Industrial Relations, 34, 1 (1995): 95-106

[11] Harcourt, Mark, Helen Lam, and Sondra Harcourt. "The Impact of Workers' Compensation Experience-Rating on Discriminatory Hiring Practices". Journal of Economic Issues XLI, 3 (2007): 681-699

[12] Empirical evidence regarding the success of experience rating as a prevention tool is mixed: some studies suggest that experience rating promotes safety, but others do not - *Thomason, T., Schmidle, T.P. and Burton, J.F. (2001). Workers' Compensation: Benefits, Costs, and Safety under Alternative Insurance Arrangements. Kalamazoo, Michigan: W.E. Upjohn Institute.*

method of improving workplace health and safety is through more prescriptive, industry-wide regulation of workplace practices. Whilst such regulation is outside the scope of this Bill, it will enforce safer practices and will therefore lower accident rates, which will in turn lower ACC levies.

3.7 Weekly Compensation for 'Non-Permanent' Employees – clauses 33 to 42 of Schedule 1

Changes

3.7.1 Currently, all employees who become incapacitated have their long term weekly compensation calculated on the same basis – regardless of the nature of their employment (e.g. full-time, part-time, fixed-term, casual).

3.7.2 Essentially, the long term weekly compensation rate for all employees is calculated by taking the amount that the employee earned in the 52 weeks period immediately prior to incapacity, and dividing that figure by the number of weeks during with the employee actually earned the earnings.

3.7.3 Prior to the 2008 amendment, a distinction was made between 'permanent' and 'non-permanent' employees, for the purposes of calculation of weekly compensation. Classification depended upon whether, in ACC's opinion, the employee would have continued to receive earnings from that particular employment, for a continuous period of more than 12 months after the onset of incapacity, if the employee had not been injured. If the answer to this question was 'yes', the employee was 'permanent'. If not, the employee was 'non-permanent'.

3.7.4 This classification had significant consequences for the level of weekly compensation the employee would receive. 'Permanent' employees would have their compensation calculated in the manner described above. 'Non-permanent' employees, however, would have their weekly payments calculated by taking the amount earned in the 52 weeks prior to incapacity, and then always dividing that figure by 52 – regardless of how many weeks it actually took the employee to earn the amount in the question.

3.7.5 This is the position which the Bill seeks to reinstate.

Submission

3.7.6 The Bill states that a return to the pre-2008 position 'would ensure that weekly compensation for non-permanent employees would be averaged to reflect the fact that, had it not been for the injury, they would have expected periods of earnings and non-earnings over a 12-month period'.

3.7.7 However, we submit that this amendment exposes a very significant proportion of New Zealand's workforce to manifestly unjust payments.[13] The CTU cites the following example:

[13] During the parliamentary debates which preceded the 2008 amendments, it was pointed out that the distinction between 'permanent' and 'non-permanent' affected approximately 400,000 workers.

.... a woman, who has been financially dependent on her husband for most of the year, undertakes some seasonal work and gets severely injured on the fourth week on the job, her $450 per week earnings for the four weeks of her job is divided by 52 weeks. At 80% this means her weekly compensation amount is $27.69 per week.

3.7.8 Furthermore, the process by which an employee is categorised as 'non-permanent' is, to a large degree, arbitrary. It requires ACC to essentially make a guess regarding whether or not the employee would have continued working for another 12 months. It must go without saying that, in many cases, this will not be able to be foretold with any level of certainty. We submit that, given the severe nature of the possible consequences of categorisation as a 'non-permanent' employee, a test fraught with such uncertainty is unacceptable.

3.7.9 The unfairness which is inherent in this amendment is exacerbated by the fact that there is no provision for ACC to allow for a more generous payment, in cases of manifest injustice.

3.7.10 For these reasons, we believe that this proposed amendment will significantly undermine the guiding principle of real compensation. As such, it ought to be rejected.

3.8 <u>Decrease in Weekly Compensation for Potential Earners – clause 47 of Schedule 1</u>

<u>Changes</u>

3.8.1 Currently, the legislation provides for payment of weekly compensation to potential earners who become incapacitated. A potential earner is somebody who either suffered his or her injury before 18 years of age, or when he/she was engaged in full time study or training that started prior to the person being 18, and continued until after the person turned 18.

3.8.2 If a person was a potential earner immediately before incapacity, is 18 or older, is not engaged in full time study, and does not have more than minimal weekly earnings, then that person becomes entitled to weekly compensation after being incapacitated for 6 months.

3.8.3 The current legislation deems the earnings of such claimants to be 125% of the minimum amount weekly earnings allowed for in the Act (as calculated under clause 42(3) of the current Schedule 1). In keeping with the principles of the scheme, potential earners are paid 80% of that amount.

3.8.4 This proposed amendment would reduce the deemed earnings of a potential earner down to 100% of the statutory minimum.

<u>Submission</u>

3.8.5 A potential earner's eligibility to compensation is based on the fact that a covered incapacity is preventing the potential earner from becoming an earner. These weekly compensation payments are designed to support such potential earners, whilst they work through their recovery and rehabilitation.

