Transient Workers Count Too

Proposed amendments to the Work Injury Compensation Act

Comments by Transient Workers Count Too

Submission date: 22 February 2019

Introduction

Transient Workers Count Too (TWC2) is a non-profit organisation dedicated to the fair treatment of low-wage migrant workers in Singapore. We have reviewed the proposed amendments to the Work Injury Compensation Act (WICA) and their potential impact on the low-wage migrant workers that TWC2 serves. We respectfully submit these comments as part of the public consultation.

TWC2 sees approximately 2,000 low-wage male migrant workers every year, and over 60% have filed injury compensation claims. These men, mostly from Bangladesh and India, are typically employed on Work Permits in the construction and marine sectors. After their injury, their Work Permits are often cancelled by their employers, following which they are then placed on Special Passes while they await resolution of their work injury claims.

The Special Pass permits him to stay in Singapore for the duration of the claim process but does not permit him to seek employment. This means that financial support through his entitlements under WICA or the Employment of Foreign Manpower Act (EFMA), such as prompt payment of medical leave wages, is critical to his daily sustenance. Additionally, a low-wage worker would not have enough savings to pay for medical care in the hope of future reimbursement by the employer. If the employer resists fulfilling his obligations under WICA and EFMA, the worker is left with no medical treatment. Such payments of medical leave wages and provision of medical care are commonly delayed due to disputes over the validity of the claim, despite legislation (EFMA) that intends for workers to be covered for injuries or illness during employment.

In brief, the main issues that injured workers bring to TWC2 are these:

a. Unsure how to file a WICA claim, unsure of the difference between an accident report filed by an employer and a claim to be filed by himself;

b. Insufficient medical leave compared to the severity of the injury;

c. Prescribed light duty by the doctor, but no work assigned and not sure if he will be paid any salary;

d. Prescribed light duty by the doctor, but employer has already cancelled his Work Permit, so he has no job to return to, thus no salary to be expected;

e. Employer delays responding to enquiries by MOM, thus MOM unable to rule on the validity of the injury claim;

f. Employer actively disputes that the injury was a result of a work-related accident;

g. (e) and (f) above thus result in withholding of medical leave wages, and difficulties for the worker in accessing medical care;

h. Claim processing duration far longer than medical leave duration, yet unable to seek employment after his medical leave has ended since he is on a Special Pass, thus worker has no income at all while waiting for final resolution of his WICA claim.

TWC2 is thankful for the opportunity to share views and comments on the proposed amendments. The proposed amendments will address some of the issues listed above, but there remain other issues which the proposed amendments will not address. Regarding these, TWC2 offers additional ideas (points 18.1 to 18.9 below) which, we urge, should also be incorporated into the revised WICA.

The comments below follow the numbering of the paragraphs in the consultation paper.

Comments on proposed amendments

Consultation paper, paragraph 3:

3.1 It is noted that there are about five cases as year for whom due compensation was not paid, and the consultation paper says, "MOM has reviewed the WICA to give greater assurance of compensation", but unfortunately, we do not see any specific proposals in the paper that would deal with such situations.

3.2 TWC2 has previously proposed the setting up of a Backstop Fund, which will pay out to the worker the compensation due to him, while taking over the claim on the recalcitrant employer for further pursuit through the courts. The Backstop Fund can be seeded with just a tiny levy on WICA insurance policies, among other possibilities.

Consultation paper, paragraph 7:

7.1 Since paragraphs 14 to 16 propose to let insurance companies handle the processing of claims, which party will be responsible for calculating the Average Monthly Earnings (AME)? If it is the insurer, how are they to compel employers to provide true and accurate information, complete with supporting documents, in order to calculate the AME? If the worker disputes the calculation, what is the process for resolution of such a dispute?

7.2 Currently, WICA Third Schedule, section 4(1) provides for medical leave wages to be equivalent to full AME for only 14 days if the worker is an outpatient, and to full AME for 60 days if hospitalised. Medical leave wages currently are rated at two-thirds AME for any period after 14 or 60 days respectively. Yet this paragraph 7 of the Consultation paper makes no mention of the step-down to two-thirds AME. Is it intended to remove this step-down provision, and make medical leave wages equivalent to full AME whatever the duration? TWC2 would support that as it would simplify the calculation of medical leave wages, and benefit low-wage workers who would otherwise (at two-thirds AME) be very tight financially.

