

# Workers' Compensation and Rehabilitation Amendment Regulation (No. 1) 2015

Explanatory notes for SL 2015 No. 135

made under the

*Workers' Compensation and Rehabilitation Act 2003*

## General Outline

### Short title

*Workers' Compensation and Rehabilitation Amendment Regulation (No. 1) 2015.*

### Authorising law

Section 584 of the *Workers' Compensation and Rehabilitation Act 2003*

### Policy objectives and the reasons for them

The Government made a number of commitments regarding Queensland's workers' compensation scheme in its pre-election policy document *Restoring the rights of Queenslanders injured at work*. This included reinstating the common-law rights for injured workers.

The *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015* (the Amendment Act) removes the greater than 5 per cent threshold for injured workers to access common law damages and restores the common law entitlement that existed prior to 15 October 2013, for injuries occurring on or after the date of the Queensland State election on 31 January 2015.

The Amendment Act inserts a new section 193A into the *Workers' Compensation and Rehabilitation Act 2003* (the Act), that provides a head of power to provide for the payment of additional lump sum compensation for workers who sustained an injury on or after 15 October 2013 and before 31 January 2015.

The *Workers' Compensation and Rehabilitation Amendment Regulation (No. 1) 2015* (the Amendment Regulation) prescribes the amount and conditions for the additional lump sum compensation under section 193A of the Act. It also establishes a panel to review decisions of an insurer in relation to this entitlement.

## **Achievement of policy objectives**

The policy objectives are achieved by amending the *Workers' Compensation and Rehabilitation Regulation 2014* (the Regulation) to prescribe the following matters under section 193A of the Act:

- in order to be entitled to the additional lump sum compensation an insurer must be satisfied, on the balance of probabilities, that the worker's employer is, or would have been, liable to pay damages to the worker for the injury sustained;
- procedures and timeframes for when the insurer is not satisfied on the evidence available that the condition has been met, including a requirement to provide reasons for the decision to the worker when it is determined that there is no entitlement;
- the payment of compensation eligible workers will be entitled to in accordance with a graduated scale dependant on their decided degree of permanent impairment;
- for additional payment where the eligible worker has engaged a lawyer to assist with gaining the additional lump sum entitlement;
- an injured worker is only entitled to one payment of additional compensation where there are multiple injuries from the same event;
- the establishment of a review panel comprised of three legal experts, to be appointed by the Minister, to review decisions of insurers about a worker's entitlement to additional lump sum compensation; and
- the process and timeframes for review applications considered by the panel.

The policy objectives are achieved by making other minor miscellaneous amendments for consistency with amendments in the Act.

## **Consistency with policy objectives of authorising law**

The Amendment Regulation is consistent with the main objectives of the *Workers' Compensation and Rehabilitation Act 2003*, that is to establish a workers' compensation scheme for Queensland that provides benefits for workers who sustain injury in their employment, for dependants if a worker's injury results in the worker's death and encouraging improved health and safety performance by employers.

The workers' compensation scheme in particular provides for compensation following for injuries sustained by workers in their employment. It is intended that the scheme should maintain a balance between providing fair and appropriate benefits for injured workers or dependants and persons other than workers and ensuring reasonable cost levels for employers, and ensure that injured workers or dependants are treated fairly by insurers.

## **Inconsistency with policy objectives of other legislation**

No inconsistencies with policy objectives of other legislation have been identified.

## **Alternative ways of achieving policy objectives**

The policy objectives can only be achieved by regulatory amendment.

## Benefits and costs of implementation

The introduction of the new additional lump sum compensation will have cost impacts for Queensland's workers' compensation scheme.

While the WorkCover Queensland Board sets premium annually, it has been estimated the impact of this entitlement can be achieved without an increase in the average premium rate of \$1.20 per \$100 wages paid. Due to the defined structure of this entitlement it will have a limited period of operation with application to a small group of workers and will not have a recurrent financial impact on the scheme.

There will also be some financial impacts for self-insurers employers who make up an estimated 9.5 per cent of claims within the Queensland Scheme (2014-15). The extent of this impact will vary between self-insurers.

## Consistency with fundamental legislative principles

The fundamental legislative principles in the *Legislative Standards Act 1992* requires that legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

The Amendment Regulation is consistent with fundamental legislative principles.

