STATEMENT OF SUSAN M. CARNEY

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REVIEWING WORKERS' COMPENSATION FOR FEDERAL EMPLOYEES

BEFORE THE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
COMMITTEE ON EDUCATION AND THE WORKFORCE

U.S. HOUSE OF REPRESENTATIVES

MAY 12, 2011

Mr. Chairman and Members of the Subcommittee,

My name is Sue Carney, and I am the National Human Relations Director for the American Postal Workers Union, AFL-CIO. The American Postal Workers Union is the world's largest postal union, representing more than 220,000 postal employees in the clerk, maintenance, and motor vehicle divisions and in support services; 50, 000 of which are veterans. We are employed in approximately 32,000 sites throughout the country, providing a public service in every city, town and community in our nation.

Workplace injuries, illnesses and deaths negatively impact a significant number of postal employees so we appreciate the opportunity to share our views regarding the Federal Employees Compensation Act (FECA) and the Department of Labor's proposed Federal Injured Employees Re-employment Act (FIERA). We believe various aspects of FECA and FIERA, if adopted as written, are disparaging and will negatively affect public servants and their families.

Furthermore, we would like to add that during a DOL briefing, the unions were adamantly advised that our concerns and objections would not be considered. Seemingly DOL used the occasion to gauge our response, rather than consider the validity of our concerns, consequently amending some of their 'marketing strategies' to make the proposal appear more equitable. Additionally, they claim their reform proposals will "produce potential cost savings of approximately $400 million over a 10-year period for the American taxpayer." To our understanding the Office has not shared how it derived this figure, nor produced documentation to support it. It's noteworthy to point out that not all of the costs related to workplace injuries are borne by taxpayers. Also significant, wage loss compensation and death benefit costs have remained stable since 2001; however war risk hazard payments and escalating costs for medical and rehabilitation services and supplies brought a combined $367.3 million increase to the program[1]. It's our understanding that this figure includes all OWCP directed medical exams.

The FECA represents a longstanding covenant that our government made with federal workers. Each side gave up something to make it equitable and fair to both parties. Its primary purpose is to shield injured federal employees and their families from loss while limiting the employers' liabilities. "*The employer relinquished the defenses enjoyed under the common law, but this loss was offset by a known level of liability for work-place injuries and deaths. The employee gave up the opportunity for large settlements*

[1] War risk hazard payment $86.2 million(WHCA) ; increase cost for medical services $281.1 million

provided under the common law, but receives the advantage of prompt payment of compensation and medical bills. These tradeoffs make the federal workers' compensation system fair and equitable to both parties. However, where either party does not receive the benefits of this covenant, the system becomes unacceptable. When FECA was amended in 1974, Congress stated it is essential that injured or disabled employees of all covered departments and agencies, including those of the United States Postal Service, be treated in a fair and equitable manner. The Federal Government should strive to attain the position of being a model employer". [2]

As we begin, it is important to point out that postal and federal workers are injured on the job because of the circumstances they encounter in performing a public service. These employees are victims of traumatic injuries such as slips and falls, muscle tears and herniated disc injuries. They are victims of poor ergonomic working conditions, like those that cause repetitive stress disease, making it difficult to perform simple tasks that involve grasping, holding and reaching. They suffer motor vehicle accidents, sustain injuries caused by faulty equipment and are innocent victims of unforeseeable, heinous crimes. Workplace injuries and diseases change lives; in many cases forever. No one ever goes to work wanting it to be the day they are injured or the day they will not return home to their family.

Injured workers do not reap greater benefits, nor do they lack motivation to return to work when capable, *as some have wrongfully implied*. In addition to the physical, mental and emotional pain that workplace injuries bring, it is important to understand the losses compensationers presently suffer before we consider asking more of these workers. They do not earn annual or sick leave. They are not able to contribute to the Thrift Savings Plan nor can they receive matching funds; this, in and of itself, causes a substantial loss for injured federal workers.[3] Their compensation rate remains locked at their date of injury (or first disability) pay rate. These employees do not receive the 'employer pay increases' they would otherwise be entitled to had it not been for their injury; only a COLA based on the Consumer Price Index (CPI), which has averaged just 2.1% annually over the last decade. Their lost workdays erode their Family Medical Leave balance, and they are often separated because of their disabilities. If separated prior to achieving the retention of health benefits and life insurance, these benefits are lost. When placed in the OWCP's vocational rehabilitation program they can expect to have their wage loss compensation

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[2] Excerpt from Joseph Perez's statement when appearing before The House Government Reform and Oversight Committee Government Management, Information and Technology Subcommittee on July 6, 1998. Perez is a former OWCP DFEC Claims Examiner and currently practices law.

