Draft for comment

South Australia

Return to Work (Employment and Progressive Injuries) Amendment Bill 2023

A BILL FOR

An Act to amend the *Return to Work Act 2014*.

Contents

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Return to Work (Employment and Progressive Injuries) Amendment Act 2023*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Return to Work Act 2014*

3—Amendment of section 4—Interpretation

After subsection (17) insert:

(18) For the purposes of this Act, a work injury has stabilised if the worker's condition is unlikely to change substantially in the next 12 months with or without medical treatment (disregarding any temporary fluctuations in the condition that might occur).

(19) For the purposes of this Act, a terminal condition is a work injury that—

(a) is incurable; and

(b) will, in the opinion of a medical practitioner, cause death.

4—Amendment of section 5—Average weekly earnings

(1) Section 5(2)—after "subsection (1)" insert:

, other than where subsection (2a) applies

(2) Section 5—after subsection (2) insert:

(2a) This subsection applies if—

(a) the work injury that results in incapacity for work is a prescribed dust/fibre disease; and

(b) the injured worker elects to have this subsection apply rather than subsection (2).

(2b) For the purposes of subsection (1), if subsection (2a) applies, relevant employment is constituted by—

(a) employment with the worker's employer at the time that the prescribed dust/fibre disease is diagnosed by a medical practitioner; and

(b) if the worker is, at the time of that diagnosis, in the employment of 2 or more employers, employment with each such employer.

(2c) An election under subsection (2a)(b)—

(a) must be made in a manner and form approved by the Corporation; and

(b) cannot be withdrawn by the worker.

(3) Section 5(16)(a)—delete paragraph (a) and substitute:

(a) a reference to the relevant date is a reference to—

(i) unless subparagraph (ii) applies—the date on which the relevant injury occurs; or

(ii) if the worker has made an election under subsection (2a)(b)—the date on which the prescribed dust/fibre disease to which the election relates is diagnosed by a medical practitioner;

(4) Section 5—after subsection (16) insert:

(17) The Minister must not make a recommendation to prescribe a disease as a prescribed dust/fibre disease unless—

(a) the Minister has consulted with—

(i) 1 or more professional associations representing medical practitioners, including the Australian Medical Association (South Australia) Incorporated; and

(ii) the Corporation; and

(iii) the Advisory Committee; and

(b) the Minister is satisfied that it will be reasonable for the disease to be prescribed.

(18) In this section—

prescribed dust/fibre disease means a disease, attributable to exposure to a form of dust or to fibres, prescribed for the purposes of this definition by regulation made on the recommendation of the Minister (see subsection (17)).

5—Amendment of section 18—Employer's duty to provide work

(1) Section 18(2)—after paragraph (c) insert:

(ca) the worker's employment with the pre-injury employer has been properly terminated on the ground of serious and wilful misconduct (and the onus of establishing that lies on the employer); or

(2) Section 18—after subsection (2) insert:

(2a) In assessing whether it is reasonably practicable for the employer to provide employment for the purposes of subsection (2)(a), the following matters must be taken into account:

(a) the size and financial resources of the employer;

(b) the extent of any adjustments required due to the worker's injury;

(c) the risk to the worker of re-injury and the degree of harm that might cause;

(d) whether the worker and the employer can maintain trust and confidence in the employment relationship;

(e) the effect on other employees of the employer;

(f) any other relevant matter.

(3) Section 18(3) and (4)—delete subsections (3) and (4) and substitute:

(3) A worker who has been incapacitated for work in consequence of a work injury who seeks employment with the pre-injury employer in accordance with this section must, for the purpose of seeking the employment—

(a) give written notice to the employer (a ***subsection (3) notice***)—

(i) confirming that they are ready, willing and able to return to work with the employer; and

(ii) providing information about the type of employment that the worker considers that they are capable of performing; and

(iii) if the worker was a labour hire worker at the time of the work injury, the injury arose from employment while the worker was supplied to a host employer and the worker seeks the host employer to cooperate with the pre-injury employer in the provision of suitable employment to the worker—a statement to that effect; and

(b) comply with any other requirements prescribed by the regulations.

(4) A worker who gives a subsection (3) notice to their pre-injury employer must, if relevant, give the host employer a copy of the subsection (3) notice at the same time.

(4a) The pre-injury employer must, within 21 days of receiving a subsection (3) notice from a worker, notify the worker in writing whether they will provide the worker—

(a) with suitable employment of the type the worker considers that they are capable of performing (as set out in the subsection (3) notice); or

(b) with other suitable employment (being other suitable employment that the pre-injury employer is willing to provide).

