

1992—No. 225

WORKERS COMPENSATION ACT 1987—REGULATION

(Relating to occupational rehabilitation services and to guidelines for
work assessments)

NEW SOUTH WALES



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HIS Excellency the Governor, with the advice of the Executive Council,
and in pursuance of the Workers Compensation Act 1987, has been
pleased to make the Regulation set forth hereunder.

JOHN FAHEY
Minister for Industrial Relations,
Minister for Further Education,
Training and Employment.

Commencement

1. (1) This Regulation commences on 25 May 1992, except as provided by subclause (2).
- (2) Clause 2 (b) commences on the date on which this Regulation is published in the Gazette.

Amendments

2. The Workers Compensation (General) Regulation 1987 is amended:
 - (a) by omitting the heading to Part 4 and by inserting instead the following heading:

PART 4—WEEKLY COMPENSATION—PARTIAL INCAPACITY

- (b) by omitting clause 10 (2) and by inserting instead the following subclause:
 - (2) Any such medical certificate need not be in or to be effect of Form 1 if it contains information about the worker's fitness for

work that (because of other information available to the employer or the particular circumstances of the case) is sufficient for the purpose of determining suitable employment for the worker.

- (c) by inserting after clause 10 the following clause:

Guidelines for assessments under s. 40 of ability to earn

10AA. For the purposes of section 40 (8) of the Act, the following guidelines are prescribed in respect of any assessment of a partially incapacitated worker's ability to earn in some suitable employment:

- (a) the assessment is to involve a worker in only such procedures as are reasonable and appropriate to determine (or assist in determining) the worker's ability to earn in some suitable employment;
 - (b) if the assessment includes a functional assessment of the worker, the functional assessment is to be done by, or under the immediate supervision of, a physiotherapist, occupational therapist or other appropriately qualified health professional;
 - (c) if the assessment includes a vocational assessment of the worker, the vocational assessment is to be done by, or under the immediate supervision of, a psychologist or appropriately qualified counsellor;
 - (d) in the assessment, regard is not to be had to any limitation, because of changes in economic conditions from time to time, in the actual availability of suitable employment (but that employment should be within the general labour market reasonably accessible to the worker concerned);
 - (e) employment of a kind which (because of the general level of its availability on the labour market referred to in paragraph (d)) is more likely to be available to a person in the worker's circumstances is to be given more weight in the assessment than employment of a kind which is less likely to be so available;
 - (f) any other guidelines approved by the Authority and issued to insurers.
- (d) by omitting from clause 10A the definition of "rehabilitation patient" and by inserting instead the following definition:
- "rehabilitation patient"** means a worker receiving treatment by way of rehabilitation:
- (e) by inserting in the heading to Part 4B after the word "TREATMENT" the words "OR SERVICE";

- (f) by inserting in clause 10C (1) after the word “treatment” the word “or service”;
- (g) by inserting after Part 4B the following Part:

PART 4C—OCCUPATIONAL REHABILITATION SERVICES

Definition

10D. In this Part, “**approved guidelines**” means guidelines that are approved by the Authority and issued to insurers.

Occupational rehabilitation service—additional services

10E. For the purposes of the definition of “occupational rehabilitation service” in section 59 of the Act, the following additional services are prescribed:

- (a) functional education;
- (b) monitoring a return to work program;
- (c) work conditioning.

Directions to employers under s.63A (4)—insurers authorised

10F. For the purposes of section 63A (4) of the Act, an insurer who is liable to indemnify an employer for any occupational rehabilitation service provided to or for the benefit of a worker is prescribed (in addition to the Authority) as a person who may direct that the employer is liable for a further amount to that prescribed by section 63A (3) of the Act.

Applications under s.63A—generally

10G. (1) An application under section 63A (4) of the Act:

- (a) is to be in the form of a rehabilitation plan or in such other form (if any) as the Authority may approve; and
- (b) is to contain such particulars as the Authority may determine.

