

LEGISLATIVE COUNCIL

Workers Compensation Amendment Bill 2015

First print

Proposed amendments

No. 1 **Determining what constitutes suitable employment for purposes of weekly compensation**

Page 4, Schedule 2. Insert after line 15:

[3] Section 32A, definition of “suitable employment”

Omit the definition. Insert instead:

suitable employment, in relation to a worker, means employment in work for which the worker is currently suited having regard to the following:

- (a) the nature of the worker’s incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker under section 44B,
- (b) the worker’s age, education, skills and work experience,
- (c) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act,
- (d) any occupational rehabilitation services that are being, or have been, provided to or for the worker,
- (e) whether the work or the employment is available,
- (f) whether the work or the employment is of a type or nature that is generally available in the employment market,
- (g) the nature of the worker’s pre-injury employment,
- (h) the worker’s place of residence,
- (i) such other matters as the Workers Compensation Guidelines may specify.

No. 2 **Merit review by IRO of work capacity decision of insurer**

Page 5, Schedule 2 [8], line 17. Insert “, any appeal from such a review under section 44BG” after “section 44BB”.

No. 3 **Merit review by IRO of work capacity decision of insurer**

Page 5, Schedule 2. Insert after line 17:

[9] Section 43 (3)

Omit the subsection. Insert instead:

- (3) The Commission is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision of an insurer unless:
 - (a) any merit review of such a decision has been finally determined or the time for making an application for such a merit review has expired, and
 - (b) any appeal from a merit review of such a decision has been finally determined or the time for making such an appeal has expired.

No. 4 **Merit review by IRO of work capacity decision of insurer**

Page 5, Schedule 2. Insert after line 19:

[10] Section 44 (1) (b)

Omit section 44 (1) (b) and (c). Insert instead:

- (b) by the Independent Review Officer as a merit review of the decision, but not until the decision has been the subject of internal review by the insurer.

[11] Section 44 (2)

Omit “review by the Authority or”. Insert instead “merit review by”.

No. 5 **Merit review by IRO of work capacity decision of insurer**

Page 5, Schedule 2. Insert after line 23:

[11] Section 44 (3) and (3A)

Omit section 44 (3). Insert instead:

- (3) An application for merit review by the Independent Review Officer may be made without an internal review by the insurer if the insurer has failed to conduct an internal review and notify the worker of the decision on the internal review within 30 days after the application for internal review is made.
- (3A) The following provisions apply to the merit review of a work capacity decision by the Independent Review Officer:
 - (a) an application for review must be made within 30 days after the worker receives notice in the form approved by the Authority of the insurer’s decision on internal review of the decision,
 - (b) the worker and the insurer must provide such information as the Independent Review Officer may reasonably require and request for the purposes of the review,
 - (c) the Independent Review Officer may decline to review a decision because the application for review is frivolous or vexatious or because the worker has failed to provide information requested by the Independent Review Officer,
 - (d) the Independent Review Officer is to notify the insurer and the worker of the findings of the review and may make recommendations to the insurer based on those findings (giving reasons for any such recommendation),
 - (e) recommendations made by the Independent Review Officer are binding on the insurer and must be given effect to by the insurer.

No. 6 **Merit review by IRO of work capacity decision of insurer**

Page 5, Schedule 2 [12], lines 26 and 27. Omit all words on that line. Insert instead:

[12] Section 44 (5)

Omit the subsection. Insert instead:

- (5) The Commission is not to make a decision in proceedings concerning a dispute about weekly payments of compensation payable to a worker while:
 - (a) a work capacity decision by an insurer about those weekly payments is the subject of a review under this section, or
 - (b) the time for making an application for such a review has not expired, or
 - (c) a merit review under this section is the subject of an appeal or the time for making such an appeal has not expired.

No. 7 **Merit review by IRO of work capacity decision of insurer**

Page 6, Schedule 2 [14], proposed section 44BC (2) (b), line 18. Omit “review by the Authority), or”. Insert instead “merit review by the Independent Review Officer)”.

