

LEGISLATIVE ASSEMBLY

Read 1^o 24 November 1981

(Brought in by Mr Ramsay and Mr Thompson)

A BILL

To amend the *Workers Compensation Act 1958* in relation to Proceedings under the Act and at Common Law and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

1. (1) This Act may be cited as the *Workers Compensation (Actions) Act 1981*. Short title.

(2) In this Act the *Workers Compensation Act 1958* is called the Principal Act. Principal Act No. 6419. Reprinted to No. 9372. Subsequently amended by No. 9549.

10 (3) This Act shall come into operation on the day it receives the Royal Assent. Commencement.

(4) The Principal Act as amended by this Act shall apply to an injury to or the death of a worker occurring on or after the commencement of this Act. Transitional provisions.

15 (5) The provisions of the Principal Act that were in force immediately before the commencement of this Act shall continue to apply in relation to an injury to or death of a worker that occurred before the commencement of this Act in all respects as if this Act had not been enacted.

Amendment of No. 6419 s. 1.

2. The portion of the Table in section 1 (2) of the Principal Act relating to Part III. shall be amended as follows:

- (a) For the expression—
 “Division 4.—Liability of Person other than Employer s. 62. 5
 Division 5.—Action Brought Independently of this Act s. 63.”
 there shall be substituted the expression—
 “Division 4.—Action Brought Independently of this Acts s. 62-70; 10
- (b) For the expression—
 “Division 6.—Insurance Policies s. 64” there shall be substituted the expression “Division 6.—Insurance Policies s. 71”;
- (c) The expression— 15
 “Division 12.—Proceedings under this Act and at Common Law s. 79” is repealed.

Amendment of No. 6419 s. 6.

3. Section 6 of the Principal Act shall be amended as follows:

- (a) In sub-section (1) the expression “(1)” is repealed;
- (b) Sub-sections (2), (3), (4) and (5) are repealed. 20

Entitlement to compensation where compensation damages, &c. paid, &c. under the law of another State territory &c.

4. After section 7A of the Principal Act there shall be inserted the following section:

“7B. (1) Where personal injury is caused to a worker which gives him a right to claim compensation or a right of action in respect of any injury under the law of any State (other than Victoria) territory or country under such circumstances that if he had no such right to claim compensation or right of action he or his dependants would be entitled to compensation under this Act, the worker and in the case of the death of the worker his dependants shall— 30

- (a) subject to sub-section (4), where no compensation or damages has already been paid or recovered and no award of compensation or judgment for damages has already been made given or entered in respect of the injury under any law of any State (other than Victoria) territory or country—be entitled to compensation in accordance with the provisions of this Act as if he or his dependants had no such right to claim compensation or right of action under the law of any State (other than Victoria) territory or country; 35 40

(b) subject

- 5 (b) subject to paragraph (e), where compensation or
damages has already been paid or recovered or an
award of compensation or judgment for damages has
already been made given or entered in respect of the
injury under any law of any State (other than
Victoria) territory or country and the amount of
compensation or damages paid or the award or judgment
is equal to, or exceeds, the compensation which would
have been payable under this Act if he or his dependants
had no such right to claim compensation or right
of action under the law of any State (other than
Victoria) territory or country—not be entitled to
compensation under this Act;
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- 15 (c) where compensation or damages has already been paid
or recovered for an award of compensation or judgment
for damages has already been made given or entered in
respect of the injury under any law of any State (other
than Victoria) territory or country and the amount
of compensation or damages paid or the award or
judgment is less than the compensation which would
have been payable under this Act if no compensation
or damages or award or judgment in his favour had
been made given or entered in respect of the injury
under any law of any State (other than Victoria)
territory or country—be entitled to compensation
being an amount equal to the difference between the
amount of compensation or damages paid or of the
award or judgment and the amount of compensation
which would have been payable under this Act if he or
his dependants had no right to claim compensation or
right of action under any law of any State (other
than Victoria) territory or country;
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- 30 (d) subject to paragraph (e), where a payment into court
has been accepted by the worker or his dependants in
proceedings or a settlement or compromise of a claim
has been made in respect of the injury under any law
of, or in, any State (other than Victoria) territory
or country and the amount of the payment into court
settlement or compromise is equal to, or exceeds,
the compensation which would have been payable under
this Act if he or his dependants had no such right to
claim compensation or right of action under the law
of any State (other than Victoria) territory or
country—not be entitled to compensation under this
Act;
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- 45 (e) where a judgment or order for damages has been
satisfied only in part, or where a payment into court
has been accepted by the worker or his dependants in
proceedings

proceedings or a settlement or compromise of a claim has been made in respect of the injury under any law of, or in, any State (other than Victoria) territory or country and the amount of the judgment or order satisfied, payment into court, settlement or compromise of the claim is less than the compensation which would have been payable under this Act if no judgment or order, payment into court, settlement or compromise had been made in respect of the injury under any law of, or in, any State (other than Victoria) territory or country—be entitled to an amount of compensation equal to the difference between the amount of the judgment or order satisfied, payment into court, settlement or compromise and the amount of compensation which would have been payable under this Act if he or his dependants had no right to claim compensation or right of action under the law of any State (other than Victoria) territory or country.