[3] The TSP Calculator illustrates that an employee who is earning $40,000 annually, contributing 10% and receiving the employer's maximum 5% contribution over the span of a 30 year career, and who is earning an average of 5% interest is estimated to realize more than$416,000 towards his / her retirement savings

reduced whether they are successful in obtaining employment or not.[4] In our opinion, these Division of Federal Employees Compensation (DFEC) procedures motivate and enable employers to refuse or withdrawal medically suitable work in order to escape a large portion of their chargeback liabilities; leaving injured workers with a significantly reduced or eliminated source of income.

FECA is supposed to be a non-adversarial, yet many workers and their physicians would disagree. In addition to the losses that were previously presented, let me share just a few examples of the adversarial scrutiny they are often subjected to. Physicians are frustrated. OWCP requires an extraordinary amount of paperwork from them and pays poorly for medical services; just 5% over the Medicare fee schedule. It is not enough for treating physicians to give their expert-medical opinion, confirming that a condition is work-related based on their examinations, testing and findings; their medical narratives are often rejected by claims examiners who have no medical background stating the doctor's opinion is not good enough because the doctor failed to share his or her reasoning. Prescribed medical treatment is often delayed or denied. In recent testimony presented by OWCP, the Acting Director stated "overcoming actual physical limitations exact a high price", which "means a more costly program". Taken in context, he seemed to imply that the Program will forgo the expense of medical treatment if it won't clearly result in a return-to-work.

Additionally, claimants are subjected to second opinions, and independent medical examinations, rather than trusting the opinion of the claimant's treating physician who understands the extent of the disability and is responsible for prescribing medical treatment. All of this needlessly adds to the cost of the program. These factors have made it difficult for claimants to find and keep doctors. When claimants do find doctors that are willing to treat them, claimants have been barred from using them if they are located further than 25 miles away. To the contrary, the Office regularly finds it acceptable to send claimants more than 100 miles away for their directed exams. DFEC also refuses to adjudicate questionable job offers for suitability; rather a claimant is required to refuse a job offer and risk going without income while the program takes months to make a suitability determination. These factors, coupled with the Office's recent and sweeping Proposed Rulemaking changes[5] and portions of the FIERA, all bring

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[4] Division of Federal Employees Compensation Procedure Manual Part 2 Chapter 0814 Sections 7 and 8. These actions are known as loss wage earning capacity (LWEC) determinations. In basic terms, a LWEC is a comparison between wages of actual or potential earnings against wages at the time of injury. The difference is what the claimant is entitled to receive in wage loss compensation. For example, a worker was making $20 hr when injured. They normally would receive $15 in WLC if they have dependents, but if the Office finds a potential job that pays $18 hourly, the employee is then only entitled to receive 75% of the difference, which in this scenario would be $1.50 hourly, even when the employee was an unsuccessful applicant. And if the employee procured the job but subsequently the job was withdrawn, the employee would still only be entitled to $1.50 per hour in WLC.

[5] RIN 1240-AA03

additional favor to employing agencies; cause unnecessary harm, in some cases irreparable harm, to injured workers and their families and do little to promote the non-adversarial program FECA is intended to be. They should not be permitted to stand.

Examining FIERA Proposals

Vocational Rehabilitation

We agree measures should be taken to help all injured workers return to suitable employment when their treating physician states that they are physically capable; however, granting authority to place employees with temporary medical restrictions into OWCP's vocational rehabilitation program is an objectionable approach. It would serve as further disincentive to employers who believe workers with disabilities are crippling their production. Currently, only employees with permanent medical restrictions can be voc-rehabbed. It's been our experience that employers regularly refuse work to these employees because they can escape chargeback through OWCP's vocational rehabilitation program due to loss wage earning capacity determinations. Comparatively, employers are more compelled to return employees with temporary restrictions to employment because they cannot be voc-rehabbed. In addition, premature vocational rehabilitation could interfere with the employees' prescribed recovery process or force employees to exceed their physical capacities. Recently, a Jacksonville OWCP District Office rehab counselor required a worker, who was only capable of working four hours a day, to interview for fifty jobs by the end of the week.