Consultation paper, paragraph 8:

8.1 Our understanding of this paragraph is that for a worker who is on light duty, and is still on the job with a Work Permit, he will receive whatever salary is due to him for days he goes to work, and if this salary is less than the AME for the same period, he is entitled to a top-up of that salary such that the total he should receive is equivalent to the AME. Is this understanding correct? If so, we suggest that the language in the revised legislation be made more explicit.

8.2 Legislation should also make clear that even if a worker's Work Permit has been cancelled and he is on a Special Pass, and thus the prescription of light duty cannot lead to any work performed, the worker is still entitled to medical leave wages for light duty, rated at the equivalent of the AME.

Consultation paper, paragraph 9:

9.1 The consultation paper states that "we will require all injuries resulting in any instance of light duty or medical leave to be reported." The threshold for mandatory reporting now will be reduced to one day of medical leave or light duty. It is necessary to consider that this may incentivise employers to put pressure on doctors to issue no medical leave at all.

9.2 A simplified reporting form is proposed for injuries resulting in less than 4 days of medical leave or light duty. It is not clear from the consultation paper what process needs to be followed if, after submitting a simplified form for an injury that at first merits less than 4 days of medical leave, the worker is subsequently given additional medical leave. TWC2 proposes that it should be made clear that as soon as the employer is aware that medical leave or light duty has aggregated to more than 3 days, the employer has to submit the longer accident report.

9.3 See also our question in 13.2 regarding automatic claims following an employer's report. Essentially, our question is whether simplified reporting for cases with less than 4 days of medical leave would also automatically trigger a claim for the workers involved. TWC2 urges that they should.

Consultation paper, paragraph 12:

12.1 In addition to the three key reasons that delay processing stated in the consultation paper, TWC2 sees one more common reason: the employer disputes that the injury was work-related in any way, or makes an issue of some detail of the claim, e.g. saying that it occurred on a different day or that a particular body part was not injured or that it did not happen in the way reported by the worker.

12.2 TWC2 has previously urged MOM to decide on validity within one month of the filing of the claim, so as not to delay medical leave wages or medical treatment for the worker. We urge that clear provisions be made in the revised WICA to realise this. For this to be realised however, both employer and employee must have early opportunities for each to see what details about the accident and injury have been submitted by the other party, and early opportunities to contest any detail that may be inaccurate or untrue.

12.3 The right to see what the other party has reported becomes an especially acute issue when, as proposed in paragraph 13, claims are activated on the basis of the employer's accident report alone. What if, for example, in the employer's report, only an arm injury is mentioned when the worker has also suffered a head injury?

12.4 In light of paragraphs 14 to 16 making insurers responsible for processing claims, there is now a further complication. Which party is responsible for ascertaining validity and how can one party appeal the decision? A clear and easy process should be in place for the details of the accident to be discussed and investigated in a mutually fair way, and expeditiously too. If it is to be insurers making the decision (at least in the first instance), then there should be a rigorous Code of Conduct for them to follow to ensure integrity and reasonable speed in the process.

Consultation paper, paragraph 13:

13.1 The proposal in 13(a) is to "Process WICA claims for all work injuries notified to MOM by the employer, without requiring the employee to separately file the claim." However, it is unclear if the worker can continue to file his own WICA claim if the employer does not file an accident report or delays doing so. TWC2 strongly urges that the option for the worker to file a claim be kept open, as we cannot assume that all employers are honest and responsible; some might wish to conceal the fact of an accident.

13.2 Paragraph 13(a) should be reconciled with paragraph 9 which requires reporting of all injuries even if only one day of medical leave or light duty is prescribed. Paragraph 9 however stipulates a simplified reporting form for cases where medical leave or light duty do not exceed three days. It is not clear from the consultation paper whether the simplified reporting form will trigger automatic claims, or whether only reports using the longer form (for cases where medical leave exceeds three days) do so. TWC2 would favour the former.

13.3 If opening a WICA claim is automatic upon an employer filing an accident report, there has to be an easy way for a worker to find out whether the employer has filed a report at all.

