Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [5.44 p.m.], on behalf of the Hon. Eric Roozendaal: I move

That this bill be now read a second time.

I am pleased to introduce the Workers Compensation Legislation Amendment Bill 2010. The bill underscores the Government's commitment to ensuring that the State's workers compensation system and associated dispute resolution services remain efficient and effective in meeting the needs of New South Wales workers and employers. The Government has consulted widely with stakeholders on the bill on an ongoing basis. Through the consultation process the Government has been mindful of ongoing concerns particularly regarding the level of the monetary threshold for appeals in the Workers Compensation Commission. In consideration of those continuing concerns, the Government moved a motion in the other place that makes amendments to the bill that address these concerns.

The first Government amendment was to remove proposed changes to appeal thresholds and the second amendment was to ensure that arrangements for admitting fresh evidence in appeals against a medical assessment apply to all parties to the appeal. The removal of the changes to appeal thresholds does not diminish or erode the intent of the package of changes, which is to ensure the efficient and prompt consideration of appeal matters and to allow the Workers Compensation Commission to assist injured workers by making determinations in relation to future medical treatment. The motion to make a further minor amendment to the provisions regarding admission of fresh evidence for appeals to medical assessment will ensure the arrangements apply to all parties and not just to the appellant, which is currently the case.

I will now deal with the remainder of the bill. First, I will outline the other provisions in the bill that will assist the Workers Compensation Commission to improve dispute resolution processes. The Workers Compensation Commission provides an independent and impartial statutory tribunal for disputed workers compensation claims in New South Wales. The commission's non-adversarial processes are at the leading edge of dispute resolution in Australia. However, it is necessary to address a number of issues that could impact the ability of the commission to deliver prompt and effective dispute resolution services. First, a presidential decision determined that the commission does not have jurisdiction to make determinations with regard to prospective medical treatment. This lack of jurisdiction has the potential to delay treatment and cause hardship for workers. The bill includes an amendment to give the commission power to make determinations with regard to expenses for treatment not yet incurred.

The bill also addresses recent case law, which has extended the grounds of appeals against the decisions of arbiters and approved medical specialists. This has resulted in delays and increased costs without generating any benefit for injured workers or employers. The bill includes an amendment to make it clear that an appeal against a decision of an arbiter is not a full review of the arbiter's decision and is limited to a determination as to whether the decision appealed against was affected by error. The bill also includes an amendment to make it clear that an appeal against a medical assessment by an approved medical specialist is limited to the ground on which the appeal is made and is not a review of any other aspect of the medical assessment.

The bill also clarifies the operation of provisions that enable certain matters in the Workers Compensation Commission to be reconsidered as an alternative to formal legal appeals or challenges. The reconsideration provisions, as currently drafted, have led to unintended outcomes, in particular, the use of reconsideration powers to hear matters that have not satisfied any grounds of appeal. In the last of the changes relevant to the operation of the commission, the bill provides the appointment of one or more senior approved medical specialists to assist with the professional development, mentoring and appraisal of approved medical specialists. I will elaborate further on these changes before moving on to the amendments proposed in the bill to improve the operation of the workers compensation system.

Workers compensation legislation provides for the commission to approve the payment of expenses for reasonably necessary medical treatment. The intention of the legislation is to ensure that in the case of a dispute the commission can order that scheme agents and insurers meet the costs of reasonably necessary medical or other treatment for workers. However, a presidential decision has determined that the commission only has jurisdiction to make determinations for medical or other treatment when the expense has already been incurred. This means that in some instances where there is a dispute between the scheme agent or insurer and a worker with regard to whether treatment is reasonably necessary, workers are unable to have their dispute heard at the commission unless they first pay for the treatment themselves. Many injured workers do not have the financial capacity to pay for treatment and then seek reimbursement from the insurer. The amendment would ensure that the commission has the power to make a decision about whether treatment requested but not yet received is reasonably necessary, medically appropriate and in the best interests of the injured worker. This will be achieved by ensuring that an approved medical specialist gives an opinion with regard to the treatment and the opinion of the approved medical specialist is taken into account in the decision.