Additionally, the Office has not disclosed the specifics of its new Return-To-Work Plan for employees who are physically unable to be voc-rehabbed, nor has it shared if the employee's treating physician will be partnered into the process. According to figures provided by OWCP, only a mere 2% of all new injury claims remain on the long-term compensation rolls for more than two years. This demonstrates there is little need to compound the Program with additional rehabilitation costs.

To accomplish the goal of returning injured workers more readily to employment, we recommend that OWCP be more prompt in authorizing all recommended medical treatment, including physical therapy and surgeries which are often denied or delayed for extended periods of time.

Assisted Reemployment Program

The APWU can appreciate the Office’s efforts to subsidize federal employment opportunities where suitable work does not actually exist within the worker’s own employing agency; however, we are gravely concerned that such efforts would result in a reduction of compensation benefits. Again, the problem lies within the Office’s LWEC procedures. DFEC procedure permits a reduction to wage loss compensation based on actual earnings. This alone is not objectionable, but, when the subsidized employment ends and residual disabilities remain there is no mechanism to reinstate the compensation that was eliminated. Another DFEC procedure permits LWECs based on constructed positions. Essentially, this permits a reduction in compensation even when the worker is unsuccessful in procuring a position. How is this fair and equitable?

We recognize that federal work cannot be used as a basis for making LWEC determinations, but the reality is, DFEC has advised it will look to comparable private sector positions to LWEC these employees. The Office has offered its Private-Sector Assisted Reemployment Program as an indicator of potential success for its Federal Assisted Reemployment Program. Interestingly, the Office has not disclosed how many private-sector program candidates they successfully placed in the program, nor has it advised how many LWEC’s were issued as a result of the program, but we do know, based on figures provided by OWCP, that 45% of the employees who secured private –sector subsidized employment were not hired at or beyond the 3 year agreement period; consequently leaving many injured workers and their families at a deficit.

We recommend employers be required to provide compelling evidence when they assert that do not have medically suitable work for partially recovered employees and prove that they have taken all mandated measures to make reasonable accommodations for their disabled workers, before these workers are sent looking for work with other employers. In our opinion, the ‘Federal’ Assisted Reemployment Program would only be favorable if changes were made to reinstate lost compensation when employment stops and if constructed LWECs were eliminated. These actions would aid in facilitating employer cooperation, they are conducive to the President’s Executive Order 13548, and would compel employers to retain their injured employees. On the surface, this proposal with all of its employer incentives could appear to inspire employers to hire injured workers; however, when you examine the existing procedures it would trigger, failure to incorporate our recommended changes creates the potential to bring irreparable harm to workers.

Conversion to Reduced Benefits for Total and Partial Disability at Retirement Age

To put matters into proper perspective, we should point out that regulations and procedures are so stringent it is virtually impossible to 'milk' the system *as is often implied*. This is evidenced in OIG's recent Semiannual Report to Congress where only twenty-three convictions for medical provider and claimant fraud were reported.[6] Compensationers are required to provide medical documentation on a fairly regular basis to support their disabilities in order to remain on the OWCP rolls. Compensationers aren't permitted to self-certify so it is meaningless for anyone to assert that injured workers may have an incentive "to cling to the self-perception of being permanently disabled." Even if they had that perception, it wouldn't be enough to keep them on the rolls. Furthermore, compensationers are regularly subjected to OWCP directed second opinion and independent medical examinations. Additionally, there is the existing and unforgiving OWCP Vocational Rehabilitation Program, so we must presume that many of the long-term compensationers are permanently and totally disabled; otherwise regardless of age, they would have been placed in OWCP's Vocational Rehabilitation Program to seek alternate employment.