13.4 As mentioned in 12.2 and 12.3, beyond just knowing whether the employer has filed an accident report, there should be an easy process for a worker to retrieve a copy of this report. The possibility exists that details in the report are inaccurate or untruthful or it contains statements and assertions that are detrimental to the worker's claim. As mentioned in 12.4, there should also be an easy process for the worker to contest statements and assertions made by the employer in the accident report, and an appeal route should be available if he wishes to contest the validity decision.

13.5 With reference to paragraph 13(b), will doctors have to indicate whether they are making a current incapacity (CI) or permanent incapacity (PI) assessment? And will the Notice of Assessment state so too?

13.6 In a case of a complicated injury where the doctor chooses to "notify the Commissioner of Labour ("Commissioner") to conduct PI assessments at a later date", the worker should be able to request for a current incapacity assessment. Some workers prefer to go home early rather than wait on in Singapore with no income and no family support.

13.7 TWC2 notes from paragraph 13(c) that in cases where no salary documents are available to arrive at an AME, a "derived AME" will instead be used. However, the method for arriving at a "derived AME" is unclear beyond saying that "the multiple will be set at a level such that the derived AME will be greater than the actual AME for at least 75% of cases." This suggests that the multiple will be drawn from the 75th percentile of cases with evidence-based AMEs. But of what group? Of all injury claims? Or of the industry sector? Overtime patterns and allowance practices vary hugely across industries, they may also be different between local employees and foreign workers (who are less likely to resist long overtime hours). We urge MOM to spell out clearly the basis for arriving at the multiple. MOM should also reveal regularly the empirical data they are using as the basis for determining the multiple.

Consultation paper, paragraphs 14 to 16:

14.1 It is difficult to comment on this section because there is insufficient detail about how the proposed new system, with insurers responsible for processing claims, is going to work. This is especially as insurers have a vested interest in pay-outs. Consequently, the details about the proposed process and the safeguards to be applied need to be clearly spelt out for consideration.

14.2 In particular, TWC2's concern centres on whether the insurer is the party to decide on the validity of a claim. Sometimes, such a decision may require close investigation, e.g. interviewing witnesses, calling for reports from main contractors, site visits, etc. If insurers are the designated parties to decide on validity of claims, are they properly equipped to perform these tasks?

14.3 As raised in 7.1, are insurers also to determine AME? This is no easy task either. In TWC2's experience in salary cases, we have come across tampered or forged time cards and salary slips, or

salary slips with erroneous calculations for overtime, etc. Are insurers up to the task of investigating such matters?

14.4 In cases where the injury falls within an exclusion clause of the policy, or where the employer had not bought or not renewed a WICA insurance policy, which party will be responsible for the claim?

14.5 Which party will issue the Notice of Assessment? If it is the insurer, it would be absurd to continue to allow the insurer to object to the Notice of Assessment, and this should be disallowed.

14.6 Perhaps the Notice of Assessment will be rendered unnecessary when insurers are to process claims and consequently, section 24 of WICA will be substantially amended. Unfortunately, the consultation paper is not clear on this, with no indication what will replace this document functionally, and how the worker will continue to be able to see how the offered compensation is calculated.

14.7 What process is available to the worker if he objects to the insurer's offer of compensation? The consultation paper has little information about this. It is important that such a process be simple and clear, and the appeal decision should not lie with the insurer. It is assuring that the final sentences of paragraph 15 and 16(a) indicate that MOM will be involved in cases of dispute, but it would be necessary to spell out processes clearly.

Consultation paper, paragraph 17(a)

17.1 TWC2 supports the increase in the maximum fine for WICA offences.

17.2 However, Section 40 of WICA needs amendment. Currently, the effect of Section 40(1) is that once an employer is convicted of failing to pay compensation, that liability to pay compensation is expunged unless the Commissioner applies to the court and the court positively orders him to pay. TWC2 urges that this section be revised given its inequity to the worker. The liability to pay compensation should remain in effect.

17.3 Section 40(3) is even more in need of amendment. Currently, it says that if a convicted employer is fined, and fails to pay the fine and thus serves a period of imprisonment in default, his liability to pay compensation is expunged. There isn't even an option for a court to order it sustained.

17.4 It is unclear what would be the status of the employer's liability to pay compensation if, pursuant to Section 35(2)(i), a court imposes only a custodial sentence with no fine.

17.5 For the above reasons, TWC2 recommends that Section 40 be revised to clarify that the liability to pay compensation always remains despite conviction and sentence.