The Workers Compensation Commission is committed to providing a transparent and independent forum for the fair, timely and cost-effective resolution of workers compensation disputes in New South Wales. Processes used in the commission are designed to support its objective of providing a fair and cost-effective resolution service for disputed workers compensation claims. However, recent court decisions have impacted the way appeal mechanisms in the commission operate. In *Sapina v Coles Myer Limited [2009] NSWCA 71* the Court of Appeal extended the scope of appeal rights by determining that an appeal is to proceed by way of a full review of the arbitrator's decision, irrespective of the identification of any error by the arbitrator. The Sapina decision has the potential to lead to delays and increased costs in the commission without achieving any benefit to workers or employers. To overcome this, the bill will restrict appeals under section 352 of the Workplace Injury Management and Workers Compensation Act 1998 to cases in which there is "legal, factual or discretionary error". The amendment reverses the effects of the court's decision and reflects the original intent of the relevant appeal provisions.

Decisions by higher courts have also broadened the scope of appeals to the commission's medical appeal panel and have the potential to undermine the registrar's role in determining whether grounds for appeal exist. The case of *Siddik v WorkCover Authority of New South Wales [2008] NSWCA 116* decided that a medical appeal panel is not confined to considering the grounds of review under which the appeal was permitted to proceed or the grounds stated by the appealing party. It is proposed to amend section 328 of the 1998 Act to ensure that the issues considered by a medical appeal panel are limited to only those issues in the grounds of appeal. This amendment will also clarify that additional evidence will be admitted only where it was not available before the medical assessment and the evidence could not reasonably have been obtained before that medical assessment.

The bill will also clarify provisions that enable certain matters in the Workers Compensation Commission to be reconsidered as an alternative to formal legal appeals or challenges. Section 378 of the 1998 Act provides for reconsideration of an assessment made by the registrar, an approved medical specialist or a medical appeal panel. The objective of section 378 is to lessen the need for formal appeal or review and to expedite resolution of matters by an approved medical specialist where relevant information was inadvertently overlooked or not passed on to the approved medical specialist by the registrar of the commission. The intention is that requests for reconsideration satisfy the same requirements as the grounds of appeal against a medical assessment. The reconsideration power would then allow review and correction of the matter where an obvious error had occurred in the decision-making process.

However, the provisions as drafted have led to difficulties resulting in the expansion of the reconsideration provision in practice. In particular, the reconsideration powers have been used to hear matters that have not satisfied any grounds of appeal. Some practitioners are making requests for reconsideration for matters that were not intended by the legislation to be reconsidered. This has resulted in unnecessary delays in the resolution of disputes by practitioners filing inappropriate applications. The bill proposes amendments to ensure that the powers of reconsideration assist in streamlining appeal and review procedures at the commission.

The bill also contains an amendment to give the commission discretion to hear appeals of an interlocutory nature and makes clear that appeals made within the required time frame that meet the monetary threshold will be automatically referred by the registrar to a presidential member. Further, the bill contains a provision to index the maximum amount for an interim payment direction for medical expenses to ensure this threshold continues to remain relative to the amount in dispute and the cost of medical treatment over time. These worthy amendments to the appeal provisions at the commission will build upon the already streamlined appeal process and are consistent with its policy objectives of a speedy and efficient dispute resolution service that meets the needs of workers and employers.

The final measure aimed at improving the efficiency of the Workers Compensation Commission relates to the engagement of senior approved medical specialists by the president of the commission. These positions will come from the pool of existing approved medical specialists. Senior approved medical specialists will have responsibilities in addition to their existing role as an approved medical specialist, including assisting with the professional development, mentoring and appraising of approved medical specialists. These positions will play a key role in improving quality and consistency in decision-making by approved medical specialists. They will also assist in enhancing the interface between commission staff and approved medical specialists to improve overall management and timeliness of dispute resolution in the commission.

I turn now to other amendments in the bill that will benefit injured workers. Once a worker has settled a work injury damages claim, the worker is precluded from making any other claim with respect to that injury. The bill includes an amendment that will ensure that injured workers are not encouraged to settle a work injury damages claim without knowing they had an entitlement to other statutory lump sum amounts. The amendment provides that an injured worker who reaches the threshold level of 15 per cent whole person impairment must have been paid their lump sum statutory entitlements before they are able to settle a work injury damages claim. This amendment protects workers by ensuring that they know about and are paid a statutory entitlement to a lump sum for which they are eligible and that any amount for work injury damages is paid separately. The amendment will promote transparency in the settlement of workers compensation and work injury damages claims between

workers and scheme agents and insurers. Importantly, the amendment does not prevent a work injury damages claim being made before the worker's statutory lump sum entitlement has been paid.