It is wrong to infer that OWCP is a lucrative retirement program marked by disincentives that preclude employees from returning-to-work, as some have stated. It is also misleading and inequitable to compare annuitants who are able to achieve a 30 year career and obtain a true high three to compensationers who stop earning creditable service when they are separated for disability[7]. Compensationers do not receive the same salary increases their uninjured coworkers do. As we previously mentioned, their compensation is locked at their date of injury pay rate. It is disingenuous to cite CSRS as comparable. The federal retirement system converted to FERS in 1983. Since that was 28 years ago, and since FIERA is supposed to be prospective, the greatest majority of workers will fall under FERS. In either case, compensationers are not able to TSP, and are ineligible to receive matching contributions. Compensationers cannot contribute to Social Security and cannot receive credit for substantial earnings. Unlike their uninjured coworkers who can work after retirement to supplement their income, totally disabled compensationers are incapable of performing any work. The loss injured workers sustain by comparison is monumental. To reduce their compensation to 50% at a pre-selected and arbitrary age on the basis that CSRS annuitants receive a slightly higher but taxable percentage than that which is being proposed, is unfounded. To assume any age a 'normal' retirement age would be unjust, age discriminatory and presumptive. To the contrary, the Bureau of Labor Statistics reports more senior employees are opting to work well into their

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[6] April 1 – September 30, 2010

[7] Employers are permitted and generally do separate employees who are collecting wage loss compensation for one continuous year.

golden years to stay active and because they cannot afford to retire.[8] Do we really want to penalize seniors with work-related medical restrictions because of their age?

We would be remiss in assuming that our senior compensationers would have retired had they not been injured. We have to presume, based on existing OWCP procedures, that these employees are incapable of working otherwise OWCP would be derelict in performing its duties. For those who have temporary medical restrictions, it's important that we recognize they may be capable of working in the future once OWCP approves all prescribed treatment and the employee is given appropriate recovery time consistent with the nature of their injury. It would be punitive to reduce their wage loss compensation based on age and the time spent on the rolls. Recovery for extensive injuries can often take longer than a year.

Several measures can be taken to make FECA more fair and equitable. Laws could be changed to allow TSP withholdings and matching contributions; or a retirement fund, comparable to TSP could be created for compensationers that would permit employee withholdings and mandate employer contributions. Compensationers could be afforded the option to elect retirement based on an estimation of what their high-three would have been had they been able to continue their federal career. As it currently stands, employing agencies are the only benefactor.

Augmentation

Currently workers with dependents receive 75% of their pay, while workers without dependents receive 66 2/3%. DOL originally offered its proposal to convert all compensationers to 70% on the premise that workers with dependents do not earn more than those without. They also state the change would ease entitlement calculations for its claims examiners. Although it is true that workers with dependents do not earn more, tax deductions for these workers are less. This creates a larger net check to better support their families; workers without dependents net less. As to DOL's newer argument that FECA benefits frequently exceed the employee's pre-injury tax-home pay; there is no equity in being locked in at a rate that does not allow your usual pay increases. Additionally, uninjured coworkers are able to recoup tax withholdings by filing annual tax returns to add to their income; compensationers cannot. It is a ridiculous notion that claims examiners are being challenged by wage loss calculations with the technology that is available. The installation of a computer program or the use of a calculator would resolve the nuisance

[8] The Bureau of Labor Statistics indicates that as of 2007, 56.3% of workers age 65 and older have opted for fulltime employment over part-time employment. That employment of workers ages 65 and over has increased 101 % between 1977 and 2007: men rose by 75%; women climbed by 147%; while workers 75 and over had the most dramatic gain, increasing by 172%. There is also an apparent failure to acknowledge that projected growth in the labor force for workers between the ages of 65 and 74 is predicted to soar by 83.4 percent between 2006 and 2016. The number of workers age 55-64 is expected to climb by 36.5 percent. By 2016, workers age 65 and over are expected nearly double its participation in the total labor force from that of 2006.

without going to the extreme of reducing benefits of worker families. APWU is opposed to any change that would burden families, or penalize workers because they are married and /or have children.