(2) If a person receives compensation under any provision of this Act in respect of any injury and subsequently compensation or damages are obtained by him or an award of compensation or damages in his favour is made given or entered or a payment into court is accepted by him or a claim is settled or compromised in his favour in respect of the injury under any law of, or in, any State (other than Victoria) territory or country then the employer shall be entitled to recover from that person the amount of the compensation paid by the employer pursuant to this Act or an amount equal to the compensation or damages or payment obtained or made settled or compromised (whichever is the lesser amount).

(3) Any dispute under sub-section (2) shall be determined by the Board whose decision shall be final.

(4) Where any person has a right to claim compensation or a right of action in respect of any injury under the law of, or in, any State (other than Victoria) territory or country he shall not be entitled to claim compensation in respect of the injury under this Act unless he makes a statutory declaration setting out any amounts of compensation or damages already paid or recovered, any award of compensation or judgment for damages already made given or entered, any payment into court he has accepted, or any settlement or compromise of any claim, or any claim for compensation or action for damages pending in respect of the injury under the law of, or in, any State (other than Victoria) territory or country.

(5) Any amount recovered or to be recovered by a worker under the law of any State (other than Victoria) territory or country as compensation or damages in respect of personal injury shall

shall be presumed, unless the worker produces satisfactory evidence to the contrary, to be compensation or damages for the same injury in respect of which the worker claims compensation or a right of action under this Act.

- 5 (6) Compensation shall not be payable pursuant to this section or section 5 if compensation has already been paid or is payable under any scheme certified under the *Workers' Compensation Act 1928*."

- 10 5. For Divisions 4 and 5 of Part III. of the Principal Act there shall be substituted the following Division:

Amendment of
No. 6419.
Divisions
substituted.

'DIVISION 4—ACTION BROUGHT INDEPENDENTLY OF THIS ACT.

- 15 62. (1) Where, within the time limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but—

Proceedings
where action
brought
independently
of this Act or
where appeal
from judgment
therein.

- 20 (a) the court in which the action is tried; or
(b) if the determination is the determination (on an appeal by either party) by an appellate tribunal—that tribunal—

shall remit the case to the Board for the assessment of the compensation.

- 25 (2) An assessment of the compensation pursuant to sub-section (1) shall be for an amount not less than the compensation which would have been payable under this Act if no action had been brought to recover damages independently of this Act for the injury.

- 30 (3) Subject to this Act if it is determined in any proceedings under this Act that the injury is one for which the employer is not liable under this Act the determination shall not prevent an action being brought in respect of the injury independently of this Act.

Action
independently
of Act after
unsuccess-
ful claim
hereunder.

- 35 63. (1) Where, within the time limited for the taking of proceedings under this Act, an action is brought to recover damages independently of this Act in respect of an injury giving rise to a claim for compensation under this Act and it is determined in that action that—

- 40 (a) damages are recoverable independently of this Act subject to such reduction as is mentioned in section 26 (1) of the *Wrongs Act 1958*; and

(b) the

- (b) the employer would have been liable to pay compensation under this Act—

section 62 shall apply in all respects as if the action had been dismissed, and, if the claimant chooses to have compensation assessed and awarded in accordance with section 62, no damages shall be recoverable in the action. 5

(2) Where a worker has recovered compensation under this Act or any corresponding previous enactment in respect of an injury caused under circumstances which would give a right to recover reduced damages in respect thereof by virtue of section 26 of the *Wrongs Act* 1958 from some person other than the employer (“the third part”), any right conferred by this Division on the person by whom the compensation was paid, or on any person called on to pay an indemnity under section 60, to be indemnified by the third party shall be limited to a right to be indemnified in respect of such part only of the sum paid or payable by the person as bears to the total sum so paid or payable the same proportion as the reduced damages bear to the total damages which would have been recoverable if the worker had not been at fault. 10 15

(3) Where either before or in an action brought to recover damages independently of this Act for injury, a judgment in favour of the worker for damages against the employer or the third party has been satisfied wholly or a claim has been settled fully the Board shall refuse to make any award in favour of the worker of his dependants (as the case may be) for any damages caused by that injury. 20 25