(4b) If the pre-injury employer—

(a) refuses to provide the worker with suitable employment, the pre-injury employer must set out in the notice under subsection (4a) the grounds on which the refusal is made; or

(b) notifies the worker that they will provide other suitable employment under subsection (4a)(b), the pre-injury employer must set out in the notice the reasons why —

(i) employment of a kind referred to in subsection (4a)(a) is not being provided; and

(ii) the pre-injury employer considers the other suitable employment to be suitable.

(4c) If the pre-injury employer refuses or otherwise fails to provide suitable employment under this section, or the worker considers that any employment offered by the pre-injury employer under subsection (4a)(b) is not suitable, the worker may apply to the Tribunal for an order under subsection (5)—

(a) within 21 days after the date on which the pre- injury employer provided written notice under subsection (4a); or

(b) if the pre-injury employer failed to provide written notice under subsection (4a)—within 21 days after the end of the 21 day period in which the employer was required to give the notice under that subsection.

(4d) Subsections (1) to (4c) operate subject to the qualification that if a worker's capacity for work is at least equal to their pre-injury capacity, the application by the worker to the Tribunal must be made within 6 months after the worker returns to their pre-injury capacity (and a worker will not be taken to have returned to their pre-injury capacity if they continue to experience an intermittent or recurring incapacity).

(4) Section 18(5)—delete "subsection (3)" and substitute:

subsection (4c)

(5) Section 18—after subsection (5) insert:

(5a) In making an order under subsection (5), the Tribunal may determine the nature of the duties to be provided, the nature of any modifications necessary to enable the worker to perform those duties, the number of hours of work per week to be performed by the worker, and, if relevant, may provide for a graduated increase in duties or hours of work.

(5b) The Tribunal may also, in making an order under subsection (5) in a case involving a worker who included a statement of a kind referred to in subsection (3)(a)(iii) in their subsection (3) notice, make any order it considers appropriate requiring the host employer to cooperate with the pre-injury employer in respect of action taken by the pre-injury employer to comply with its obligation under this section to provide suitable employment to the worker.

(5c) The Tribunal may, in the case of an employer that is—

(a) a member of a group of self-insured employers comprised of related bodies corporate; or

(b) the Crown or an agency or instrumentality of the Crown,

make an order under subsection (5) that the employment be provided by—

(c) if paragraph (a) applies, the pre-injury employer or another member of the group (as specified in the order); or

(d) if paragraph (b) applies, the Crown or an agency or instrumentality of the Crown.

(5d) If the Tribunal makes an order in favour of a worker under subsection (5), the Tribunal may also order the employer to pay an amount equal to the wages or salary that the worker would have received had the employer provided suitable employment as a result of the worker seeking employment as contemplated by subsection (3)(a) and (b)—

(a) subject to the operation of subsection (5e); and

(b) subject to a determination of the Tribunal, in the exercise of its adjudicative function, to reduce the amount that would otherwise be payable under this subsection.

(5e) In determining an amount for the purposes of making an order under subsection (5d), the Tribunal must take into account—

(a) any weekly payments the worker was entitled to receive under Part 4 Division 4; and

(b) any remuneration earned by the worker from employment or other work,

in the period to which the order under subsection (5d) relates.

(6) Section 18(6) and (7)—delete subsections (6) and (7) and substitute:

(6) A party (other than the relevant compensating authority) to proceedings before the Tribunal under this section is entitled, subject to subsections (8) and (9) and any limits prescribed by regulation, to an award against the relevant compensating authority for the party's reasonable costs of the proceedings before the Tribunal.

(7) Section 18(9)—delete "worker" wherever occurring and substitute in each case:

party

(8) Section 18(12) to (15)—delete subsections (12) to (15) (inclusive) and substitute:

(12) An award of legal costs cannot exceed 85% of the amount that would be allowable under the relevant Supreme Court scale if the proceedings were in the Supreme Court.

(13) On receiving an application to the Tribunal under this section, the Registrar must immediately send copies of the application to the other parties to the proceeding and to the compensating authority.

(14) Within 21 days of receiving a copy of an application under subsection (13), the compensating authority must provide to the Tribunal any document or thing in the compensating authority's possession or control relevant to the application.

(15) The Tribunal may, in acting under this section, determine whether the worker has suffered a work injury within the meaning of this Act (without necessarily determining any other claim or right to compensation or any other benefit, service or support, or determining any other question, under this Act).

