

Passed by both Houses



New South Wales

Workers Compensation Legislation Amendment Bill 2010

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2010*



New South Wales

Workers Compensation Legislation Amendment Bill 2010

Act No , 2010

An Act to amend workers compensation legislation to make further provision for determination of compensation and work injury damages, workplace rehabilitation, medical assessment, appeals and other matters.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Workers Compensation Legislation Amendment Act 2010*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation.
- (2) A proclamation under this section may appoint a particular time on a day as the time for commencement on that day.

Schedule 1 **Amendment of Workers Compensation Act 1987 No 70**

- [1] **Section 9A No compensation payable unless employment substantial contributing factor to injury**
Omit “occupational rehabilitation service” from section 9A (3) (b).
Insert instead “workplace rehabilitation service”.
- [2] **Section 38A Determination of whether worker seeking suitable employment**
Omit “occupational rehabilitation services” from the definition of *rehabilitation training* in section 38A (7).
Insert instead “workplace rehabilitation services”.
- [3] **Section 40 Weekly payments during partial incapacity—general**
Insert at the end of section 40 (1):
 Note. Section 35 limits the maximum weekly payment of compensation under this section.
- [4] **Section 40 (2)**
Omit “(but not exceeding \$1,000)” wherever occurring.
- [5] **Section 40 (2) and (2A)**
Insert at the end of each subsection:
 Note. The difference between (a) and (b) is the maximum amount of compensation payable to the worker. It is not a limit on the combined total of compensation and earnings.
- [6] **Section 40 (7)**
Omit “subsection (2)”. Insert instead “subsection (2A)”.
- [7] **Section 59 Definitions**
Omit “occupational rehabilitation service” from the definition of *medical or related treatment*.
Insert instead “workplace rehabilitation service”.
- [8] **Section 59, definition of “occupational rehabilitation service”**
Omit the definition.

[9] Section 59, definition of “workplace rehabilitation service”

Insert in alphabetical order:

workplace rehabilitation service means any service provided as a workplace rehabilitation service by or on behalf of a provider of rehabilitation services approved under section 52 of the 1998 Act.

[10] Section 60 Compensation for cost of medical or hospital treatment and rehabilitation etc

Omit “occupational” from section 60 (1) (d). Insert instead “workplace”.

[11] Section 60 (5)

Insert after section 60 (4):

- (5) The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute must be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act, unless the regulations otherwise provide.

[12] Section 60A Worker not liable for medical, hospital and rehabilitation charges above applicable rates

Omit “an occupational” wherever occurring. Insert instead “a workplace”.

[13] Section 63A Rates applicable for workplace rehabilitation services

Omit “occupational” wherever occurring in section 63A (1), (2), (5) and (6).
Insert instead “workplace”.

[14] Section 63A (3) and (4)

Omit the subsections.

[15] Section 73 Reimbursement for costs of medical certificate and examination

Insert after section 73 (2):

- (3) The following provisions apply to compensation to which a worker is entitled in respect of the obtaining of a permanent impairment medical certificate and any examination required for the certificate:

-
- (a) the compensation is not payable until the claim for the permanent impairment compensation to which the certificate or examination relates is determined,
 - (b) a claim for the compensation is to be treated as part of the claim for the permanent impairment compensation to which the certificate or examination relates (and so is subject to the requirements of section 281 of the 1998 Act as to when the claim must be determined),
 - (c) section 279 (Liability to be accepted within 21 days) of the 1998 Act does not apply to the compensation.

[16] Part 3, Division 6, heading

Omit the heading. Insert instead:

Division 6 Indexation of certain amounts

[17] Section 79 Definitions

Insert at the end of the definition of *adjustable amount*:

, and

- (c) the amount of \$7,500 specified in section 297 (2) of the 1998 Act.

[18] Section 79, definition of “base index number”

Renumber paragraph (c) as paragraph (d) and insert as paragraph (c):

- (c) in respect of the adjustable amount of \$7,500 specified in section 297 (2) of the 1998 Act—the latest index number for the adjustment date of 1 October 2010, and

[19] Section 145 Employer or insurer to reimburse Insurance Fund

Insert after section 145 (4):

- (4A) The Commission is not authorised to make a determination that waives the liability of an employer under subsection (1) to reimburse the Insurance Fund or that limits or otherwise affects any function of the Nominal Insurer to decide whether or not any such liability should be waived.

[20] Section 151IA Retirement age

Omit “age 65”.

Insert instead “pension age (as defined in the *Social Security Act 1991* of the Commonwealth for persons other than veterans)”.

[21] Section 172A Security deposit or guarantee for payment of premium— optional alternative premium calculation method

Omit section 172A (6). Insert instead:

- (6) Sections 214–215B apply to and in respect of an amount of money deposited or required to be deposited with the Nominal Insurer under this section as if:
 - (a) the amount deposited or required were deposited or required pursuant to an obligation imposed under Division 5 (Self-insurers), and
 - (b) the employer were a self-insurer while the employer holds a policy of insurance in respect of which the amount is held or required to be held on deposit, and
 - (c) a reference in those provisions to the Authority were a reference to the Nominal Insurer.

