



# Significant Changes to Workers Compensation Law

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On 9 November 2010 the Workers Compensation Legislation Amendment Act 2010 was passed by both houses of parliament and has received Royal Assent. This Act makes a number of significant substantive and procedural changes to the law and is expected to commence on 1 February 2011.

The main points are as follows:

- The Commission has been given jurisdiction to determine disputes concerning liability for medical expenses not yet incurred, such disputes to be the subject of assessment by an AMS although it would appear that the determination of the AMS is not conclusively presumed to be correct. This amendment applies to any referral to the Commission in respect of proposed medical treatment after the commencement of the amendment;
- Section 151IA of the 1987 Act has been amended to enable future economic loss damages to be recovered up to the pension age as defined in the *Social Security Act 1991*, replacing the previous limit of age 65. The pension age depends upon the worker's date of birth and in the case of people born after 1 January 1957 is currently 67. This amendment applies to any claim for Work Injury Damages in which court proceedings are initiated after the commencement of the amendment and regardless of when or if a mediation has taken place;
- It is now required that an injured worker be paid lump sum compensation prior to recovering Work Injury Damages, rather than it simply being necessary to make a claim for such compensation prior to or at the same time as the making of a claim for Work Injury Damages.

The purposes of this amendment is to avoid the situation where a worker loses the right to lump sum compensation by reason of an early settlement of a claim for Work Injury Damages. This amendment applies to any claim which has not been determined or settled prior to the commencement of the amendment;

- The monetary thresholds for appeals to a Presidential Member against a decision of an arbitrator have been amended to delete the requirement that at least 20% of the compensation award be the subject of an appeal, and the requirement that the compensation in dispute on the appeal has been increased from \$5,000 to \$7,500, with this figure being subject to indexation. This amendment applies only to appeals against decisions of arbitrators made after the commencement of the amendment;
- An appeal may now be brought against an interlocutory decision, but only where the Commission constituted by a Deputy President is "of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute". This amendment applies only to appeals against decisions of arbitrators made after the commencement of the amendment;

- The scope of an appeal from a decision of an arbitrator to a Presidential Member under s.352 of the 1998 Act has been narrowed to overturn Court of Appeal authority to the effect that such appeals are reviews on the merits, by now requiring that the Appellant must establish that the decision of the arbitrator was affected by an error of fact, law or discretion and limits the power of the Presidential Member to the correction of any such error. This constitutes a return to the principles applied in the early years of the Commission. This amendment applies only to decisions made by arbitrators after the commencement of the amendment;
  - The legislation has been amended to make it clear that the lodging of an appeal stays the arbitrator's decision and the requirement to pay lump sum and s.60 compensation but does not act as a stay on the obligation to pay weekly benefits as ordered by the arbitrator. This amendment applies to appeals pending on the date of commencement;
  - The legislation has been amended to make it clear that new evidence will only be admissible in a s.352 appeal where the evidence concerned was both not available and could not reasonably have been obtained by the Appellant prior to the proceedings being commenced, or where a failure to grant leave to admit the evidence would cause substantial injustice.
- This amendment applies only to decisions made by arbitrators after the commencement of the amendment;
- The scope of an appeal against a Medical Assessment Certificate under s.328 of the 1998 Act has been narrowed to overturn Court of Appeal authority to the effect that a Medical Appeal Panel could conduct a general review of a MAC subject to the requirements of procedural fairness, by now requiring that the review undertaken by the Appeal Panel is limited to the grounds of appeal on which the appeal is brought. This amendment applies to medical assessments made before or appeals lodged prior to the commencement of the amendment but does not affect any decision made by a court, the Registrar or an Appeal Panel made prior to the commencement of the amendment;
  - The legislation has been amended to make it clear that new evidence will only be admissible in a s.328 appeal where the evidence concerned was both not available and could not reasonably have been obtained by the Appellant prior to the assessment being undertaken by the AMS. This amendment applies to medical assessments made or appeals lodged prior to the commencement of the amendment but no so as to affect any decision of a court, the Registrar or an Appeal Panel made before the commencement of the amendment;
- The power of the Registrar under s.329 of the 1998 Act to refer a medical assessment for further assessment as an alternative to an appeal can only be exercised if the matter could otherwise have proceeded on appeal, meaning that one of the specified grounds of appeal in s.327(4) has been made out (presumably to the satisfaction of the Registrar). Section 329 does, however, also allow the Registrar to refer a medical assessment back to the same AMS who had conducted the original assessment for reconsideration regardless of whether the MAC could have been appealed. This amendment applies to a medical assessment made or a medical appeal lodged prior to the commencement of the amendment but does not affect any decision of a court, the Registrar or an Appeal Panel made before the commencement of the amendment;
  - The reconsideration power contained in s.378 of the 1998 Act has been recast so as to make it clear that the Registrar or a Medical Appeal Panel may reconsider any matter dealt with by them and, without limiting the general power of reconsideration, the section can be invoked to correct an "obvious error". The commencement of this amendment is not specified in the legislation but would appear to be applicable to any application for reconsideration made after the commencement of the amendment;

- Section 40 of the 1987 Act has been amended to make it clear that the indexed amount referred to in s.40(2)(a) and (b) represents the maximum amount payable to a worker who has returned to employment rather than acting as a limit on the combined total of compensation and earnings. This amendment applies to any compensation payable after the commencement of the amendment regardless of whether the injury in question was received before the commencement;
- The restrictions on the maximum amount for which an employer is liable for workplace rehabilitation services has been removed and, to achieve consistency with Federal Legislation, the Act now provides for the approval rather than accreditation of providers of rehabilitation services. This amendment applies only to claims in respect of rehabilitation services made after the commencement of the amendment;
- The legislation has been amended to make it clear that the cost to a worker of obtaining a permanent impairment medical certificate forms part of the worker's entitlement to lump sum compensation. This amendment applies 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 the amendment;
- The power of the Commission to determine the liability of an employer or insurer to reimburse the Insurance Fund has been removed, meaning that the Commission is no longer authorised to waive or set aside a right of recovery against an employer or an insurer or to interfere with a decision made by the Nominal Insurer in relation to waiver of recovery. The amending legislation does not specify a date for the commencement of these amendments and it must be assumed that the power of the Commission is limited as stated from the date of the commencement;
- Specialised insurers are now exempt from the requirement that they be authorised under the Commonwealth *Insurance Act 1973* in order to carry on insurance business. This legislation does not specify the commencement date for these amendments;
- The legislation has been amended to provide self insurers, specialised insurers and retro paid loss employers to provide a security bond as a means of satisfying a requirement for the deposit of an amount of money as security. The legislation does not specify a commencement date for these amendments.

As is often the case, it might be anticipated that a number of the abovementioned provisions will be subject to challenge in proceedings before either the Commission or the Supreme Court and it remains to be seen whether the amendments as made in fact achieve the objectives stated by the government in making them.

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