3.8.6 The deemed level of earnings for all potential earners is constant – no provision is made for the actual earning potential of the individual (based on their particular skills/training/education). Because of this, we submit that setting the earnings figure at the minimum level is inappropriate.

3.8.7 Furthermore, it must be borne in mind that, because potential earners are covered claimants, they are unable to make a claim for loss of potential earnings. This right was given away, in exchange for compensation available under the scheme. For that reason, the guiding principle of real compensation applies to potential earners as much as it does to actual earners.

3.8.8 Therefore, we submit that this proposed amendment should be rejected, and the status quo retained.

3.9 Increase of Weekly Compensation to the Minimum Amount – clause 42 of Schedule 1

Changes

3.9.1 Under the current legislation, low income employees (i.e. those whose weekly compensation payments fall below the statutory minimum) are entitled to have their weekly compensation increased to the minimum level as calculated under the Act, from the second week of their incapacity.

3.9.2 Under this proposed amendment, such claimants would not be entitled to receive minimum weekly compensation until the 6th week of incapacity. Low income employees who are incapacitated for 5 weeks or less will not be entitled to the minimum amount of compensation.

Submission

3.9.3 A minimum level of compensation assists to ensure that the guiding principle of real compensation is fulfilled, in relation to low income employees.

3.9.4 Under the proposed amendment, during the first 5 weeks of their incapacity, these claimants would be left to manage on 80% of an already low wage.

3.9.5 We submit that the status quo be maintained, as it ensures that low income claimants receive a meaningful level of compensation from the second week of incapacity.

3.10 Abatement of Holiday Pay – clause 49 of Schedule 1

Changes

3.10.1 Under the law as it stands, payments made on the termination of employment (such as holiday pay) are not included as 'earnings', for the purposes of abatement of weekly compensation.

3.10.2 This proposed amendment would reverse that position.

Submission

3.10.3 As has been pointed out by the CTU, holiday pay is a payment made to a claimant in respect of a time when that claimant was not injured. Therefore, even though the actual payment may take place at a point in time when the claimant is incapacitated, it was 'earned' at an earlier point in time.

3.10.4 Therefore (and as has also been pointed out by the CTU), this proposed amendment would result in claimants effectively being forced to put money, which was earned prior to their incapacity, towards the costs of their injury. In other words, this amendment shifts some of the costs of injury onto the injured person (similar to co-payments for certain forms of medical treatment). Had the employee exhausted their leave entitlements prior to termination of employment, they would not be penalised in this way.

3.10.5 This is contrary the guiding principles of the scheme, and is a further erosion of the terms of the social contract.

3.10.6 For these reasons, we oppose this amendment.

3.11 Abolition of Ministerial Advisory Panel on Work-related Gradual Process, Disease or Infection – clause 8 of the Bill

Changes

3.11.1 Section 31 of the current legislation provides for the appointment of a ministerial advisory panel on work-related gradual process, disease or infection ('the panel'). The legislation states that the function of the panel is to:

> ... provide independent and specialist advice to the Minister on any matter relating to work-related gradual process, disease or infection.

3.11.2 Clause 8 of the Bill would revoke this provision.

Submission

3.11.3 We oppose this proposed amendment, on the basis that work done by the panel remains a relevant and important part of the evolving law regarding cover and entitlements for occupational disease.

3.11.4 Occupational disease is a major issue in New Zealand. ACC has confirmed that, in the 2007/08 period, the total cost of covered occupational disease claims amounted to more than $152 million. Because of the latency period between exposure to workplace hazards and diagnosis of occupational disease, identification of risks, injury prevention and monitoring are made more difficult (when compared with traumatic injury, the effects and causes of which are much more obvious in the short term).

3.11.5 In-depth focus on occupational disease is therefore very important. Effective management of occupational disease now is necessary, in order to contain and reduce longer term costs. Agencies must be informed of the emphasis which needs to be put on the prevention of occupational disease, as well as traumatic injury. Employers and service providers desire certainty regarding the legislative descriptions of occupational disease. Such certainty will also allow for wider injury prevention benefits.

3.11.6 The panel is a body which ideally suited to providing the in-depth focus on occupational disease which is required. The panel is specifically and solely focused on occupational

disease, and has specialist knowledge tailored to this. The panel currently consists of lawyers, an occupational therapist, an epidemiologist, an occupational physician, and an occupation health and safety consultant. The panel includes representation of both union and employer interests.

3.11.7 The advice which the panel provides to the Minister is independent, as required by the legislation. However, to ensure that this advice is soundly reasoned, the panel consults the ACC, CTU, Business NZ, Statistics NZ, NOHSAC and the DoL.

3.11.8 In the current year, the proposed focus of the panel was the amending of descriptions of occupational disease set out in Schedule 2, the improving of surveillance of occupational disease, and the key issue of hearing loss. Furthermore, the panel has a strategic focus on improving outcomes for claimants by streamlining the cover process.

3.11.9 In light of the ongoing importance of occupational disease, and the relevance of the advice given by the panel, we submit that the proposal to abolish the panel is to be rejected.