[22] Section 177A Special provisions for specialised insurers

Omit section 177A (3) (c). Insert instead:

- (c) that the applicant is authorised under section 12 of the *Insurance Act 1973* of the Commonwealth to carry on insurance business in Australia (or does not require such an authorisation to lawfully carry on the insurance business to be carried on pursuant to the licence), and

[23] Section 182 Matters that may be regulated by conditions of licences

Omit section 182 (1) (c). Insert instead:

- (c) requiring a charge or other security to be taken by the Authority in respect of the assets of an insurer, or otherwise requiring the insurer to provide security, for the purpose of securing the payment of the insurer's liabilities (including contingent liabilities) for the payment of compensation under this Act.

[24] Section 215B

Insert after section 215A:

215B Bond as alternative to deposit

It is sufficient compliance with a requirement of this Division to deposit an amount of money with the Authority if a bond is provided, on terms acceptable to the Authority, as security for the amount required to be deposited.

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

Insert as Part 19G:

**Part 19G Provisions consequent on enactment of
Workers Compensation Legislation
Amendment Act 2010**

1 Definition

In this Part:

2010 amending Act means the *Workers Compensation Legislation Amendment Act 2010*.

2 Weekly payments during partial incapacity

An amendment made by the 2010 amending Act to section 40 of the 1987 Act applies only to compensation payable pursuant to a claim for compensation made after the commencement of the amendment (and so applies even if the injury concerned was received before that commencement).

3 Retirement age

The amendment made by the 2010 amending Act to section 151IA of the 1987 Act does not apply to an award of damages in proceedings commenced before the commencement of the amendment.

4 Rates applicable for occupational rehabilitation services

The repeal by the 2010 amending Act of section 63A (3) and (4) of the 1987 Act does not affect a claim for an amount payable under that section made before the commencement of the repeal and that section and regulations under that section continue to apply in respect of such a claim as if the provisions had not been repealed.

5 Reimbursement for costs of medical certificate and examination

Section 73 (3) of the 1987 Act extends to compensation payable in respect of the obtaining of a permanent impairment medical certificate and any examination required for the certificate before the commencement of that subsection.

6 Lump sum compensation to be paid before damages recovered

Section 280B of the 1998 Act extends to a claim for damages that is pending immediately before the commencement of that section

(but does not apply to a claim finally determined or settled before that commencement).

7 Appeal against medical assessment

An amendment made by the 2010 amending Act to section 327 or 328 of the 1998 Act extends to a medical assessment made before the commencement of the amendment (including an appeal made before that commencement) but not so as to affect any decision of a court, the Registrar or an Appeal Panel made before the commencement of the amendment.

8 Appeal against decision of Commission constituted by Arbitrator

- (1) An amendment made by the 2010 amending Act to section 352 of the 1998 Act does not apply to an appeal when the decision appealed against is a decision made before the commencement of the amendment, except as provided by subclause (2).
- (2) Section 352 (5A) of the 1998 Act is for the removal of doubt and extends to appeals pending on the commencement of that provision.

9 Adjustment of maximum interim medical expenses payment

For the purposes of the operation of Division 6 (Indexation of certain amounts) of Part 3 of the 1987 Act in relation to the adjustable amount in section 297 (2) of the 1998 Act, 1 October 2010 is not an adjustment date and the first adjustment date is 1 April 2011. Accordingly, the first adjustment under that Division of that adjustable amount is to be the adjustment provided for under that Division on and from 1 April 2011.

10 Coal miners

- (1) The amendments made by the 2010 amending Act do not apply to or in respect of coal miners, and this Act and the 1998 Act (and the regulations under those Acts) apply to and in respect of coal miners as if those amendments had not been enacted.
- (2) In this clause, *coal miner* means a worker employed in or about a mine.

[26] Schedule 6, Part 20

Insert at the end of clause 1 (1):

Workers Compensation Legislation Amendment Act 2010

Schedule 2 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

[1] Section 23 Specific functions

Omit “accredited rehabilitation providers” from section 23 (1) (e).

Insert instead “approved rehabilitation providers”.

[2] Section 52 Workplace rehabilitation

Omit section 52 (4) (c). Insert instead:

- (c) may provide for the approval of providers of rehabilitation services for the purposes of return-to-work programs and may require employers to use the services of approved providers in connection with the program, and

[3] Section 64 Notice of incapacity, medical etc treatment and damage to property

Omit “occupational” from section 64 (1) (b). Insert instead “workplace”.

[4] Section 65 Making a claim for compensation

Omit “occupational” from section 65 (20). Insert instead “workplace”.

[5] Section 257 Notice of incapacity, medical etc treatment and damage to property

Omit “occupational” from section 257 (1) (b). Insert instead “workplace”.

[6] Section 260 How a claim is made

Omit “occupational” from section 260 (3). Insert instead “workplace”.