(4) In an action brought to recover damages independently of this Act for damages for an injury or death, or in the case of an appeal against the judgment in such an action, the worker may, before the expiration of a period of 28 days after judgment or the determination of the appeal (as the case requires), abandon the judgment. 30

(5) Where a worker abandons the judgment pursuant to sub-section (4), section 62 shall apply in all respects as if the action had been dismissed and if the worker chooses to have compensation assessed and awarded in accordance with section 62, no damages shall be recoverable in the action. 35

(6) Judgment shall not be abandoned pursuant to sub-section (4) except within 28 days of the judgment being entered or in the case of an appeal within 28 days of the determination of the appeal. 40

(7) The worker shall give notice of abandonment to the defendant or respondent in writing.

(8) For the purposes of this section “worker” includes personal representative or the person bringing the action under Part III. of the *Wrongs Act* 1958 (as the case requires). 45

63A. (1) Subject

63A. (1) Subject to section 70, nothing in this Act shall affect the right of any person to take and prosecute any proceedings against an employer or any other person whether he has accepted payment of compensation under this Act or not.

Acceptance of compensation (otherwise than on award) not a bar to proceedings at common law.

- 5 (2) Subject to sections 63 and 70 where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer (which other person is called "the third party") to pay damages in respect thereof proceedings may be taken both
10 against the third party and against any person liable to pay compensation under this Act for such compensation.

- 15 63B. Where the worker has obtained a judgment in any proceedings to recover damages against the employer or a third party and such judgment remains unsatisfied in whole or in part the worker shall be entitled to claim compensation under this Act but not for an amount greater than the amount by which such judgment remains unsatisfied, any moneys so recovered by way of compensation shall for the purposes of such judgment be deemed
20 to be moneys recovered under such judgment and the amount owing thereunder shall be reduced accordingly.

Where judgment unsatisfied worker may claim compensation.

- 25 64. Where a judgment or order for damages in favour of a worker and against his employer or the third party has been satisfied in whole or a payment into court by the employer or the third party has been accepted for an injury or a claim has been settled or compromised for which compensation would have been payable under this Act—

Reduction of amount of compensation where judgment satisfies &c.

- (a) the right to compensation under this Act shall be reduced by an amount equal to the amount recovered under the judgment, payment into court, settlement or compromise, as the case may be;
30 (b) the right of a worker to further weekly payments under this Act shall thereupon cease or determine;
35 (c) the Board may refuse to make any award in favour of the worker for any damage caused by an injury if it is satisfied that the judgment for damages, payment into court, settlement or compromise, as the case may be, was in respect of the damage caused by such injury.

- 40 65. (1) Where a judgment or order for damages in favour of a worker is to be entered or made in any court in respect of the injury of the worker in proceedings independent of this Act against an employer by whom payments of compensation have already been made in respect of that injury under this Act, the amount of the judgment or order shall be reduced by the amounts
45 of payments made in respect of the period to which the judgment or order for damages relates.

Amount of judgment &c. to be reduced by payments during period to which judgment &c. relates.

(2) Where

(2) Where damages recoverable independently of this Act are subject to such reduction as is mentioned in section 26 (1) of the *Wrongs Act 1958* such reduction shall be calculated after the reduction under sub-section (1) (if any) has been made.

Provision in case of judgment for damages against third party when payments already made.

66. (1) Subject to section 70 where a judgment or order for damages in favour of a worker is to be entered or made in any court in respect of the injury of the worker in proceedings independent of this Act against a third party for whose acts or defaults the worker's employer is not responsible and payments of compensation have already been made in respect of that injury by the employer, then— 5 10

(a) (if pursuant to any rules of the court made in that behalf the employer has joined in the proceedings) a judgment or order in favour of the employer may be entered or made in respect of an amount equivalent to the payments of compensation made and the amount of the judgment or order in favour of the worker may be reduced by the corresponding amount accordingly; 15

(b) (if the employer has not joined in the proceedings but it is made to appear to the court that the payments of compensation have been made) the amount of the judgment or order shall be reduced by the amount of the payments made, and in any such case the employer shall be entitled to be indemnified for the payments made and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting shall be entitled to be indemnified by the third party for such proportion of the amount of the compensation paid as is appropriate to the degree to which the injury was attributable to the act default or negligence of the third party and all questions as to the right to and the amount of any such indemnity shall in default of agreement be settled by action or if the parties consent by the Board— 20 25 30

but where the amount of the judgment or order in favour of the worker is not so reduced, the employer shall be entitled to be indemnified for the payments so made by the third party reduced to the same extent (if any) as the damages in favour of the worker are reduced by virtue of section 26 (1) of the *Wrongs Act 1958*, and the third party shall, if he has so indemnified the employer, be entitled to retain or (as the case requires) to recover from the worker in any court of competent jurisdiction as a civil debt recoverable summarily an amount equivalent to the amount of payments so made, and where any amount is retained in accordance with the provisions of this paragraph the judgment or order to the extent of that amount, be deemed to have been satisfied. 35 40 45