Another amendment in the bill will ensure that injured workers will continue to be paid weekly benefits by scheme agents and insurers pending an appeal. Where an arbitrator has determined that weekly benefits should be paid to a worker, a scheme agent or insurer can appeal that decision. In some instances, the scheme agent or insurer has refused to pay the worker until the outcome of the appeal in spite of the arbitrator's decision that benefits should be paid. At present there are inadequate enforcement mechanisms to ensure that injured workers receive their weekly benefits until the appeal is heard and determined. The bill provides for scheme agents and insurers to pay injured workers once they have received a determination from an arbitrator, whether or not that decision is being appealed. This amendment reflects the general law, where an appeal does not automatically stay the original decision, and this proposal will clarify that this is the case in relation to weekly workers compensation payments. However, the bill also makes it clear that decisions regarding medical expenses and permanent impairment are stayed pending an appeal. This approach protects injured workers from potential recoveries for treatment not found to be reasonably necessary or lump sum payments found not to be compensable.

The bill includes an amendment that provides partially incapacitated workers with greater incentive to take up suitable duties in the workplace. A partially incapacitated worker potentially receives two payments—the first being wages or salary from their employer. The second payment is a weekly benefit paid by their scheme agent or insurer, which is calculated on their capacity for work, within the medical restrictions placed on them as a result of their injury. The bill makes it clear that for partially incapacitated workers who are seeking employment or who return to work, the maximum weekly compensation amount is a limit on the compensation payable and not a limit on the combined total of compensation and earnings. The amendment allows a worker to be paid up to the maximum weekly compensation amount in addition to the earnings from their employer. The current limit on maximum weekly payments for workers who unreasonably reject suitable employment is not changed.

I now turn to measures in the bill to assist WorkCover to more efficiently administer the workers compensation system. The first measure makes clear that only the workers compensation nominal insurer has the discretion under section 145 of the Workers Compensation Act 1987 to waive reimbursement by an uninsured employer for amounts paid out of the Workers Compensation Insurance Fund to an injured worker of that employer. The amendment restricts the jurisdiction of the Workers Compensation Commission to review the Nominal Insurer's discretion to waive rights of recovery against uninsured employers. This amendment is necessary to overcome a court decision that found that under the current legislation the Workers Compensation Commission had the jurisdiction to override the nominal insurer's discretion with regard to waiving liability of an uninsured employer to reimburse the Workers Compensation Insurance Fund. The nominal insurer is responsible for the management of the Workers Compensation Insurance Fund and any payment made for an uninsured liability claim comes out of the fund. The decision to waive liability for reimbursement to the Workers Compensation Insurance Fund is essentially a commercial one that rests properly with the nominal insurer, as the body responsible for the management of the Fund.

Nevertheless, I draw attention to existing controls in the workers compensation legislation and the general law that ensure that the nominal insurer's discretion is exercised fairly. The Workers Compensation Act 1987 sets out procedures that give protection to uninsured employers. These procedures include giving notice to uninsured employers and providing an opportunity for them to dispute liability and to address the matters set out in subsection 145 (2), including their capacity to meet the liability. The nominal insurer carefully considers submissions made by employers in the course of determining whether recoveries should be pursued. In addition, an employer can take proceedings in the Supreme Court challenging decisions of the nominal insurer to issue a recovery notice where it is considered that there is no legal basis for a notice to be issued, such as where it is contended that there was no employment relationship.

The second of these measures is to allow self and specialised insurers and retro-paid loss employers to give security to WorkCover by way of insurance bonds. I remind members of the significant reforms made in 2008 to the way premiums are calculated for large employers who choose to access the retro-paid loss premium calculation method. Currently, there are around 158 individual employer entities participating in this premium calculation method, demonstrating it to be a popular and significant workers compensation premium reform. The amendment proposed in this bill will build on this reform making it even more attractive for large employers operating within New South Wales.

Self and specialised insurers and employers participating in the retro-paid loss premium calculation method are required to give security to WorkCover to cover the cost of their claims liabilities should they become unable to meet them for any reason. Security is normally to be given by way of a direct deposit. However, the legislation does allow for two alternative forms of security—Commonwealth and State bonds or bank guarantees. Bank guarantees have been the most commonly used alternative form of giving security. However, retro-paid loss employers have advised that the cost of a bank guarantee has increased significantly since the onset of the global financial crisis, and their availability is limited. Some employers have reported that banks providing guarantees have required a deposit to the same value as the guarantee. This ties up capital in the same way as a direct deposit, leaving a bank guarantee of no value as an alternative form of giving security.