No. 8 **Merit review by IRO of work capacity decision of insurer**

Page 6, Schedule 2 [14], proposed section 44BC (2) (c), lines 19 and 20. Omit all words on those lines.

No. 9 **Restoration of Commission’s power to order payment of costs**

Page 7, Schedule 2 [14], proposed section 44BF (1), line 16. Omit “A legal practitioner is not entitled to be paid or recover any”. Insert instead “Despite section 343 of the 1998 Act, a legal practitioner may be paid or recover an”.

No. 10 **Restoration of Commission’s power to order payment of costs**

Page 7, Schedule 2 [14], proposed section 44BF (1), line 17. Omit “if”. Insert instead “unless”.

No. 11 **Restoration of Commission’s power to order payment of costs**

Page 7, Schedule 2 [14], proposed section 44BF (2), line 21. Omit “section 341”. Insert instead “sections 341 and 343”.

No. 12 **Merit review by IRO of work capacity decision of insurer**

Page 7, Schedule 2 [14]. Insert after line 24:

44BG Appeal against merit review of work capacity decision

- (1) A worker who is dissatisfied with a recommendation made by the Independent Review Officer under section 44BB (3A) (d) may appeal against the recommendation.
- (2) An appeal is to be made by application to the Registrar. The appeal is not to proceed unless the Registrar is satisfied that 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) An appeal must be made within 30 days after the worker receives notice of the recommendations appealed against, unless the Commission is satisfied that special circumstances justify an increase in the period for an appeal.
- (4) The appeal is to be by way of a new merit review of the original decision of the insurer.

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- (5) Fresh evidence, or evidence in addition to or in substitution for the evidence on which the decision was made, may be given on the appeal.
 - (6) An appeal under this section stays the operation of the decision appealed against pending the determination of the appeal. Sections 44BD and 44BE apply in respect of a decision of the Commission on an appeal under this section in the same way as they apply in respect of a review decision.
 - (7) The Commission may confirm, vary or set aside the recommendation of the Independent Review Officer.
 - (8) A decision of the Commission on an appeal under this section is binding on the insurer and the worker.
 - (9) The provisions of Part 9 of Chapter 7 of the 1998 Act apply to an appeal under this section in the same way as they apply to and in respect of the hearing of other proceedings before the Commission.
 - (10) Clause 2 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* applies to and in respect of the provision of legal services in connection with an appeal to the Commission under this section in the same way as it applies to and in respect of the provision of legal services in connection with a claim or defence of a claim for damages referred to in that section.
Note. Clause 2 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* prohibits a law practice from providing legal services in connection with a claim or defence unless a legal practitioner associate responsible for the provision of those services believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success.

No. 13 **Removal of limit on medical and related expenses**

Pages 9 and 10, Schedule 3 [1]–[4], line 3 on page 9 to line 31 on page 10. Omit all words on those lines. Insert instead:

[1] Section 59A Limit on payment of compensation

Omit the section.

No. 14 **Restoration of certain journey claims**

Page 15. Insert after line 7:

**Schedule 6 Amendment of Workers Compensation Act
1987 No 70—journey claims**

Section 10 Journey claims

Omit section 10 (3A).

No. 15 **Restoration of certain journey claims**

Page 17, Schedule 6. Insert after line 3:

5 Journey claims

- (1) Section 10 (3A) of the 1987 Act is taken never to have been enacted and any compensation that would have been payable but for that subsection is accordingly still payable.
- (2) For that purpose, in relation to a personal injury received by a worker on any journey that occurred before the commencement of the 2015 amending Act for which compensation was not payable when the journey occurred:
 - (a) the time limit in section 151D of the 1987 Act is taken to be 3 years after the date of the injury, or 6 months after the date of commencement of the 2015 amending Act, whichever is the later, and

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- (b) the time for giving notice under section 254 of the 1998 Act is taken to be within 30 days after the date of commencement of the 2015 amending Act, and
 - (c) the time limits in sections 261 and 262 of the 1998 Act are taken to be 3 years after the date of the injury, or 6 months after the date of commencement of the 2015 amending Act, whichever is the later.
- (3) Any worker who made a claim for compensation before the commencement of this Act that was rejected only because of the operation of section 10 (3A) of the 1987 Act may make a further claim within the time limit specified in this clause.