Scheduled Awards

Our primary objection to this proposal is based upon the change in pay rate percentages. It is our opinion that claimants should continue to receive their benefits based on their dependent status (75% dependents, 66 2/3% no dependents) for reasons we offered under augmentation. Moreover, we object to the GS 11 Step 3 rate ($53, 639.00) being used to calculate the value of scheduled awards. Historically, the employee's actual pay rate, at time of injury or first disability, whichever is greater, has been used to calculate scheduled awards. Today, this change would result in an increase for some claimants but a decrease for others. In the future however, it is likely that the GS-11 Step 3 rate would be even less reflective of the actual pay rates for some workers. Coupled with the DOL's recent adoption of the AMA Guide Sixth Edition, which significantly reduces impairment ratings and in turn considerably reduces the value of scheduled awards, the utilization of the GS 11 Step 3 rate would be a double-blow to compensationers who suffer a permanent loss of use.

In order to be equitable and fair the APWU recommends that scheduled awards remain based on the employee's pay rate. We strongly urge the DOL to convert back to using the AMA Guide Fifth Edition, in order to facilitate a more accurate means to rate impairments. There are no regulations that require DOL to use the latest edition of the AMA. In fact, AMA Guides Task Force Member, Matthew Dake, reports the AMA Sixth Edition is a flawed process that produces flawed results.

Death Benefits

Our objection to this proposal is based upon the change in pay rate percentages. It is our opinion that survivors should continue to receive their benefits based on the historic compensatory rate of 75%. A reduction does little more than swipe income from the spouses and children of federal workers who died providing a public service to our country.

Definition of New Claim for Disability

APWU has strong objections to this proposal. This is a veiled attempt to corral all compensationers, even those with existing approved claims into the FIERA. Passage would gather individuals submitting short-lived disability claims caused by a need to recover from physical therapy, spinal injection, surgery or other intermittent medical treatment. It would net claimants that experience a spontaneous worsening of an already accepted medical condition, and would also capture claimants who have medically suitable job

offers withdrawn by employers, as is happening within the Postal Service in cataclysmic proportion. This is perhaps the slyest of all the DOL proposals. The DOL leaves many with the impression that FIERA is prospective as it will only affect individuals with "new" claims, but in reality DOL is attempting to change the understood definition of what is "new". Passage of this proposal would afford employing agencies even greater favor by burdening a significantly greater number of injured workers and their families. All Compensation Act submissions require adjudication but traditionally only two are considered new claims. The definition of a new claim should remain limited to traumatic injuries and occupational disease.

Burial Expenses

This update is long overdue; however APWU would suggest the benefit be more reflective of actual final expenses. According to the National Funeral Directors Association, the average cost in 2009 was $7,755.00.

Computation of Pay

Workplace injuries are not supposed to cause loss to workers. Therefore, compensation is purposeful in including all of the pay factors that an employee would have been entitled to had they not been injured. Traditionally, compensation is based on an employee's salary, including night differential, Sunday premium pay and holiday pay, and for some workers includes overtime. Quite simply, APWU objects to compensation being paid at any rate other than the employee's actual pay rate at time of injury or first disability, inclusive of all usual entitlements to Sunday premium, night differential, holiday pay and where appropriate overtime pay. It should not be based or capped on an arbitrarily selected GS rating, which would create a pay increase for some employees and a decrease for others. It is neither fair nor equitable to generate savings for employers off the backs of injured workers. Furthermore, we will restate that it is a ridiculous notion that claims examiners are being challenged by wage loss calculations with the technology that is available.

Waiting Period

Continuation of Pay, its very spirit is stated in its name. It is in place to ensure employees and their families have an income while OWCP adjudicates their claim. Despite OWCP's testimony, it often takes 60 – 120 days for claims to be approved and for wage loss compensation to begin. The APWU is opposed to federal employees being subjected to a three-day waiting period. All workplace injuries are real; even minor ones. This fact does not make them frivolous. Employees are subjected to the same scrutiny and requirements for minor injuries. They still need to meet the same five requirements to

achieve claim approval, one of which includes a medical narrative with medical reasoning. A three day waiting period has been unjustly imposed upon Postal Workers in order to save money for the employer. The same should not be imposed upon federal workers. APWU would request the three day waiting period be removed from COP for postal workers. This action would satisfy the stated goal of uniformity and enable COP to fulfill its intended purpose.