(2) Where

(2) Where under sub-section (1) a judgment or order is made in favour of the employer or an indemnity is payable the judgment or order in favour of the employer or the indemnity is to be reduced by an amount equal to any amount recoverable by the employer or a person called upon to pay the indemnity from the Motor Accidents Board under section 8 and the judgment or order in favour of the worker shall be reduced accordingly.

67. Where the injury for which compensation has been paid and which is not recoverable under section 8 from the Motor Accident Board was caused under circumstances creating a legal liability in the employer of the worker and also against a third party to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting shall be entitled to be indemnified by the third party for such proportion of the amount of the compensation paid as is appropriate to the degree to which the injury was attributable to the act default or negligence of the third party and all questions as to the right to and the amount of any such indemnity shall in default of agreement be settled by action or if the parties consent by the Board.

Indemnity by
third party.

68. (1) Where in an action for damages brought by a worker independently of this Act in respect of injury to the worker against a person for whose acts or defaults the employer of the worker is not responsible an amount is lodged or paid into court by or on behalf of that person in accordance with the Rules of the Court in which the action was brought and the amount is accepted by the worker, the worker shall refund immediately to the person by whom the compensation was paid where that person has not recovered and is not entitled to recover under section 8 from the Motor Accidents Board, an amount equivalent to the amounts of payments of compensation received under this Act in respect of the injury or the amount accepted, whichever is the lesser.

Payment into
court.

(2) Where pursuant to the provisions of sub-section (1) moneys are required to be refunded but are not refunded in accordance with that sub-section, the person entitled to the refund may recover the money in any court of competent jurisdiction as a civil debt recoverable summarily.

(3) Notwithstanding anything to the contrary in this Act the employer shall not be indemnified in respect of any moneys already paid by him to the worker by way of compensation under this Act where the worker is required to refund an amount equivalent to those moneys pursuant to sub-section (1).

69. Where

Provision
in case of
settlement by
third party
when payments
already made.

69. Where a claim by a worker independent of this Act for damages in respect of the injury of the worker against a person for whose acts or defaults the employer of the worker is not responsible has been settled or compromised without regard to the fact that payments of compensation had been made by the employer under this Act, then the person by whom payment was made upon the settlement or compromise of the claim shall, if he is subsequently required under the provisions of this Act to indemnify the employer for the payments so made, be entitled to recover from the worker in any court of competent jurisdiction as a civil debt recoverable summarily an amount equivalent to the amount of payments so made. 5 10

Reduction of
compensation
where damages
obtained under
Part III. of
Wrongs Act
1958.

70. (1) Subject to sub-section (3) where any award in favour of a person or persons for whose benefit an action for damages is permitted to be brought under Part III. of the *Wrongs Act* 1958 has been made under this Act in respect of the death of a worker, any judgment, order for damages, settlement or compromise made or entered in respect of the death of a worker in an action for damages under Part III. of the *Wrongs Act* 1958 shall be reduced by the amount of the award under this Act. 15 20

(2) Subject to sub-section (3) where a judgment, order for damages, settlement or compromise has been made or entered in an action for damages under Part III. of the *Wrongs Act* 1958, any award under this Act in favour of any person or persons for whose benefit the action for damages under Part III. of the *Wrongs Act* 1958 is permitted to be brought, in respect of the worker's death shall be reduced by— 25

- (a) the amount mentioned in clause 1 (a) (i) under the heading "The Clauses Referred To" in section 9 or that amount as increased or decreased in accordance with the provisions of section 9 (3); or 30
- (b) the amount of the judgment, order, settlement or compromise—

whichever is the lesser.

(3) Sub-sections (1) and (2) do not apply to or in relation to the death of a worker which occurred before 1 December 1979. 35

Amendment of
No. 6419.
Section
renumbered.

6. In Division 6 of Part III. of the Principal Act for the expression "64" there shall be substituted the expression "71".

Division 12
of Part III.
repealed.

7. Division 12 of Part III. of the Principal Act shall be repealed. 40

Repeal of
No. 6420
s. 27.

8. Section 27 of the *Wrongs Act* 1958 shall be repealed.