



New South Wales

# Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019

under the

Workers Compensation Act 1987

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Workers Compensation Act 1987*.

VICTOR DOMINELLO, MP  
Minister for Customer Service

## Explanatory note

The object of this Regulation is to make provision for the following matters in connection with the calculation of a worker's pre-injury average weekly earnings for the purposes of determining the worker's entitlement to weekly payments of compensation—

- (a) the adjustment of the period in respect of which the earnings of the worker are to be taken into account for the purposes of the calculation (including, for example, an adjustment for a worker who has not been continuously employed for a period of 52 weeks before the injury),
- (b) the matters to be taken into account in determining the amount that a short-term worker would have reasonably been expected to earn during the period of 52 weeks after the injury,
- (c) the calculation of pre-injury average weekly earnings for certain apprentices, trainees and young people,
- (d) the making and approval of agreements between a worker and the employer as to the amount of pre-injury average weekly earnings that is to apply to the worker,
- (e) the exclusion from the earnings of the worker of payments made without obligation by the employer,
- (f) the payment by insurers of any increase in the amount of weekly payments of compensation resulting from a work capacity decision, within 14 days after the decision is made,
- (g) savings arrangements consequent on the enactment of the *Workers Compensation Legislation Amendment Act 2018*.

This Regulation is made under the *Workers Compensation Act 1987*, including sections 44BAA and 280 (the general regulation-making power), clauses 2–5 of Schedule 3 and clause 1 of Part 20 of Schedule 6.

## **Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019**

under the

Workers Compensation Act 1987

### **1 Name of Regulation**

This Regulation is the *Workers Compensation Amendment (Pre-injury Average Weekly Earnings) Regulation 2019*.

### **2 Commencement**

This Regulation commences on 21 October 2019 and is required to be published on the NSW legislation website.

## Schedule 1      **Amendment of Workers Compensation Regulation 2016**

[1]    **Part 3, heading**

Omit the heading. Insert instead—

### **Part 3    Pre-injury average weekly earnings—injuries occurring before 21 October 2019**

**6AA    Application of Part**

This Part applies only to injuries received before 21 October 2019.

[2]    **Part 4**

Omit Part 4. Insert instead—

### **Part 4    Pre-injury average weekly earnings—injuries occurring on or after 21 October 2019**

#### **Division 1      Preliminary**

**8    Definitions**

In this Part—

*pre-injury average weekly earnings agreement*—see clause 8H.

*the relevant earning period* has the same meaning as in clause 2(2) of Schedule 3 to the 1987 Act.

*unadjusted earning period*—see clause 8A(3).

#### **Division 2      Relevant earning period**

**8A    Operation of Division**

- (1) This Division provides for the adjustment of the relevant earning period under clause 2(2) of Schedule 3 to the 1987 Act for a worker in employment for the purposes of calculating the pre-injury average weekly earnings in relation to the worker.
- (2) The relevant earning period in respect of the employment is to be adjusted in accordance with the provisions of this Division in the following order—
  - (a) Clause 8B (Adjustment for workers not continuously employed),
  - (b) Clause 8C (Adjustment for financially material change to earnings),
  - (c) Clause 8D (Alignment of relevant earning period with pay period),
  - (d) Clause 8E (Adjustment for unpaid leave).
- (3) Accordingly, a reference in a provision of this Division—
  - (a) to the relevant earning period is a reference to the relevant earning period as adjusted in accordance with any preceding provision applicable to the worker, or
  - (b) to the *unadjusted earning period* is a reference to the relevant earning period as so adjusted, but without regard to any adjustment under the provision in which the expression is used.

**8B Adjustment for workers not continuously employed—Schedule 3, clause 2(3)(a) of 1987 Act**

- (1) The relevant earning period for a worker in employment is to be adjusted in accordance with this clause if the worker was not engaged in the employment from the beginning of the unadjusted earning period.
- (2) The relevant earning period for the worker in the employment is to be adjusted by excluding any period before the day on which the worker was first engaged in the employment.

**8C Adjustment for financially material change to earnings—Schedule 3, clause 2(3)(a) of 1987 Act**

- (1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during the unadjusted earning period, there was a change of an ongoing nature to the employment arrangement resulting in a financially material change to the earnings of the worker (for example, a change from full-time to part-time work).
- (2) The relevant earning period is to be adjusted by excluding from the period any period before the change to the earnings of the worker occurred.

