

NEWSLETTER

WORKERS' COMPENSATION LEGISLATION AMENDMENT BILL 2012

Last week the NSW Government put through a bill to amend the Workers Compensation legislation which dramatically reduces, or in some cases, destroys workers' entitlements to benefits.

Attached is a summary of those changes which can be circulated to your officers. If you want to arrange an information session, please contact our office and that can be done.

One other aspect which is of major concern is in relation to the legal costs associated with workers' compensation claims.

Previously the position was that if the worker was successful then the insurer paid the worker's legal costs according to a schedule of costs set out in the Regulations. If the worker was unsuccessful, no costs were recoverable by the insurer or the worker and the worker's lawyers were prohibited from claiming any legal costs against their client.

The original Bill had a provision which basically said that the costs follow the result; in other words if the insurer was successful then it could recover its legal costs from the worker and vice versa.

When the Bill was being debated before the Legislative Council that provision was amended by what has become known as the Fred Nile Amendment. It now appears that the prohibition on lawyers charging their clients costs in workers' compensation matters has been removed which would mean that a lawyer can charge a workers' compensation client legal costs but capped according to the Regulations.

That part of the Bill relating to costs has been quarantined and will not commence on proclamation of the Bill. We understand that there are negotiations taking place between the Government and the Opposition in relation to costs. Once the position becomes clear, we will issue a further bulletin.

Regards

A handwritten signature in black ink, consisting of a series of small, connected loops followed by a long horizontal stroke that ends in a small hook.

BOB WHYBURN

Solicitor-Director

28 June 2012

WORKERS COMPENSATION LEGISLATION AMENDMENT ACT, 2012

The legislation dramatically reduces or destroys worker's entitlements to benefits under the NSW Workers Compensation Scheme.

Worker's entitlements under the legislation fall within 4 broad headings:

- i. Entitlements to Weekly Payments.
- ii. Entitlements to Payment of Medical Expenses.
- iii. Entitlements to Lump Sum Compensation for Permanent Impairment and Pain & Suffering.
- iv. Access to Common Law where their Employer was Negligent.

Taking each of these in turn:

1 WEEKLY PAYMENTS

1.1 Worker's entitlements prior to the amendments

Under the previous legislation injured workers were entitled to weekly payments of compensation at what was known as their current weekly wage rate (normal flat earnings) for a period of 26 weeks from the date of injury. Thereafter the entitlement varied depending on whether the worker was totally or partially incapacitated.

If the injured worker remained totally incapacitated they were entitled to weekly payments at what was known as the statutory rate which as at the date of last indexation was \$432.50 pw for a single worker. The amount was increased if the worker had dependants. The worker was entitled to this amount until they reached a year from the time they would have otherwise reached the Commonwealth retirement age.

If the worker was partially incapacitated after the first 26 weeks, or subsequently became partially incapacitated, they were entitled to weekly payments representing the difference between what they would have been likely to earn had they not been injured and what they were now able to earn in some suitable employment up to a maximum of the applicable statutory rate. Again, this entitlement continued generally till their 66th birthday or until they recovered or obtained employment where they were able to earn more than they would have if they had not been injured.

Provisions existed for partially incapacitated workers to be paid an amount equivalent to 80% of their current weekly wage rate for up to 12 months if the employer failed to provide suitable duties when requested.

1.2 The changes

The amendments in respect of weekly payments apply whether or not the worker was injured or made a claim for compensation before or after 19 June 2012.

The changes provide that weekly compensation will be payable depending on the period post injury:

- i. Week 1-13.
- ii. Week 14-130.
- iii. After week 130.
- iv. After 5 years.

In respect of the first 13 weeks a totally incapacitated worker is entitled to 95% of their average weekly earnings with a cap of \$1,838.70. A partially incapacitated worker is entitled to 95% of their average weekly earnings less an amount calculated as representing their ability to earn.

During weeks 14-130 a totally incapacitated worker is entitled to 80% of their average weekly earnings. A partially incapacitated worker who is working not less than 15 hours per week is entitled to 95% of their average weekly earnings less an amount for their ability to earn. A partially incapacitated worker who is not working at least 15% per week is entitled to 80% of their average weekly earnings less an amount for their ability to earn.

After week 130 an injured worker's entitlement **ceases** unless:

- i. **The insurer** assesses the worker has no capacity to earn and that this situation is likely to continue indefinitely. In that situation, the worker continues to be entitled to 80% of their average weekly earnings.
- ii. If a partially incapacitated worker is working at least 15 hours per week and is earning at least \$155.00 pw and has been assessed by the insurer as being unlikely to be able to increase their earnings beyond that point, they will be entitled to 80% of their average weekly earnings less an amount for their ability to earn.
- iii. After 5 years **no** entitlement to weekly compensation exists unless an injured worker continues to satisfy the test that applies after week 130 and in addition to this has been assessed as having a 20% or greater whole person impairment.