No. 16 **Merit review by IRO of work capacity decisions of insurer**

Page 17, Schedule 6, lines 23–36. Omit all words on those lines. Insert instead:

7 Determining what constitutes suitable employment

The amendment made by the 2015 amending Act to substitute the definition of *suitable employment* in section 32A of the 1987 Act extends to a work capacity decision of an insurer made before the commencement of that amendment, where the decision had not been finally determined before that commencement.

8 Work capacity reviews

- (1) An amendment made by the 2015 amending Act to section 43 or 44 of the 1987 Act, or to insert Subdivision 3A of Division 2 of Part 3 of the 1987 Act, extends to a work capacity decision of an insurer made before the commencement of that amendment, where the decision had not been finally determined before that commencement, but only if no review had been commenced under section 43 (1) (b) or (c) of the 1987 Act before that commencement.
- (2) Section 44BF of the 1987 Act, as inserted by the 2015 amending Act, extends to a work capacity decision of an insurer made before the commencement of that section, where the decision had not been finally determined before that commencement.

No. 17 **Removal of limit on medical and related expenses**

Page 18, Schedule 6, lines 5–17. Omit all words on those lines. Insert instead:

11 Medical, hospital and rehabilitation expenses

- (1) Section 59A of the 1987 Act is taken never to have been enacted and any compensation that would have been payable but for that section is accordingly still payable.
- (2) For that purpose, compensation is payable in relation to any treatment, service or assistance given or provided in respect of an injury that occurred before the commencement of the 2015 amending Act for which compensation was not payable when the treatment, service or assistance was given or provided.
- (3) Any worker who made a claim for compensation before the commencement of this Act that was rejected or reduced only because of the operation of section 59A of the 1987 Act may make a further claim.

No. 18 **Restoration of Commission’s power to order payment of costs**

Page 18, Schedule 6. Insert after line 24:

14 Costs in proceedings

Section 341 (as substituted by the 2015 amending Act) and sections 342, 343 and 345 (as re-enacted by the 2015 amending Act) of the 1998 Act extend to proceedings pending in the Commission before the commencement of the substituted or re-enacted section but not finally determined before that commencement.

No. 19 **Merit review by IRO of work capacity decision of insurer**

Page 18. Insert after line 38:

Schedule 7 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86—merit review of work capacity decisions

[1] Section 27 Functions of Independent Review Officer

Omit “review” from section 27 (b). Insert instead “conduct merit reviews of”.

[2] Section 105 Jurisdiction of Commission and Compensation Court

Omit the note to section 105 (1).

No. 20 **Restoration of Commission’s power to order payment of costs**

Page 18. Insert after line 38:

Schedule 7 Amendment of Workplace Injury Management and Workers Compensation Act 1998 No 86—legal costs

[1] Sections 341–343

Omit section 341. Insert instead:

341 Costs to be determined by Commission

- (1) Costs to which this Division applies are in the discretion of the Commission.
- (2) The Commission has full power to determine by whom, to whom and to what extent costs are to be paid.
- (3) The Commission may order costs to be assessed on the basis set out in the relevant law or on an indemnity basis.
- (4) The Commission may not order the payment of costs by a claimant unless the Commission is satisfied that the claim was frivolous or vexatious, fraudulent or made without proper justification.
- (5) If the Commission is satisfied that a part only of a claim was frivolous or vexatious, fraudulent or made without proper justification, the Commission may order the claimant to pay the costs relating to that part of the claim.
- (6) Any party to a claim may apply to the Commission for an award of costs.
- (7) In this section:
relevant law means:

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- (a) the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*), or
 - (b) any relevant regulations under Division 4 of this Part.