## Consultation

In pursuing its reform agenda, the Government made a commitment to work with industrial organisations and the legal community to seek a swift and calm transfer to the new workers' compensation system, with consideration of the rights of injured workers and the timing of workers' compensation payments.

To that end, the Government established a stakeholder reference group to advise the government on appropriate arrangements to reinstate common law rights for injured workers under the *Workers' Compensation and Rehabilitation Act 2003*. In formulating its advice, the group was required to give consideration to: the rights of injured workers; the sustainability of the workers' compensation scheme; the timing of the reforms and any transitional arrangements; ensuring that the reforms emphasise rehabilitation and return to work for workers and employers; and ensuring that the reforms contribute to Queensland's employment growth.

Membership of the group was drawn from employer representatives including the Chamber of Commerce and Industry Queensland, the AiGroup and Housing Industry Association, employee representatives including the Queensland Council of Unions, the Queensland Nurses' Union, the Construction, Forestry, Mining & Energy Union and Australian Workers' Union, legal representatives including the Queensland Law Society, the Bar Association of Queensland and the Australian Lawyers Alliance, and WorkCover Queensland and the Association of Self-Insured Employers Queensland.

The majority of members of the group raised significant concerns regarding the impact on workers injured between 15 October 2015 and 31 January 2015 who remain ineligible to access common law damages.

## **Notes of Provisions**

### **Short Title**

Clause 1 provides the short title of the Regulation.

### **Commencement**

Clause 2 provides that this regulation commences on 9 October 2015, the same date that section 193A of the *Workers' Compensation and Rehabilitation Act 2003* commences.

### **Regulation amended**

Clause 3 provides that this regulation amends the *Workers' Compensation and Rehabilitation Regulation 2014*.

### **Amendment of s103 (If dentist, doctor or nurse practitioner not available)**

Clause 4 amends s103 as a consequence of the amendments made in clauses 4 and 5 of the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015* (the 2015 Amendment Act). Section 103 will apply to applications for assessment of degree of permanent impairment before applying for compensation made under section 132A of the Act and applications for a certificate of dependency made under 132B of the Act. It also clarifies that s103 applies to applications under sections 132, 132A and 132B where a certificate cannot be provided because the dentist, doctor or nurse practitioner is not available to attend the worker.

### **Amendments of s104 (Certificate given by dentist, doctor or nurse practitioner)**

Clause 5 amends s104 as a consequence of the amendments made in clauses 4 and 5 of the 2015 Amendment Act. Section 104 will apply to applications for a certificate of dependency lodged under 132B of the Act. It also clarifies that s104 applies to applications under sections 132, 132A and 132B where a certificate is not lodged because the worker sustained the injury in another State or country.

### **Insertion of new s 105A**

Clause 6 inserts a new section 105A as a consequence of the amendments made in clause 5 of the 2015 Amendment Act. It prescribes the evidentiary requirements when applying for a certificate of dependency under s132B of the Act.

### **Amendment of pt 4, div 3 hdg (Entitlement to compensation for permanent impairment)**

Clause 7 amends the heading of Part 4 Division 3.

### **Amendment of s 109 hdg (Additional lump sum compensation for certain workers-Act, s 192(2))**

Clause 8 amends the heading of section 109 as a consequence of the amendments made in clause 26 of the 2015 Amendment Act to clarify that it applies to workers with a degree of permanent impairment of 30% or more.

### **Insertion of new pt 4, div 3A**

Clause 9 inserts a new Division 3A that sets out the amount of additional compensation and the conditions that must be met to be eligible for the additional lump sum compensation provided for under section 193A(2) of the Act.

Section 193A of the Act sets out that the entitlement for additional lump sum compensation applies to a worker who sustained an injury on or after 15 October 2013 and before 31 January 2015 that results in a degree of permanent impairment of five per cent or less, that is not a terminal condition and for which they have not accepted or rejected an application for compensation under section 189 of the Act. Section 193A(2) provides that the amount and conditions of the additional lump sum compensation are prescribed by regulation.

Section 112C provides that the amount of the additional lump sum compensation, for a worker who meets the qualifying condition under section 112D, is the amount provided for under schedule 4A (see clause 11).