**8D Alignment of relevant earning period with pay period—Schedule 3, clause 2(3)(b) of 1987 Act**

- (1) The relevant earning period for a worker in employment may be adjusted to align the relevant earning period with any regular interval at which the worker is entitled to receive payment of earnings for work performed in the employment.
- (2) The relevant earning period is not to be adjusted as provided by this clause unless the insurer is reasonably satisfied that the amount of pre-injury average weekly earnings calculated by reference to the period as so adjusted is not less than the amount that it would have been but for the adjustment.

**8E Adjustment for unpaid leave—Schedule 3, clause 2(3)(a) of 1987 Act**

- (1) The relevant earning period for a worker is to be adjusted in accordance with this clause if, during any period of not less than seven consecutive calendar days within the unadjusted earning period—
  - (a) no earnings in the employment were paid or payable to the worker, and
  - (b) the worker took a period of unpaid leave (*the unpaid leave period*) commencing on the first day of that consecutive period.
- (2) The relevant earning period is to be adjusted by excluding each day (whether or not the day was a usual work day for the worker) of the period commencing on the first day of the unpaid leave period and ending immediately before the day on which earnings in the employment once again became payable to the worker.

**Division 3 Pre-injury average weekly earnings—short-term workers, apprentices, trainees and young people**

**8F Pre-injury average weekly earnings for short-term workers—Schedule 3, clause 4(2) of 1987 Act**

- (1) In determining the earnings that a worker could reasonably have been expected to have earned in employment for the purposes of clause 4(1) of

Schedule 3 to the 1987 Act, the following matters are to be taken into account—

- (a) any contract of employment made before the date of the injury,
  - (b) any award or agreement relating to the employment,
  - (c) any hours worked or earnings received by the worker during the period of 52 weeks before the injury.
- (2) If the consideration of those matters does not reasonably assist in determining the earnings that the worker could reasonably have been expected to have earned in the employment, the earnings are to be determined by having regard to the average weekly amount earned during the period of 52 weeks before the injury by other persons for the performance of similar work as the worker (whether or not with the worker's employer).

**8G Pre-injury average weekly earnings of apprentices, trainees and young people—Schedule 3, clause 5(3)(c) of 1987 Act**

- (1) For the purposes of clause 5(3)(c) of Schedule 3 to the 1987 Act, the worker's pre-injury average weekly earnings are to be determined by having regard to the average weekly amount earned during the latest earning stage—
  - (a) by other persons who have attained the age of 21 years, and
  - (b) for the performance by those persons of similar work as the worker (whether or not with the worker's employer).
- (2) If there are no persons who have attained that age and who are so employed and performing similar work as the worker, the worker's pre-injury average weekly earnings is the maximum weekly compensation amount.
- (3) In this clause—

*latest earning stage* means the period of 52 weeks before the worker attained the age of 21 years.

**Division 4 Pre-injury average weekly earnings agreements**

**8H Operation of Division**

- (1) This Division sets out matters relating to an agreement between a worker and the employer as to the amount of pre-injury average weekly earnings that is to apply to the worker for the purposes of Division 2 of Part 3 of the 1987 Act (a *pre-injury average weekly earnings agreement*).
- (2) An obligation of the insurer to determine an application for approval of a pre-injury average weekly earnings agreement under this Division ceases if the insurer disputes liability for the weekly payments of compensation.
- (3) An agreement approved under this Division ceases to have effect for the purposes of clause 8I if the insurer disputes liability for the weekly payments of compensation.

**8I Agreements to be approved by insurer—Schedule 3, clause 3(2)**

The amount of pre-injury average weekly earnings that applies to a worker for the purposes of Division 2 of Part 3 of the 1987 Act is the amount specified in a pre-injury average weekly earnings agreement (if any) approved by the insurer in accordance with this Division.

**Note.** See clause 8H(2) in relation to the cessation of the operation of this Division where liability is disputed.

**8J Application for approval of agreement—Schedule 3, clause 3(1)**

- (1) The worker or the employer may apply for the approval by the insurer of a pre-injury average weekly earnings agreement.
- (2) The application is to be made within 5 days after the initial notification to the insurer of the injury (within the meaning of Part 3 of Chapter 7 of the 1998 Act).
- (3) The application is to be in writing and is to include each of the following—
  - (a) the agreed amount of pre-injury average weekly earnings,
  - (b) the date of the agreement,
  - (c) the date of the injury and claim number,
  - (d) the name of the worker and of the employer,
  - (e) the name and contact details of any person authorised by the employer to enter into the agreement,
  - (f) details of any other employment in which the worker is engaged,
  - (g) any supporting information (including, for example, a contract of employment or payslips),
  - (h) any other information that the worker or the employer considers was taken into account in reaching the agreement,
  - (i) acknowledgement of the consent of the parties to the agreement.
- (4) The worker or the employer may withdraw the application by giving notice in writing to the insurer.