Sanction for Non-Cooperation with Nurses

To impose sanctions for non-cooperation with nurses means to eliminate eligibility for wage loss compensation and scheduled awards. The nurse intervention program is already fraught with overzealous nurses who attempt to impede or redirect the prescribed medical treatment of the claimant's treating physician, and who impose themselves in private examinations and doctor patient discussions. APWU is opposed to giving these nurses the authority to have sanctions initiated without first giving claimants access to due process.

Compensation for Foreign Nationals

Upgrades to this provision are long overdue. However, since these foreign nationals are performing a public service for our country, APWU believes they should be compensated using the same percentage ratings that apply to our claimants (75% dependents, 66 2/3% no dependents).

Conclusion

Although we are very disappointed with portions of FECA, many of the FIERA proposals, and some of the Office's action, we still believe the Department of Labor is the best means available to handle the claims process for all federal and postal workers. APWU feels strongly that the Federal Workers Compensation Program (OWCP DFEC) should continue to strive to be a model program, not work to be comparable to insufficient state programs. To help OWCP meet its burden, it is our opinion that more claims examiners are needed. To eliminate some of the erratic decisions claimants are receiving all claims examiners should be required to receive, on a regular basis, more comprehensive training regarding regulations, procedures and precedent setting Employees Compensation Appeals Board decisions.

We also believe efforts should be made to recreate the non-adversarial atmosphere that the Program is intended to be. To help accomplish this we recommend more substantive outreach to employee representatives and more meaningful technical assistance to treating physicians and claimants who are often confused by the processes. Efforts should be made to make the Program more palatable for doctors.

Many forgo treating claimants because of the extraordinary reporting requirements and low reimbursement rate for services. It is our opinion that OWCP should be granted moderate enforcement authority to compel employers, who have been skirting return-to-work obligations and other responsibilities to comply. We would also implore the Committee to work to create more meaningful safety and health mandates to protect workers, and provide better mechanisms to enforce them. These initiatives alone could reduce the overall cost of workplace injuries and disease.

Bending policy and recreating procedures to favor agencies do little to maintain a fair and equitable atmosphere. Shrouding them as "modernization, return-to-work and administration simplification" is disingenuous. As we examine the history presented by the Congressional Research Service, we would request that we be mindful not to regress but rather progress. Before we consider passing legislative changes, we must ensure they are meaningful changes and examine how the consequences of our actions will impact workers and their families.

We thank you for your time and consideration regarding this paramount issue. I am available to answer any questions you may have to further clarify your understanding of the compensation processes and of our concerns.

Susan M. Carney
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American Postal Workers Union, AFL-CIO

Ms. Susan M. Carney has been a career employee with the United States Postal Service since 1989. She has 22 years of union experience serving the American Postal Workers Union, AFL-CIO membership. She has held numerous positions within her APWU Local and State organizations, including: Shop Steward, Trustee, Secretary-Treasurer, Executive Vice-President and President of the New Jersey State APWU. In 2001, she was elected the APWU National Human Relations Director and serves full-time as a resident officer in Washington, DC.

Ms. Carney serves as the senior committee member of the USPS National Employees Assistance Program (EAP); the AFL-CIO Union Veterans' Council, the AFL-CIO Civil, Human and Women's Rights Committee; and also serves on the Postal Employees Relief Fund as the senior Executive Committee member.

Under Ms. Carney's direction, the Human Relations Department is responsible for providing guidance to the APWU membership in relation to a number of issues, including: the EAP, veterans' rights, members' assistance programs, illegal discrimination, community services, disaster relief; civil, human and women's rights; reasonable accommodation, and workplace injuries and illnesses, which is a top priority of the department.

Ms. Carney implemented the union's first National Injury Compensation Training Program. She has conducted hundreds of training seminars - educating thousands of labor representatives, attorneys and medical professionals throughout the country. Ms. Carney has created countless resources to assist members navigate their way through the OWCP processes and to help representatives achieve justice for injured workers.

Ms. Carney understands firsthand the impact of workplace injuries and is painfully aware of what it means for employees and families to live with disabilities. She herself suffers from carpal tunnel and thoracic outlet syndromes which were caused by her employment; as a result she endures a combined 44% permanent loss of use to her arms. Her husband, having served in the United States Army, is considered 100% disabled as a result of his military service.