

WORKERS compensation in WA:

Changes to the Workers Compensation & Rehabilitation Act

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Rationale for the changes

The Government of Western Australia introduced a Bill into Parliament in September 1999 which made radical changes to the *Workers' Compensation & Rehabilitation Act* in Western Australia. This bill became law in October 1999.

The rationale behind the changes is to reduce premium costs to employers in relation to workers compensation.

Employers were confronted with premium increases of up to 300%. For an average small business employing 20 workers premium costs may have gone from \$50,000 in 1998 to \$200,000 in 1999.

As a result of these premium increases employers were in a position where they may have had to lay off a significant number of employees in an effort to cut their premium costs.

The Government's rationale therefore was that if radical changes were made to the *Workers' Compensation & Rehabilitation Act* to severely limit workers' access to common law rights the premium costs would decrease immediately.

There have been reports in the *West Australian* that insurance companies have adopted the attitude that are not prepared to reduce premium costs until such time as the effect of the changes is known. This is likely to take 1-2 years. It therefore seems likely that employers are going to continue to suffer the effects of increased premiums and that employees may be laid off as a result.

Changes

Section 5 of the Act contains definitional sections and changes have been made to that section.

The prescribed amount has been increased from approximately \$109,000 to \$119,048. The prescribed amount is the maximum amount that injured workers may receive by way of weekly payments of compensation. The structure of the Act is such that this increase in the prescribed amount feeds through into increases in medical expenses and rehabilitation expenses.

Medical expenses are now \$35,714.40 and rehabilitation expenses are \$8,333.36.

The prescribed amount will be

adjusted at the end of each financial year in line with variations in the wages cost index, ordinary time hourly rates of pay, excluding bonuses for Western Australia, as published by the Australian Statistician.

It appears that the provisions allow for increases and decreases of the prescribed amount according to movements in the wages cost index.

Common Law

The provisions of the *Workers' Compensation & Rehabilitation Act* since 1993 limited workers to taking common law claims against their employer only if they were able to establish a likely future economic loss in excess of approximately \$109,000 or if they had a disability of 30% or more as assessed under the Act.

As a general proposition it was difficult to attain the 30% disability threshold.

Post the changes in 1993 it was initially thought that it would be difficult for workers to attain the economic threshold of approximately \$109,000. However, as time passed, the Court's interpretation of the provisions made clear that the threshold was not the major impediment it was first thought to be.

While it was possible to obtain leave the difficulty was that, if a matter went to trial, it was necessary to establish a real future pecuniary loss in excess of \$109,000.

The realities of trials and awards of damages by judges are quite different from the test applied to allow a worker to obtain leave to issue proceedings against an employer. As a result, very few matters ever proceeded to trial because of the substantial risk of the worker not proving a future pecuniary loss in excess of \$109,000.

This impediment meant that workers were under pressure to settle their claims because of the risk of not beating the threshold at trial, losing the lot and having costs awarded against them.

The effect of the changes which became law on 5 October, 1999 is to remove the financial threshold as an entry point into common law entirely.

In summary, the entitlement of a worker to pursue their employer at

common law is now entirely based upon the level of disability.

There are now 3 categories of potential claimants being:

- (1) Those who have a disability rating as calculated in accordance with the Act between 0%-16%. These workers are entitled only to workers' compensation benefits which are basically a maximum amount of weekly payments of \$119,048, medical expenses of \$35,714.40, rehabilitation expenses of \$8,333.36 and, depending on their level of permanent disability, a payment pursuant to the Second Schedule of the *Workers' Compensation Act*, as calculated in accordance with the Act. These people can also redeem by way of a lump sum after 6 months on compensation.
- (2) Those with a disability rating between 16%-30%, are entitled to elect, generally within 6 months of their first payment of weekly pay-

ments of compensation, to pursue a common law claim. Should they elect to pursue a common law claim all of their rights and entitlements under the *Workers' Compensation and Rehabilitation Act* are extinguished and cannot, under any circumstances except if their disability ultimately reaches a 30% level, be resurrected. Also, the maximum amount of damages a person in this category can receive from a common law claim is capped at \$250,000 (presently) less any workers' compensation they have already received by the time they elect to pursue common law. If these people choose to remain in the workers' compensation system they have the same rights as those in the 0-16% category.

- (3) Those who have a disability rating of 30% or more are entitled both to receive workers' compensation benefits and pursue their employers at common law.

Election for common law within six months

As a result of amendments to the Act it is necessary for workers who have a disability rating between 16%-30% to elect to pursue common law within 6 months of the date of first receipt of payments of weekly compensation. It is possible, under certain very limited circumstances, for a worker to seek an extension of this 6 months.

Common law rights now based on degree of disability

The new Section 93D concerns itself with the assessment of levels of disability and the procedure to be followed to have that level of disability determined.

Degree of Disability

The degree of disability of a worker is to be assessed as follows:

Pursuant to the Second Schedule of the *Workers' Compensation Act* if there is an item in that Schedule which relates



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**“The limited time a worker
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to the disability.

The Second Schedule of the *Workers' Compensation and Rehabilitation Act* provides for the loss of things such as an arm and by virtue of Section 25 of the Act 'loss of' is also taken to mean 'permanent loss of use of' and 'permanent loss of the efficient use of'.

If the Second Schedule does not cover a disability then one looks to the Assessment of Disability Guide under the *Workers' Compensation & Rehabilitation Act* of Western Australia prepared by the West Australian Branch of the Australian Medical Association, First Edition.

This Guide covers a wider range of disabilities than the Second Schedule and is in part to be read in conjunction with the US Guides to Permanent Impairment, Fourth Edition. If the AMA Guides do not provide the answer then one moves on to the next step.

Insofar as the Second Schedule and AMA Guides do not provide the answer then you look to the regulations. The problem is that no regulations have been promulgated in relation to this issue and therefore there will be a number of people who will miss out entirely because of the unusual nature of their disability.

**The reality of disability
assessment**

The problem with categorisation of rights according to levels of disability is that loss of function does not generally equate to financial loss.

The limited time a worker is given to act, if the worker falls within the 16%-30% category (6 months, and maybe, under special circumstances longer) does not accord with reality. It is unusual for doctors to provide an assessment of permanent disability within 12 months.

Depending upon the ultimate interpretation given to these provisions, it may be the case that the 16%-30% category largely becomes a non-issue because it will be impossible to obtain from doctors the appropriate certification of the level of disability within the limited time.

Transitional provisions

The Government attempted in its legislation to make provision for those who were already in the workers' compensation system and any claims they may have.


Prior to 5 October, 1999 it was necessary for a worker to apply to the District Court to obtain leave to issue proceedings for damages. To obtain leave the worker either had to convince the Court it was likely they would suffer a future pecuniary loss in excess of approximately \$109,000, or they had a disability of 30% or more.

All those people who had already obtained leave under the old Act are in a position to continue with their actions and will be subject to the provisions of the old Act. There were a number of applications before the Court at the time the new law came into effect. These applicants are now subject to the new provisions of the Act and their applications can go no further.

The transitional provisions were meant to provide for these and other people to allow them to decide whether they would pursue a common law claim according to their level of disability. Unfortunately, the legislation was flawed and it effectively excluded those whose compensation payments commenced before April 1999 from any chance of electing to pursue common law proceedings if their disability fell in the 16%-30% range.

After much battering the Government realised this error and legislation has been passed to correct it.

Summary

The Workers Compensation system in Western Australia is now a dog's breakfast cobbled together by politicians who have no idea of what they have created. It provides no justice to workers, probably will not achieve its stated aims and is an example of the weak and vulnerable being sacrificed to the false god of profit. 

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