1.3 The Transitional Provisions

The transitional provisions provide that insurers are to arrange work capacity assessments for existing recipients (workers injured or who made claims prior to the 19.6.12) within 12 months of the date of the changes taking effect. This can be done at any time within the 12 months. The changes set out above then apply to existing recipients at the conclusion of a period of 3 months from the time the work capacity assessment is held. This means that **all** existing recipients of weekly compensation will become subject to the time limit provisions under the new legislation within a period of 15 months from 19.6.12. The vast majority of injured workers who have previously understood they were entitled to weekly compensation until they reached

retirement age will find their entitlement to weekly compensation will cease 130 weeks after they become subject to the new legislation.

1.4 The Assessment of Ability to Earn and the Review Process

Suitable employment is defined in the changes as being work for which the worker is currently suited regardless of whether the work or the employment is available, whether the worker or employment is of a type or nature that it is generally available in the employment market or with regard to the worker's place of residence. The Courts have previously been able to take these factors into account.

The changes provide that a decision as to the worker's capacity to earn is made by the insurer. A worker unhappy with the insurer's decision is required to within 30 days seek an internal review by the insurer. If unhappy with the internal review the worker is then entitled to within a further 30 days seek a review either by the Workcover Authority or by a newly created officer known as the Independent Review Officer. The Workcover Authority can conduct a merit review of the insurer's decision. The Independent Review Officer may only review the insurer's procedures in making the work capacity decision and cannot review any judgment or discretion exercised by the insurer. The Workers Compensation Commission is specifically excluded from jurisdiction in relation to disputes concerning work capacity assessment.

2. MEDICAL EXPENSES

Changes in respect of medical expenses apply whether the injury occurred before or after 19.6.12.

Prior to the changes an injured worker was entitled to payment of reasonable medical and therapeutic expenses for the rest of their life.

Under the changes no medical expenses are payable in respect of treatment provided more than 12 months after the claim for compensation was made unless the injured worker continues to receive weekly compensation. A worker injured prior to 19.6.12 who is not presently receiving weekly compensation will no longer be entitled to payment of their medical expenses after 19.6.13.

If a worker continues to receive weekly payments of compensation for a period of in excess of 12 months the entitlement to medical expenses ceases 12 months after the date weekly payments cease. There will be few, if any, injured workers still receiving payment of their medical expenses 5 years from now.

The legislation also provides that medical expenses are not payable by the insurer unless prior approval is obtained from the insurer. The legislation provides that Workcover guidelines can make some exemptions to this but that the guidelines can also define the nature of the treatment that is considered reasonably necessary and of particular concern is that the Workcover guidelines can set out standard treatment plans for particular injuries.

3. **LUMP SUM CLAIMS**

Prior to the changes an injured worker was entitled to claim lump sum compensation where an injury has caused them to suffer a permanent impairment. If the permanent impairment was greater than 10% they were also entitled to claim an amount for pain and suffering. The amount for pain and suffering was assessed having regard to the subjective effect on the worker's life. If a dispute arose in respect of this the Workers Compensation Commission could determine this amount.

The changes provide that in respect of a claim for compensation made after 19.6.12 no lump sum compensation is payable if the worker has suffered a whole person impairment of less than 10%. Claims for pain and suffering have been abolished. In particular, the legislation provides that only 1 claim for lump sum compensation can be made. This means that an injured worker is unable to make any further claim should their condition unexpectedly deteriorate.

Workers are only entitled to obtain 1 assessment as to the extent of their impairment. This will particularly disadvantage workers who have suffered injuries to multiple body systems such as a worker who has a severe spinal injury who also experiences bowel and/or bladder dysfunction.

4. **WORK INJURY DAMAGES CLAIMS**

Injured workers who are able to establish that their employer had been negligent and who have been assessed at having a 15% or greater whole person impairment may claim work injury damages. Such a claim, if successful, entitles the worker to recover their economic loss up to the time of their retirement although a successful claim extinguishes the worker's entitlement to ongoing medical expenses.

Surprisingly, the changes have left this entitlement essentially untouched.

5. **MISCELLANEOUS**

5.1 **The Disease Provisions:**

An injured worker was previously able to show that they had suffered an injury for the purposes of the Act if they could show that work had aggravated, accelerated or exacerbated an underlying disease or condition from which they suffered. The provisions have now been amended to provide that a worker must show employment was the main contributing factor to the aggravation, acceleration or exacerbation. Many older workers suffer aggravations of pre-existing osteoarthritic changes when they suffer a fall or other injury at work. These cases will now most likely be excluded.

5.2 The journey provisions previously provided that workers were covered on their way to or from work. Workers are now only covered if they can show there was a real and substantial connection between their employment and the accident or incident on the journey.