(2) An accredited provider is required to make an application under section 63A (4) as soon as practicable after the accredited provider becomes aware that the total cost of occupational rehabilitation services provided to or for the benefit of a worker in respect of an injury will, or is likely to, exceed the maximum amount prescribed by section 63A (3).

Applications under s.63A (4)—services provided by more than one provider etc.

10H. (1) An accredited provider may, for the purpose of determining whether an application under section 63A (4) of the Act is necessary, request the relevant insurer (in writing) to supply

details of any costs that have been claimed from the insurer in respect of occupational rehabilitation services previously provided by another provider in respect of the same injury.

(2) If the insurer does not, within 14 days or such longer period as the Authority may determine, supply the accredited provider with those details, the provider need only make an application under section 63A (4) of the Act if the total cost of services provided by that provider to or for the benefit of the worker concerned will, or is likely to, exceed the maximum amount prescribed by section 63A (3) of the Act.

Directions by insurers—special provisions

10I. (1) If an application under section 63A (4) of the Act is made to an insurer:

- (a) the insurer may request further information from the applicant; and
- (b) the insurer is, as far as practicable, to deal with the application within 7 days after receiving it or the further information (whichever is the later).

(2) A direction by an insurer under section 63A (4) of the Act must be in accordance with the approved guidelines (if any) relating to such directions.

(3) Any such direction may, subject to those approved guidelines:

- (a) specify that an employer's liability for a further amount to that prescribed by section 63A (3) of the Act is limited by reference to a maximum further amount for which the employer is liable for the proposed services (including, if appropriate, particular services) or to the nature, number or duration of those services, or both; or
- (b) specify that the employer is liable for such amount as is reasonably appropriate, having regard to the reasonable necessity for the provision of the services concerned.

Conditions etc.—directions under s.63A (4)

10J. (1) If a direction is given under section 63A (4) of the Act and the accredited provider concerned becomes aware that, because of a change of circumstances or otherwise, it is no longer necessary for the occupational rehabilitation service covered by the direction to be provided to or for the benefit of the worker, the provider is to cease providing the service and notify the Authority or the relevant insurer.

(2) The Authority or an insurer may, subject to any approved guidelines, give a direction under section 63A (4) of the Act:

- (a) that is subject to such conditions as may be specified in the direction; and
- (b) by notice in writing given to the provider concerned, amend or revoke the conditions specified in any such direction or add to those conditions,

and any such amendment, revocation or addition takes effect on and from the time the provider concerned receives the notice or from a later time specified in the notice. The Authority or the insurer is to ensure that the employer concerned also receives a copy of the notice as soon as practicable after it takes effect.

Review by the Authority

10K. (1) If an insurer, after an application under section 63A (4) of the Act has been made to it:

- (a) refuses to give a direction under section 63A (4) of the Act; or
- (b) gives only part of any such direction applied for by or on behalf of the worker or the accredited provider concerned,

the insurer must refer the matter as soon as practicable to the Authority in such form and in such manner as the Authority may determine.

(2) If an insurer gives a direction under section 63A (4) of the Act, the worker or accredited provider concerned may apply to the Authority for a review of the direction:

- (a) if the worker or provider objects to a condition (or an amendment or revocation of a condition) that the insurer has attached or added to the direction; or
- (b) if the insurer declines further liability on behalf of the relevant employer for any occupational rehabilitation service covered by a direction previously given by the insurer.

(3) An application for review is required to be:

- (a) made in such form; and
- (b) accompanied by such information; and
- (c) in such manner,

as the Authority may determine.

(4) The Authority may, in relation to a matter that has been referred to it or in relation to an application for a review under this clause:

- (a) confirm the decision of the insurer; or
- (b) confirm the decision with such modification as the Authority considers to be appropriate; or
- (c) give a direction under section 63A (4) of the Act that the Authority considers to be appropriate.

