Good faith

"I am tired of dealing with a system that leaves workers begging at the table of ever-fatter insurance companies."

By Brian Hilliard

I have been a workers' compensation lawyer for nearly 20 years. When I first started to practise in the area, there were no fetters on the capacity of the Supreme Court to deal with injuries caused by negligent employers.

I used to enjoy the exposure to common law courts and took a lot of pleasure in obtaining settlements and judgments for amounts that at least gave plaintiffs the chance to restore their lives after injury had affected them. I felt I was able to achieve some justice for workers who had been injured in the course of doing their jobs.

However, since 2001 a lot of that pleasure has been removed in Tasmania. I am now growing tired.

Sick and tired, in fact, of having to deal with a system that leaves workers begging at the table of the ever-fatter insurance companies.

What really irks me is that the insurance companies are not satisfied with simply having all of the power in the court, and in a system that is designed to provide inadequate compensation to injured people. They also seem to feel the need to use their position of power to take advantage of marginalised workers, often in an unscrupulous manner.

Workers' compensation insurers take on a management role in the rehabilitation process of injured workers. They are called on to make decisions about medical and associated treatment, about the continuation of direct compensation to the worker and the rate of that compensation.

Time and again I see cases where the insurance companies have arbitrarily cut off payment, refused medical treatment or forced workers into unsuitable rehabilitation and return-to-work programs, effectively making their lives as difficult as possible.

The insurers do this in the knowledge that before the matter comes before the courts or tribunals, they will start a process whereby they make inadequate offers until the workers give in and finally settle. I have even seen solicitors acting for insurers in conferences say something like ..."well you may well win this one but if your payments are reinstated we will take every opportunity to cut your payments, we will use the rehab programs and within a short period of time your payments will be cut off again, so here take this offer and your life will be simple again". This is also accompanied by the stick that if you happen to lose your application they will pursue you for costs.

I was very interested to read a case reported a few years ago in NSW (*CGU v Garcia* (2007) NSWCA 193) where Turner Freeman had successfully argued at first incidence that there was an implied term of good faith in the workers' compensation legislation of NSW, which meant that an insurance company could not in bad faith cut off a worker's payments of compensation based only on one or two reports, when the bulk of medical evidence indicated that the worker was in fact entitled to receive ongoing payments.

Unfortunately, the Court of Appeal did not agree that the term could be implied, and the judgment against the insurer was overturned.

This is clearly a matter for government reform. Labor governments (and even well-minded liberal governments) around the nation should be encouraged to review their workers' compensation legislation and insert provisions that insurers, who basically run workers' lives remotely, should be legally obliged to do so with the best interests of the workers in mind.

Such a requirement would reinforce the beneficial nature of workers' compensation legislation and would provide far better results for workers across the nation. A duty of good faith would also empower workers to a degree and the fear of litigation would encourage the insurers to do the right thing. ■

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