(15a) The Tribunal, in making an order under subsection (5), is not limited to considering only employment of the type the worker nominated in the subsection (3) notice and may take into account any change in capacity for work after the making of the application to the Tribunal or any other evidence before the Tribunal.

(9) Section 18(16)—delete "subsections (12) to (15) (inclusive)" and substitute:

this section

(10) Section 18—after subsection (16) insert:

(16a) A host employer must, to the extent that it is reasonable to do so, co-operate with a labour hire employer, in respect of action taken by the labour hire employer in order to comply with its obligation under this section to provide suitable employment to a worker.

(16b) For the purposes of subsection (16a), a host employer is required, to the extent that it is reasonable to do so—

(a) to respond as soon as practicable to a request for co-operation by the labour hire employer and in any event within 14 days of receiving a subsection (3) notice seeking the provision of suitable employment; and

(b) to participate in discussions with the labour hire employer and the worker on return to work planning and the provision of duties; and

(c) to provide the labour hire employer, the worker, and other parties involved in the return to work process with access to the workplace; and

(d) to provide duties at the host employer's workplace consistent with the worker's capacity (but nothing in this paragraph is taken to require the host employer to enter into an employment relationship with the worker).

(16c) The duty to provide suitable employment under subsection (1) extends—

(a) in the case of a pre-injury employer that is a member of a group of self-insured employers comprised of related bodies corporate—to each of the related bodies corporate in the group; and

(b) in the case of a pre-injury employer that is an agency or instrumentality of the Crown that is taken under section 130 to be registered as a self-insured employer—to all such agencies or instrumentalities of the Crown.

(16d) Despite subsection (3), if the pre-injury employer is a member of a group of self-insured employers comprised of related bodies corporate the subsection (3) notice may be given to the employer in the group nominated under section 129(12).

(11) Section 18—after subsection (17) insert:

(18) In this section—

host employer, in relation to a labour hire worker, means the employer to whom the worker was supplied as a labour hire worker at the time of the occurrence of the relevant work injury;

labour hire employer, in relation to a labour hire worker, means the employer of the worker as a labour hire worker at the time of the occurrence of the relevant work injury;

labour hire worker has the same meaning as in the *Labour Hire Licensing Act 2017*;

pre-injury capacity means the capacity that existed immediately before the occurrence of the work injury that resulted in the worker being incapacitated for work;

related bodies corporate—bodies corporate are ***related bodies corporate*** if they are related bodies corporate under section 50 of the *Corporations Act 2001* of the Commonwealth.

6—Insertion of section 19A

After section 19 insert:

19A—Jurisdiction to determine monetary claims

(1) The Tribunal (constituted as the South Australian Employment Court) has jurisdiction to hear and determine monetary claims for wages or salary payable under section 19.

(2) The Tribunal may only, in the exercise of jurisdiction under this section, make an order for costs where costs may be ordered in a monetary claim under the *Fair Work Act 1994*.

(3) In determining an amount on a claim under this section, the Tribunal must take into account any weekly payments the worker was entitled to receive over the period in relation to which the claim relates.

(4) A claim under this section must be made within 6 years after the sum claimed became payable.

(5) If the Tribunal makes an order for the payment of an amount under this section, the Registrar may issue a certificate under the seal of the Tribunal, certifying the amount payable and the person by whom and the person to whom it is payable.

(6) The certificate may be filed in a court that has civil jurisdiction up to, or exceeding, the amount of the certificate and it will then be enforceable as a judgment of that court.

(7) Nothing in this section limits the jurisdiction of the Tribunal under the *Fair Work Act 1994*.

7—Amendment of section 22—Assessment of permanent impairment

(1) Section 22(7)(a)—delete paragraph (a) and substitute:

(a) must not be made—

(i) until there is evidence that the injury has stabilised; or

(ii) unless—

(A) the injury is a condition prescribed for the purposes of this subparagraph by a regulation made on the recommendation of the Minister (see subsection (7a)); and

(B) any requirement prescribed by the regulations has been satisfied; or

(iii) unless the injury is a terminal condition;

(2) Section 22—after subsection (7) insert:

(7a) The Minister must not make a recommendation to prescribe a condition for the purposes of subsection (7)(a)(ii) unless—

(a) the Minister has consulted with—

(i) 1 or more professional associations representing medical practitioners, including the Australian Medical Association (South Australia) Incorporated; and

(ii) the Corporation; and

(iii) the Advisory Committee; and

(b) the Minister is satisfied that the condition is—

(i) serious and potentially life threatening if suffered by a person; and

(ii) extremely likely to cause an ongoing deterioration of a person's health, such that the degree of impairment resulting from the condition is unlikely to stabilise for a significant period of time.