**8K Approval of agreement—Schedule 3, clause 3(1)**

- (1) After receiving an application for approval of a pre-injury average weekly earnings agreement in accordance with clause 8J, the insurer is to determine whether to approve, or refuse to approve, the agreement.
- (2) The insurer is to determine the application within 7 days after receiving the application (except as provided by subclause (3)).
- (3) If the insurer has a reasonable excuse for not commencing provisional weekly payments of compensation, the insurer is to determine the application within 7 days after the earlier of the following—
  - (a) the insurer ceases to have a reasonable excuse for not commencing those weekly payments,
  - (b) the insurer accepts liability for weekly payments of compensation in respect of the injury.
- (4) The insurer is to approve a pre-injury average weekly earnings agreement if satisfied that the agreed amount reasonably reflects the worker's pre-injury earnings (excluding any earnings before or after the period of 52 weeks ending immediately before the date of the injury) and that the agreement is otherwise fair and reasonable.
- (5) The insurer must not approve a pre-injury average weekly earnings agreement relating to a worker who is a person under legal incapacity (within the meaning of Part 6 of the *Workers Compensation Commission Rules 2011*).
- (6) The insurer may decide to make weekly payments of compensation on the basis of the agreed amount of pre-injury average weekly earnings until the application for approval of the agreement is determined (an *interim payment decision*).

- (7) For the avoidance of doubt, an interim payment decision is, for the purposes of clause 3 of Schedule 3 to the 1987 Act, a decision that is authorised to be made before the agreement can take effect.  
**Note.** Clause 3 of Schedule 3 to the 1987 Act provides that certain decisions authorised or required to be made by the regulations are taken not to be work capacity decisions for the purposes of Division 2 of Part 3 of that Act.
- (8) The insurer is not to approve a pre-injury average weekly earnings agreement if, before the application for approval of the agreement was made, the insurer made a work capacity decision about the amount of the worker's pre-injury average weekly earnings.
- (9) The insurer is not to make a work capacity decision about the amount of the worker's pre-injury average weekly earnings before the application for approval of the pre-injury average weekly earnings agreement is determined.
- (10) As soon as practicable after an application is determined, the insurer must notify the worker and the employer of the determination.

#### **8L Variation of agreement**

- (1) Only one pre-injury average weekly earnings agreement may be approved by the insurer in respect of the worker's claim for weekly payments of compensation.
- (2) However, the insurer may approve a variation of the pre-injury average weekly earnings agreement on the application of the worker or the employer if the worker's entitlement to the use of a non-monetary benefit has been withdrawn on or after the date of the injury concerned.

#### **8M Withdrawal of pre-injury average weekly earnings agreement—Schedule 3, clause 3(2) and (3)**

- (1) A party to a pre-injury average weekly earnings agreement approved under this Division may withdraw from the agreement at any time by giving notice in writing to the other party and to the insurer.
- (2) Within 7 days after receiving notice of the withdrawal, the insurer is to—
  - (a) determine the amount of the pre-injury average weekly earnings that applies to the worker for the purposes of Division 2 of Part 3 of the 1987 Act, and
  - (b) give the worker and the employer notice in writing of the withdrawal from the agreement and of the amount determined in accordance with paragraph (a).
- (3) A decision of the insurer under this clause determining the applicable amount of pre-injury average weekly earnings is a work capacity decision and takes effect on the date of the notice under subclause (2)(b).
- (4) However, subclause (3) does not limit the application of clause 8N in respect of any payment increase decision.  
**Note.** See also section 80 of the 1998 Act with respect to the required period of notice for the reduction of weekly payments.

### **Division 5 Miscellaneous**

#### **8N Insurer procedures for work capacity decisions—section 44BAA**

- (1) Within 14 days after making a payment increase decision, the insurer must pay to the worker the amount of the increase in weekly payments of compensation that has become payable to the worker as a result of the decision.

Maximum penalty—20 penalty units.

- (2) A ***payment increase decision*** is a work capacity decision about the amount of a worker's pre-injury average weekly earnings or current weekly earnings that results in an increase in the amount of weekly payments of compensation becoming payable to the worker in respect of any period before the decision is made.



## **Schedule 2      Amendment of Workers Compensation Act 1987 No 70**

**[1]    Schedule 3 Earnings for purposes of weekly payments of compensation under  
Division 2 of Part 3**

Insert at the end of clause 6(2)(c)—

, or

(d) any payment made without obligation by the employer.

**[2]    Schedule 6 Savings, transitional and other provisions**

Insert “(other than Schedule 3.1[10] to the amending Act)” after “earnings amendments” in clause 7(1) of Part 19L.