

16 February 2015

NAT 004/15

Workers' Compensation: Big changes to Accident [Makeup] Pay and South Australian Scheme

Summary

This Member Advice provides an update on Accident Makeup Pay provisions in Awards. It also provides important information about the new Return to Work Scheme that will become effective in South Australia on 1 July 2015.

Accident [Makeup] Pay

Many Industrial Awards have, for many years, included provisions that require an employer to make additional payments in the form of *Accident [Makeup] Pay* when a worker is receiving weekly payments for workers' compensation.

In line with transitional arrangements in Modern Awards, these provisions expired on 31 December 2014. However, the ACTU has made an application for the provisions to be reinstated and, potentially, be applied more broadly.

Member Advice - NAT 002/15 was sent to members in January 2015 providing more detail about this issue; it can be accessed at:

<http://www.aigroup.com.au/memberadvices/>

South Australia – New Return to Work Scheme

On 1 July 2015, the new South Australian Return to Work Scheme will commence and WorkCoverSA will become ReturnToWorkSA.

Established by the *Return to Work Act 2014*, the scheme makes significant changes to entitlements and obligations of workers and employers. It also establishes a requirement that ReturnToWorkSA must seek to achieve an average premium rate that does not exceed 2%; this compares to the current premium rate of 2.75%.

Key areas of impact are outlined below. The Act can be accessed at:

<http://www.legislation.sa.gov.au/LZ/C/A/RETURN%20TO%20WORK%20ACT%202014.aspx>

Entitlement to compensation

An entitlement to compensation will exist if work was:

- A significant contributing cause for physical injuries; and
- THE significant contributing cause for psychiatric injuries [NB: the existing exclusions related to psychiatric injuries from "reasonable management/administrative action, taken in a reasonable manner" will continue to apply].

Determining Claims

Provisional liability will no longer exist.

ReturnToWorkSA is required to determine a claim, wherever practicable, within 10 business days. If they are unable to determine the claim within that time, the worker must be paid "interim benefits". In other circumstances, ReturnToWorkSA may grant interim benefits.

Seriously injured

Access to many of the provisions within the legislation require an assessment to be made as to whether the worker is seriously injured. A worker will be assessed as seriously injured if they have a whole person impairment (WPI) of 30% or greater.

It is important to note that, in order to be classified as being seriously injured, a worker's physical and psychiatric injuries must be assessed separately, i.e. a physical and psychiatric injury, each of which are less than 30%, cannot be added together to achieve the 30% threshold.

Finally, any consequential mental harm which is due to the consequence of a bodily injury, will not be included in the assessment.

Weekly benefits

A significant change in relation to weekly benefits is that timeframes will be determined on the basis of *elapsed weeks*, rather than *aggregate weeks*.

Under current legislation, weeks accrue on the basis of the number of weeks in which weekly compensation was payable, i.e. if a worker is back at work on full time modified duties, that week would not count towards the week count.

The *Return to Work Act* clearly identifies that any reference to weeks are the weeks elapsed since the injured worker first had an incapacity that resulted in time off work, or the need for modified duties.

Weekly payments will be paid at a specified percentage of Average Weekly Earnings (AWE):

- First 52 weeks – 100%
- 53 to 104 weeks – 80%
- After 104 weeks
 - if not seriously injured, weekly payments cease
 - if seriously injured – 80% until retiring age [NB: retiring age is defined as when the person would become entitled to receive the aged pension]

Transitional Arrangements

The following table illustrates the transitional arrangements in place for workers with existing injuries.

At 30 June 2015	1 July 2015 to 30 June 2016	1 July 2016 to 30 June 2017
Currently receiving	May receive	May receive
100%	100%	80%
90%	90%	80%
80%	80%	80%
Unless seriously injured, benefits will cease at 30 June 2017		

Medical Expenses

In most cases, payment of medical expenses will cease 12 months after weekly compensation payments cease. Seriously injured workers will be entitled to have medical expenses paid indefinitely, ensuring that they have lifetime care and support, consistent with the requirements of the National Disability Insurance Scheme (NDIS).

Accessing lump sum payments

Permanent Impairment Payments (PIP)

Permanent Impairment Payments (PIP) are available for physical injury only, not psychiatric injuries.

Non-economic loss

PIP for *non-economic loss* will continue to be available for workers who have a WPI of 5% or more.

Economic loss

In addition, workers with a WPI of 5% or more, who are not seriously injured, will have access to a PIP for *economic loss* (loss of earning capacity).

This payment will be calculated using a set formula which takes into account a prescribed amount determined by the WPI%, the age at time of injury and hours worked at the time of injury.

The maximum amount (currently \$350,000) would be payable to a worker with 29% WPI, who was 25 years old or less and working full time at the time of the injury.

It is important to highlight that seriously injured workers cannot access this PIP for economic loss, as they are entitled to weekly payments until retiring age.

Common law access

Seriously injured workers will be able to commence legal action to recover damages. Lump sum payments for economic loss can be awarded if the injury was caused by the negligence of their employer; damages are not payable for consequential mental harm. There will be no entitlement to damages for either non-economic loss or the costs of medical expense or care.

Rehabilitation and Return to Work

The Act establishes most of the rights and obligations related to rehabilitation and return to work. However, regulations and guidelines will serve to establish some of the detail.

Recovery and return to work plans

There will no longer be a requirement for Agents to establish rehabilitation programs. Instead, there will be a greater focus on Agents ensuring that *recovery and return to work plans* are established if the worker is likely to be incapacitated for 4 weeks.

Provision of Suitable Duties

The provisions of the current section 58B and 58C which establish obligations to provide duties and to advise WorkCoverSA before terminating employment, have been carried over to the new Act.

In addition, a new provision creates an ability for injured workers to actively seek the provision of suitable employment and to apply to the SA Employment Tribunal (a new tribunal that replaces the Workers' Compensation Tribunal) to direct the employer to provide duties, as part of a recovery/return to work plan, if the tribunal *does not believe it is unreasonable to do so*.

It will be essential that employers respond appropriately if they receive a written request from the worker to provide duties, and to have strong representation in any action in the tribunal. Ai Group can provide valuable assistance in these matters, and can represent employers at the Employment Tribunal.

Premium Issues

The Act addresses a small number of premium related issues. In addition to the 2% target outlined above, the Act establishes that:

- *secondary injuries* will no longer be excluded from the premium calculation for individual employers (it is our current understanding that this will only apply to claims lodged after 1 July 2015); and
- there will no longer be a 7.5% cap on industry rates, meaning that industries with poorer claims experience could see an increase in their rate.

It is expected that further premium changes will be revealed over coming months, and be reflected in the premiums order that establishes the premium formulae.

To assist members to better understand the practical implications of the new Act, Ai Group has developed a seminar that will be delivered in Adelaide on 26 February 2015.

For further information, or to register, http://pdf.aigroup.asn.au/training/2014/14526_workcover_sa_w.pdf

Do you require further advice?

For membership services, contact the Ai Group BIZassistInfoline on 1300 78 38 44.

For information about our safety and workers' compensation consulting and training services, contact:

Consulting Services

Trinette Jaeschke
0400 282 477

Training and Events

Seema Khatri
0428 907 838



Tracey Browne
Manager, National Safety and Workers' Compensation
Policy and Membership Services