Section 193A of the Act provides that entitlement is subject to conditions prescribed by Regulation. Section 112D prescribes that the condition is that an insurer must be satisfied, on the balance of probabilities, the worker's employer is, or would have been, liable to pay damages to the worker for the injury sustained; but for the fact that the worker was unable to seek damages due to the operation of the common law threshold. If a worker who sustained an injury on or after 15 October 2013 and before 31 January 2015 has had their degree of permanent impairment for the injury decided, then the insurer is required to decide if a worker satisfies the qualifying condition.

Under section 112G the insurer is to provide the worker with a notice that sets out the decision of the insurer on the workers entitlement for an additional lump sum payment under section 193A of the Act. If the worker meets the condition the notice will include the amount of the payment.

If the insurer decides the condition is not satisfied the notice must state the decision and advise the worker that they can ask the insurer for written reasons for the decision. A written request for reasons for the decisions must be made within 10 business days and the insurer must provide the reasons for the decision within 10 business days of the request. Any worker who asks for written reasons for the decision may apply to the panel for a review of the decision.

If the insurer does not have enough information to decide if the worker meets the condition the notice will advise the worker that they may provide additional information to the insurer. The notice must state that if additional information is not provided within 60 business days of receiving the notice then the worker is not entitled to additional lump sum compensation under section 193A and there is no right of review for this decision. If additional information is provided within 60 business days the worker must advise the insurer if they have engaged a lawyer to assist with providing the information. On request from a worker the insurer has the discretion, where a worker has a reasonable excuse, to allow additional time to provide the information.

The insurer has 60 business days after receiving additional information to make a decision on whether the worker meets the qualifying condition. If the insurer is not satisfied that the qualifying condition is met the insurer must provide the worker with the opportunity to attend a meeting to discuss the proposed decision and provide the worker

with any relevant information 10 business days before the meeting. The insurer must then decide whether the worker meets the qualifying condition within 10 business days of the meeting. Where no decision is made within 60 days of receiving additional information or within 10 days of a meeting the insurer is taken to have made a decision that the worker is not entitled the additional lump sum compensation. If the insurer decides the worker is not entitled they must provide written reasons for decision.

If the insurer has provided a written reason for decision or is taken to have decided the qualifying condition is not satisfied, the worker may apply for a review of the decision within 20 business days, setting out the reasons for requesting a review. Only if the insurer has not previously requested additional information from a worker, can the worker provide additional information in support of their application. When an application for review is made the insurer must provide the panel and the worker with any information used to decide whether the qualifying condition is satisfied.

The review is heard by a panel comprised of a chairperson and two members appointed by the Minister. Each member of the panel must be a qualified lawyer with significant experience in personal injury and negligence laws. In reviewing the insurer's decision the panel is not required to receive oral submissions. The panel will confirm the decision or cancel the decision and substitute a new one and provide a written notice and reasons for its decision. The panel's decision is final. If the panel decides the qualifying condition has been met the insurer must provide the worker with a written notice that sets out the amount of additional lump sum compensation they are entitled to.

#### **Insertion of new pt11**

Clause 10 sets out that where workers may be entitled to an additional lump sum compensation under section 193A of the Act, and they had their degree of permanent impairment assessed prior to these provisions commencing, the insurer must consider whether they meet the qualifying condition for the compensation as soon as practicable after commencement.

#### **Amendment of sch 3, hdg (Graduated scale of additional compensation for certain workers)**

Clause 11 amends the heading of Schedule 3.

#### **Insertion of new sch 4A**

Clause 12 inserts a new Schedule 4A which prescribes the additional lump sum payment under section 193A of the Act. The amount is calculated on a graduated scale based on two times the statutory lump sum entitlement for the degree of permanent impairment. If the worker has a notice of assessment for a physical injury and a notice of assessment for a psychological injury from the same event they are only entitled one payment for the injury that has the highest degree of permanent impairment. Schedule 4A also sets out a worker's entitlements to a payment towards legal costs if they have engaged a lawyer to undertake certain matters.

#### **Amendment of sch 13 (Dictionary)**

Clause 13 inserts various new definitions to support the new provisions.