(5) The Authority is to notify in writing the relevant insurer, employer, accredited provider and worker of the outcome of its review.

Revocation by Authority of direction under s.63A (4)

10L. (1) The Authority may, after giving a direction under section 63A (4) of the Act, revoke (in whole or in part) the direction if it considers it appropriate to do so in the circumstances.

(2) The Authority may suspend any such direction pending its decision on whether to revoke the direction.

(3) The Authority is to give notice in writing to all parties of any such suspension or revocation (but may, in the case of suspension, give oral notice and confirm the notice later in writing).

(4) If the Authority suspends or revokes a direction under section 63A (4) of the Act, the employer concerned ceases to be liable (subject to any order of the Compensation Court) for any occupational rehabilitation services or class of service specified in the notice of suspension or revocation and to which the direction relates.

(5) The suspension or revocation has effect in respect of services provided after the accredited provider concerned receives notice of the suspension or revocation or after such later time as may be specified in the notice.

Submissions to Authority

10M. The Authority must, before making a decision on:

- (a) an application for a direction under section 63A (4) of the Act or a review of an insurer's decision in respect of such an application; or
- (b) whether to amend, revoke or add to the conditions to which any such direction is subject; or
- (c) whether to suspend or revoke any such direction,

give any person who may be adversely affected by the decision a reasonable opportunity to make submissions to the Authority on the matter.

Payment under direction by Authority not admission of liability

10N. The payment of any amount in accordance with a direction by the Authority under section 63A (4) of the Act is not to be taken as an admission of liability.

Claims under Uninsured Liability and Indemnity Scheme

10O. In the case of a claim under the Uninsured Liability and Indemnity Scheme involving the provision of occupational rehabilitation services to or for the benefit of the worker concerned:

- (a) any application for a direction under section 63A (4) of the Act may only be made to the Authority; and
- (b) for the purpose of the definition of “occupational rehabilitation service” in section 59 of the Act, services may be provided to or for the benefit of the worker by any person determined by the Authority to be suitable (as well as by a provider accredited under section 152 of the Act) and, in that case, references in this Part to an accredited provider are to be read as references to such a person.

Application of Part to self-insurers

10P. If, in respect of an application under section 63A (4) of the Act, a self-insurer decides or refuses to pay a further amount to that prescribed by section 63A (3) of the Act:

- (a) the decision is, for the purposes of this Part, taken to be a direction that the employer concerned is liable for that further amount; or
- (b) the refusal is, for the purposes of this Part, taken to be a refusal to give a direction under section 63A (4) of the Act,

and for any such purposes, a reference in this Part to an insurer includes a reference to a self-insurer.

Application of Part to proceedings pending in Compensation Court

10Q. If proceedings are pending in the Compensation Court, the Authority may, in relation to an application or a reference for review received by it under this Part which is connected with the proceedings:

- (a) give a direction under section 63A (4) of the Act (unless the Court otherwise orders); or
- (b) decline to deal with the matter.

Disputes—conciliation procedures etc.

10R. For the purposes of section 100C of the Act, disputes involving matters under this Part are excluded from Division 2 of Part 4 of the Act (relating to the conciliation of disputes by conciliation officers), except as the Authority may otherwise determine from time to time.

EXPLANATORY NOTE

The objects of this Regulation are:

- (a) to exclude certain medical certificates from the procedural requirement that they be in the prescribed form if they provide sufficient information;
 - (b) to provide guidelines, consistent with the current application of section 40 of the Act, for the assessment of the ability to earn of a worker who is partially incapacitated; and
 - (c) to make provision with respect to compensation for rehabilitation services as a consequence of the commencement of the relevant provisions of the Workers Compensation (Benefits) Amendment Act 1989—in particular, to prescribe procedures relating to arrangements for reviewing proposed occupational rehabilitation expenditure above \$1200 in respect of the same injury and relating to the giving of directions for an increase in the maximum amount of compensation payable in such cases.
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