342 Costs unreasonably incurred

- (1) If the Commission is satisfied that any party's costs on a claim have been unreasonably incurred, the Commission is to order that those costs are not to be paid by any other party to the claim.
- (2) A costs agreement made in accordance with the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) is of no effect to the extent to which it relates to costs the subject of an order in force under subsection (1).
- (3) Costs incurred by a party to a claim are considered to have been unreasonably incurred for the purposes of this section only if they were incurred by the party:
 - (a) after a reasonable offer of settlement of the claim was made to the party, or
 - (b) after the party has failed without reasonable excuse to comply with a written request from another party to the claim to provide that other party with particulars (including any necessary medical report) sufficient to enable that other party to properly consider the claim for the purpose of making an offer of settlement, or
 - (c) after the party has unreasonably failed to participate in conciliation of a dispute with which the claim is concerned and the Commission is of the opinion that the failure has resulted in unnecessary litigation, or
 - (d) in connection with an unsuccessful application by the party to admit further evidence in respect of matters of which a medical assessment certificate of an approved medical specialist that has been admitted in evidence in proceedings is evidence (whether or not conclusive evidence) and the Commission is of the opinion that the application was frivolous or vexatious, or
 - (e) in connection with any issue raised in relation to a claim in respect of which there were, when the issue was raised, no grounds for a reasonable belief that the issue would be determined in favour of the party by whom it was raised.
- (4) A legal practitioner representing a party to proceedings before the Commission, or providing legal services to the party's insurer, is not entitled to recover from the party or insurer, as the case may be, any costs that the Commission has ordered are to be treated as unreasonably incurred.
- (5) The Commission may by order exempt any costs or a proportion of any costs from the operation of this section if of the opinion that it would be unjust not to do so because the legal practitioner concerned made all reasonable efforts to avoid unnecessary litigation in the proceedings or for any other reason should not be held responsible for the incurring of the costs concerned.

343 Restrictions on recovery of solicitor/client costs

- (1) The legal representative or agent of a person in respect of a claim made or to be made by the person:
 - (a) is not entitled to recover from the person any costs in respect of the claim unless those costs are awarded by the Commission, and

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- (b) is not entitled to claim a lien in respect of those costs on, or deduct those costs from, the sum awarded, ordered or agreed as compensation unless those costs are awarded by the Commission.
 - (2) Any such award of costs may be made on the application either of the person or of the legal representative or agent concerned.
 - (3) This section prevails to the extent of any inconsistency with the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*).
 - (4) A person must not:
 - (a) claim a lien that the person is not entitled to claim because of this section, or
 - (b) deduct costs from a sum awarded, ordered or agreed as compensation that the person is not entitled to deduct because of this section.
- Maximum penalty: 50 penalty units.
- (5) A person who has paid an amount in respect of costs to another person that the other person was not entitled to recover because of this section is entitled to recover the amount paid as a debt in a court of competent jurisdiction.

[2] Section 345

Insert after section 344:

345 Costs penalties where appeal is unsuccessful

- (1) On an appeal from the Commission constituted by an Arbitrator to the Commission constituted by a Presidential member:
 - (a) if the appellant is unsuccessful on the appeal, the Commission is to order that the appellant's costs on the appeal are not to be paid by any other party to the appeal, and
 - (b) if the appellant is an insurer (other than a licensed insurer that maintains a statutory fund under the 1987 Act) and is unsuccessful on the appeal, the Commission may order the insurer to pay to the Authority for payment into the WorkCover Authority Fund an administration fee of \$1,000 or such other amount as may be prescribed by the regulations.
- (2) A costs agreement made in accordance with the legal costs legislation (as defined in section 3A of the *Legal Profession Uniform Law Application Act 2014*) is of no effect to the extent to which it relates to costs the subject of an order in force under subsection (1) (a).
- (3) If an appeal concerns lump sum compensation, weekly payments of compensation or medical expenses compensation, the appellant is considered to be unsuccessful on the appeal unless the decision on appeal results in a change in favour of the appellant in the amount awarded or ordered to be paid in the decision appealed against of at least \$5,000 (or such other amount as may be prescribed by the regulations) and at least 20% of the amount awarded or ordered to be paid.
- (4) An administration fee that an insurer is ordered to pay is recoverable as a debt due to the Authority.
- (5) The Registrar is to notify the Authority of an order to an insurer under this section to pay an administration fee.