Other issues not discussed in the consultation paper

As mentioned in our Introduction, there are some other issues faced by workers which do not appear to be addressed by the proposed amendments. We take the liberty of suggesting measures that will do so. Some of these measures do not require amending WICA, but only need modification and clearer enunciation of policy, or stronger enforcement of existing law. Nonetheless, these additional measures will aid in ensuring smoother and fairer claims handling.

18.1 The proposals are silent on one issue that is a common source of distress for workers – inability to obtain timely medical treatment when the validity of a claim is unverified -- which is sometimes due to deliberate feet-dragging by employers. TWC2 urges MOM to make it policy that the medical insurance that employers must buy for Work Permit holders (a condition of EFMA) should be activated to ensure that no worker is left without timely treatment. If the WICA claim is later determined to be valid, the expense claims made under medical insurance can be reversed, with these medical expenses then charged to the WICA insurance policy.

18.2 Medical leave wages are similarly delayed if a WICA claim is not verified within the first month. Such delay violates the intent of WICA which clearly states in Section 14A(2) that medical leave wages should be paid no later than the usual salary payment day, which the Employment Act requires to be no less frequent than monthly. TWC2 recommends that the provision in 14A(2)(a), which states that "such compensation… shall be payable… even though no claim… is made under this Act", is commodious enough to allow the interpretation that medical leave wages are payable even if the validity of the claim has yet to be established. If not even lodging a claim is no bar to getting medical leave wages, neither should a claim that is pending verification. After all, Section 14A(3) provides for the possibility that the worker should return monies received if the claim is later found to be invalid.

18.3 TWC2 also urges greater enforcement of Section 6 of the Workplace Safety and Health (Incident Reporting) Regulations, which mandates reporting by employers within 10 days. Enforcement of this regulation will help expedite the verification of claims. Insurers, even if responsible for processing claims, cannot enforce this section. It is MOM's responsibility to do so.

18.4 To better reflect legislative intent as expressed in Section 3 of WICA, MOM should clarify and strengthen the presumption, e.g. by means of a directive, that an injury is related to work if it occurred at the workplace and should not place a heavy burden of proof on the injured worker. The operating protocol should be that unless the employer can overcome this presumption within one month, the claim should be considered valid. This would improve on the present situation where the claim can linger in limbo for months while waiting for the employer to respond. By keeping a case in limbo, the worker may not get his medical leave wages or appropriate medical care. In setting out a Code of Practice for insurers for handling claims, this point should be included.

18.5 The testimony of witnesses who testify for the employer, but who also work for and thus can be coerced by the employer, should be treated with great caution. A directive to this effect from

MOM to insurers – if they are the parties responsible for verifying claims – would help prevent erroneous decisions.

18.6 There should be a process available to workers to seek exception to the one-year time bar on medical treatment and medical leave wages when the employer can be shown to have been unreasonably obstructive to the employee getting appropriate medical treatment in the first year after the accident. Employers should not be permitted to run time out and then benefit from doing so.

18.7 For greater efficacy and avoidance of late disputes, MOM should require that the AME be established and agreed upon by all parties prior to issuing the Notice of Assessment (or whatever document replaces it).

18.8 To ensure that no workplace injury goes unreported, which aligns with the intent "to have a more comprehensive picture of the extent of work injuries" (paragraph 9 of the consultation paper), MOM should require that doctors and healthcare providers report to MOM when a Work Permit holder is issued more than three days' medical leave or light duty, or is hospitalised for 24 hours.

18.9 Most workers with WICA claims find their medical leave or light duty period ending well before they are given a doctor's appointment for assessment of permanent incapacity. After that, there is still a long period before a compensation offer is made to them. Without entitlement to medical leave wages, this long waiting period is financially ruinous for them. TWC2 recommends that MOM permits foreign workers to seek new employment as soon as their medical leave or light duty has expired. TWC2 is aware of the concern that should these workers undertake physically demanding jobs, they may aggravate the injury, thus complicating the assessment of permanent incapacity. However, workers whose Work Permits had not been cancelled would naturally be expected to return to their previous jobs which may be physically demanding. Citizen employees filing injury claims would also be free to seek new employment whenever they wish. If concern about aggravating their injuries prior to assessment does not apply to these two categories, there is no fair reason that such concern should disallow Special Pass holders from seeking new jobs.

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