[7] Section 270 Obligations of worker to provide authorisations and medical evidence

Omit “occupational” from section 270 (1) (b). Insert instead “workplace”.

[8] Section 280B

Insert after section 280A:

280B Lump sum compensation to be paid before damages recovered

- (1) An injured worker cannot recover damages in respect of an injury from the employer liable to pay compensation under this Act in respect of the injury unless and until any permanent impairment

compensation and pain and suffering compensation to which the worker is entitled in respect of the injury has been paid.

- (2) This section does not prevent a claim for damages from being made before any permanent impairment compensation and pain and suffering compensation to which the worker is entitled in respect of the injury has been paid.

Note. This section ensures that an injured worker receives the compensation to which the worker is entitled before damages are recovered (because section 151A of the 1987 Act would prevent the payment of compensation after damages are recovered).

[9] Section 289 Restrictions as to when dispute can be referred to Commission

Insert after section 289 (2):

- (2A) Subsection (2) does not prevent the referral to the Commission of a dispute about whether any proposed treatment or service is reasonably necessary as a result of an injury.

Note. Section 60 of the 1987 Act provides for such a dispute to be referred to the Commission.

[10] Section 297 Directions for interim payment of weekly payments or medical expenses compensation

Insert after section 297 (2):

Note. The amount of \$7,500 is subject to adjustment under Division 6 of Part 3 of the 1987 Act.

[11] Section 320 Appointment of approved medical specialists

Insert after section 320 (2):

- (2A) One or more approved medical specialists may be appointed as a senior approved medical specialist, either by the instrument of appointment of the approved medical specialist or by a later instrument executed by the President.

[12] Section 327 Appeal against medical assessment

Omit section 327 (3) (b). Insert instead:

- (b) availability of additional relevant information (but only if the additional information was not available to, and could not reasonably have been obtained by, the appellant before the medical assessment appealed against),

[13] Section 327 (6)

Omit the subsection. Insert instead:

- (6) The Registrar may refer a medical assessment for further assessment under section 329 as an alternative to an appeal against the assessment (but only if the matter could otherwise have proceeded on appeal under this section).

Note. Section 329 also allows the Registrar to refer a medical assessment back to the approved medical specialist for reconsideration (whether or not the medical assessment could be appealed under this section).

[14] Section 328 Procedure on appeal

Omit section 328 (2) and (3). Insert instead:

- (2) The appeal is to be by way of review of the original medical assessment but the review is limited to the grounds of appeal on which the appeal is made. The WorkCover Guidelines can provide for the procedure on an appeal.
- (3) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment.

[15] Section 352 Appeal against decision of Commission constituted by Arbitrator

Omit section 352 (1)–(3). Insert instead:

- (1) A party to a dispute in connection with a claim for compensation may appeal to the Commission constituted by a Presidential member against a decision in respect of the dispute by the Commission constituted by an Arbitrator.
- (2) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that the procedural requirements of this section and any applicable Rules and regulations as to the making of an appeal have been complied with. The Registrar is not required to be satisfied as to the substance of the appeal.
- (3) There is no appeal under this section unless the amount of compensation at issue on the appeal is both:
 - (a) at least \$5,000 (or such other amount as may be prescribed by the regulations), and

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Schedule 2 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86

(b) at least 20% of the amount awarded in the decision appealed against.

(3A) There is no appeal under this section against an interlocutory decision except with the leave of the Commission. The Commission is not to grant leave unless of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute.

[16] Section 352 (5) and (5A)

Omit section 352 (5). Insert instead:

(5) An appeal under this section is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. The appeal is not a review or new hearing.

(5A) An appeal under this section stays the operation of the decision appealed against pending the determination of the appeal. However, an appeal does not stay or otherwise affect the operation of a decision as to weekly payments of compensation and weekly payments of compensation remain payable despite any appeal.

[17] Section 352 (6)

Insert “The Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned or that failure to grant leave would cause substantial injustice in the case.” at the end of the subsection.

[18] Section 352 (8)

Omit “, but does not include any award, order, determination, ruling or direction of an interlocutory nature prescribed by the regulations”.

[19] Section 378

Omit the section. Insert instead:

378 Reconsideration of decisions of Registrar or Appeal Panel

(1) The Registrar or an Appeal Panel may reconsider any matter that has been dealt with by the Registrar or an Appeal Panel, respectively, and rescind, alter or amend any decision previously made or given.

- (2) Without limiting subsection (1), if the Registrar is satisfied that there is an obvious error in the text of a decision, the Registrar may alter the text of the decision to correct the error.
- (3) Without limiting subsection (1), if an Appeal Panel is satisfied that its decision or any medical assessment certificate it has issued contains an obvious error, the Appeal Panel concerned may correct that error and, if necessary, issue a replacement medical assessment certificate (which is to prevail over any previous certificate).
- (4) The reconsideration of a matter that is in response to an application for reconsideration must be completed within 2 months after the application is received.
- (5) This section does not affect any other power under this Act or the 1987 Act to review or amend a decision.