

setting up activities on low tables and packing them away again.

In the short term, you may be able to give the injured worker administrative duties to help out the director (this is every director's dream!) Meanwhile, you will need to replace the worker in the room, as there are ratios you need to maintain in terms of how many staff you have relative to the number of children. If you do not have your own casual staff you can draw on, you will then have the added cost of going through an agency to obtain a staff member to replace your worker. If you are unlucky enough to be missing one of your Early Childhood Teachers, the cost of obtaining a casual through an agency to cover them or replace them while they are injured can be around \$60/hour, which works out at \$2,480 for an average 40-hour week. Considering that a permanent teacher would be costing you less than half of that amount, gross, it is a large cost to have to cover.

Back injuries received from working in child care can result in staff having

to have anything from one or two days off, to needing months off. Like all injuries and all industries, the recovery time of your staff depends on a lot of factors. Their age, their health, their fitness level, whether the injury has happened over a short period of time or whether it is an ongoing, chronic issue are all factors that can influence their recovery and the time it is likely to take.

**HIGH STAFF TURNOVER**

Child care, in general, has a high turnover of staff. This is the result of many contributing factors, one of them being the physical strain on the body of this kind of work. Another is the emotional stress of looking after children. This is also quite common, but harder to define and treat. Anyone who has had anything to do with child care knows how demanding children can be. Whether they are a few months old or a few years old, there is a lot of responsibility involved in caring for someone else's children.

**IMPROVING CONDITIONS**

More changes will be coming into effect over the next few years that are going to improve the working conditions of child care workers. As mentioned before, the ratio of staff to children for the zero-to-twos is being decreased. The ratios for the older children will also be decreasing. For those working with the two to three year olds, the staff to child ratio will be going from one to eight down to one to five. This will automatically result in less physical and emotional stress and strain for child care workers, and have a flow-on effect of less workers' compensation. The healthier you can keep all your staff, the better for all involved. ■

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By Kasarne Robinson

# NSW Workers' Compensation Legislation Amendment Bill 2010

The Workers' Compensation Legislation Amendment Bill was introduced in the NSW Legislative Assembly on 23 June 2010. The Bill was debated, and amendments made to the first draft by the Legislative Assembly on 27 October 2010. The Bill was passed without further amendment by the Legislative Council on 9 November 2010.

**T**he object of the Bill is to amend the *Workers' Compensation Act 1987* and *Workplace Injury Management and Workers' Compensation Act 1998*. The most noteworthy amendments are as follows:

**DISPUTES CONCERNING FUTURE TREATMENT**

The most exciting news the Bill brings is that it extends the jurisdiction of the Workers' Compensation Commission (WCC) beyond disputes about treatment and services that have been provided to an injured worker to cover disputes about treatment and services that are proposed to be provided. Disputes are to be referred to an Approved Medical Specialist.

**RETIREMENT AGE**

An amendment is made to s1511A of the 1987 Act to refer to 'retirement age' rather than 'age 65', thus keeping the maximum age for determining economic loss for calculating work injury damages in line with the age for entitlement to the age pension. The amendment does not apply to an award of damages in proceedings commenced before the commencement of the amendment. >>

**APPEALS AGAINST A DECISION OF AN ARBITRATOR**

The Bill addresses recent case law – such as *Sapina v Coles Myer Limited*<sup>1</sup> – where the Court of Appeal has extended the grounds of appeal against the decisions of arbitrators. The Bill seeks to make it clear that an appeal against a decision of an arbitrator is limited to a determination of whether the decision appealed against was or was not affected by any error of fact, law or discretion, and to the correction of any such error. This proposed amendment to s352 of the 1998 Act spells out that an appeal is not a review or a new hearing.

The amendment to s352 makes provision for appeal of an interlocutory decision with leave of the Commission. Leave is not be granted unless the Commission is of the view that determining the appeal is necessary or desirable for the proper and effective determination of the dispute.

Section 352 is further amended to remove the requirement for leave to appeal, and provides that the appeal is not to proceed unless the registrar is satisfied as to the procedural requirements of this section and any applicable rules and regulations. The registrar is not required to be satisfied as to the substance of the appeal, provided the procedural requirements have been met.

**NEW EVIDENCE IN APPEAL AGAINST ARBITRATOR'S DECISION**

Section 352(6) is amended to the effect that the Commission is not to grant leave unless satisfied that the evidence concerned was not available to the party, and could not reasonably have been obtained by the party, before the proceedings concerned, or that failure to grant leave would cause substantial injustice in the case.

**NO INCREASE IN THRESHOLD FOR APPEALS**

The first draft of the Amendment Bill proposed an increase in the monetary threshold. It would apply to appeals under s352 of the 1998 Act against an arbitrator's decision from \$5,000 to \$7,500. Thankfully, this increased

threshold was not included. Therefore, the threshold must still be at least \$5,000 and at least 20 per cent of the amount awarded in the decision appealed against.

**STAY PENDING APPEAL**

The Bill inserts s352(5A) into the 1998 Act, providing that an appeal under s352 stays the operation of the decision appealed against pending determination of the appeal, but does not stay or otherwise affect the operation of a decision as to weekly payments, and weekly payments of compensation remain payable despite any appeal. Thus, a decision concerning medical expenses and permanent impairment compensation is stayed pending an appeal.

**APPEAL AGAINST MEDICAL ASSESSMENT**

The Bill seeks to amend s327(3)(b) and s328(3) to the effect that fresh evidence cannot be adduced on an appeal against a medical assessment unless the evidence was *both* not available to the party and not reasonably obtainable by the party before the medical assessment.

Section 328(2) is amended to make it clear that a review is limited to the grounds of appeal on which the appeal is made.

Section 327(6) is amended to provide that the registrar may refer a medical assessment for further assessment under s329, as an alternative to appealing against the assessment (but only if the matter could otherwise have proceeded on appeal under the section). The existing provisions of s329 remain.

**RECONSIDERATION OF DECISIONS OF REGISTRAR OR APPEAL PANEL**

Section 378 is amended to remove reference to an approved medical specialist. Thus, only the registrar or an appeal panel may reconsider any matter dealt with by the registrar or appeal panel and rescind, alter or amend any decision previously made or given.

The amendments provide that the registrar may alter the text of a

decision to correct an obvious error. If the appeal panel is satisfied that its decision, or any medical assessment certificate it has issued, contains an obvious error, the appeal panel concerned may correct the error and issue a new medical assessment certificate, if necessary. The time-limit for reconsidering a matter in response to an application for reconsideration remains at within two months after the application is received.

**PAYMENT OF LUMP SUM COMPENSATION PRIOR TO RECOVERING WORK INJURY DAMAGES**

An amendment to include s280B of the 1998 Act provides that an injured worker cannot recover damages (work injury damages) in respect of an injury from the employer liable to pay compensation under this Act in respect of the injury, unless and until any permanent impairment compensation and pain and suffering compensation to which the worker is entitled in respect of the injury has been paid. This amendment seeks to ensure that an injured worker receives the compensation to which the worker is entitled before work injury damages are recovered. The amendment does not prevent an injured worker from making a claim for work injury damages before the worker's statutory lump sum entitlements have been paid.

**GENERAL**

The Bill also includes administrative amendments to reflect the implementation of the Nationally Consistent Approval Framework for Workplace Rehabilitation Providers by WorkCover. References to 'occupational rehabilitation service' are replaced with references to 'workplace rehabilitation service' and providers of workplace rehab services will be approved rather than accredited. ■

**Note:** 1 [2009] NSWCA 71.

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