Some large employers and self and specialised insurers have expressed an interest in insurance bonds as another alternative form of giving security, and the bill contains a proposal to allow this to happen. Making this amendment ensures that the workers compensation system in New South Wales remains flexible and responsible to the needs of employers. The use of insurance bonds will free up capital for these businesses and allow them to manage their day-to-day operations more efficiently. However, I can assure honourable members that the level of security provided by insurance bonds is equal to that provided by the bank guarantees and Commonwealth and State bonds. Insurance bonds and bank guarantees have the same obligations at law when being called upon for payment; some insurance bonds are worded in the same way as bank guarantees.

The Commonwealth and some State governments accept insurance bonds as security as long as the issuer meets certain regulatory and credit worthiness requirements. For example, New South Wales Treasury allows agencies to accept insurance bonds if the provider is either regulated by the Australian Prudential Regulatory Authority or meets appropriate credit rating thresholds. As part of this current proposal WorkCover will require that insurance bonds given as security are issued by providers who are both regulated by the Australian Prudential Regulatory Authority and meet appropriate credit-rating thresholds. This additional level of security will protect the interests of all New South Wales employers and employees and is the same level of security required for self-insurance under the Commonwealth Comcare scheme.

Finally, I note that the bill also includes miscellaneous amendments. The first of these amendments provides for a worker's entitlement to reimbursement for the cost of obtaining a permanent impairment medical certificate to be part of the claim for permanent impairment. The workers compensation legislation provides for insurers to meet the costs of permanent impairment medical certificates within 21 days of notification of the costs of the certificate. A minority of permanent impairment certificates do not meet the criteria set by WorkCover guidelines for determining permanent impairment, making it difficult for scheme agents and insurers to make decisions about applications for lump sum permanent impairment compensation. The bill provides for the costs of permanent impairment medical certificates to be met by insurers as part of the final resolution of the claim for lump sum permanent impairment. The amendment will ensure that scheme agents and insurers meet the cost of those reports that form the basis of a determination for lump sum permanent impairment.

The second miscellaneous amendment aligns the maximum age for determining future economic loss due to deprivation or impairment of earning capacity under work injury damages to reflect the age of retirement under the Commonwealth Social Security Act 1991. The Commonwealth Social Security and Other Legislation Amendment (Pension Reform and Other Budget Measures) Act 2009 increases the age of entitlement for the age pension from 65 to 67 on a staged basis between 1 July 2017 and 1 July 2023. Currently, the work injury damages entitlement to economic loss compensation ceases at the age of 65, which when drafted was the age of retirement. This needs to be amended to ensure that workers retain their entitlement to economic loss up to the retiring age. The bill will amend section 151IA of the Workers Compensation Act 1987 to ensure that the change to the retiring age is appropriately recognised and accounted for in any decision or settlement of a claim for damages under part 5 of the Workers Compensation Act 1987.

The third miscellaneous amendment provides that an applicant for a specialised insurer licence is not required to obtain an authority under section 12 of the Commonwealth Insurance Act 1973 if the applicant is exempt from the operation of the Commonwealth Act. Section 12 of the Commonwealth Act deals with the power of the Australian Prudential Regulatory Authority to issue licences to insurers, but it does not apply to some entities established by State laws. Racing NSW, which is a specialised insurer, is established under State law and therefore exempt from the operation of the Commonwealth Act. This amendment will allow Racing NSW to renew its specialised insurer licence.

The bill contains administrative amendments to reflect the implementation by WorkCover of the nationally consistent approval framework for workplace rehabilitation providers. All references to "occupational rehabilitation service" are replaced with references to "workplace rehabilitation service", and all providers of workplace rehabilitation services will be approved rather than accredited. Further, the list of rehabilitation services will be removed from the legislation to reflect the model of workplace rehabilitation that has been adopted by the nationally consistent approval framework for workplace rehabilitation providers. This model more accurately reflects the full range of services required to assist an injured worker back to work and is currently being adopted across the Commonwealth, States, Territories and New Zealand.

The final amendment is the removal of the monetary review point for workplace rehabilitation services. Currently, there is a monetary cap for these services beyond which WorkCover is required to review the necessity of the service. The amendment removes this cap as, in practice, the insurer reviews all these services to ensure they are reasonably necessary, regardless of the amount. Honourable members will see from a close reading of the bill that it contains important measures for the benefit of workers and employers. It also contains measures that will assist the Workers Compensation Commission to deliver a more effective, efficient and streamlined workers compensation dispute resolution system that meets the need of New South Wales workers and businesses. I commend the bill to the House.