8—Amendment of section 42—Federal minimum wage safety net

Section 42(2)(b)—delete paragraph (b) and substitute:

(b) a reference to the relevant date is a reference to the date applying in relation to the worker under section 5(16)(a); and

9—Amendment of section 122—Powers and procedures on a referral

(1) Section 122(6)(a)—delete paragraph (a) and substitute:

(a) an assessment must not be made—

(i) until there is evidence that the injury has stabilised; or

(ii) unless—

(A) the injury is a condition prescribed for the purposes of this subparagraph by a regulation made on the recommendation of the Minister (see subsection (6a)); and

(B) any requirement prescribed by the regulations has been satisfied; or

(iii) unless the injury is a terminal condition;

(2) Section 122—after subsection (6) insert:

(6a) The Minister must not make a recommendation to prescribe a condition for the purposes of subsection (6)(a)(ii) unless—

(a) the Minister has consulted with—

(i) 1 or more professional associations representing medical practitioners, including the Australian Medical Association (South Australia) Incorporated; and

(ii) the Corporation; and

(iii) the Advisory Committee; and

(b) the Minister is satisfied that the condition is—

(i) serious and potentially life threatening if suffered by a person; and

(ii) extremely likely to cause an ongoing deterioration of a person's health, such that the degree of impairment resulting from the condition is unlikely to stabilise for a significant period of time.

Schedule 1—Transitional provisions

1—Interpretation

(1) In this Schedule—

designated day means a day appointed by proclamation as the designated day for the purposes of the provision in which the term is used;

principal Act means the *Return to Work Act 2014*.

(2) Other terms used in this Schedule have meanings consistent with the meanings they have in the principal Act.

2—Average weekly earnings

(1) Section 5 of the principal Act, as in existence immediately before the designated day, continues to apply in relation to the average weekly earnings (and, if relevant, notional weekly earnings) of a worker if the determination of the average weekly earnings is made before the designated day.

(2) If, on or after the designated day, a disease is prescribed by regulation as a prescribed dust/fibre disease under section 5(18) of the principal Act, as enacted by section 4(4) of this Act, the prescription of the disease will not apply in relation to the average weekly earnings (and, if relevant, notional weekly earnings) of a worker if the determination of the average weekly earnings is made before the commencement of the regulation.

3—Employer's duty to provide work

The amendments made by section 5 of this Act to section 18 of the principal Act apply on or after the designated day (including in respect of a work injury attributable to a trauma that occurred before that day).

4—Monetary claims

Section 19A(1) of the principal Act, as enacted by section 6 of this Act, apply in relation to an application made to the Tribunal on or after the designated day.

5—Amendment of Impairment Assessment Guidelines

(1) The Impairment Assessment Guidelines are amended or modified in the manner set out in this clause.

(2) Clause 1.13 and 1.14 of the Impairment Assessment Guidelines—delete the clauses and substitute:

1.13 An assessment of whole person impairment is only to be conducted when one of the conditions in section 22(7)(a) of the Act has been satisfied.

1.14 If an assessment cannot proceed under clause 1.13, the assessor must provide an explanation about why the assessment must be deferred.

(3) Clause 2.3 of the Impairment Assessment Guidelines—delete "must be at MMI" and substitute:

must be stabilised

(4) Clause 2.3 of the Impairment Assessment Guidelines—delete "must be at MMI" and substitute:

must be stabilised

(5) Clause 2.22 of the Impairment Assessment Guidelines—delete "to permit adequate time to achieve MMI" and substitute:

to allow adequate time for the injury to have stabilised

(6) Clause 3.47 of the Impairment Assessment Guidelines—delete "to permit adequate time to achieve MMI" and substitute:

to allow adequate time for the injury to have stabilised

(7) Clause 16.4 of the Impairment Assessment Guidelines—delete "must have reached maximum medical improvement (MMI – refer introduction 1.13 – 1.14)" and substitute:

must satisfy the requirements of section 22(7)(a) of the Act

(8) Clause 17.3 of the Impairment Assessment Guidelines—delete "has stabilised/reached MMI" and substitute:

satisfies the requirements of section 22(7)(a) of the Act

(9) Appendix 1 of the Impairment Assessment Guidelines—delete "MMI" and substitute:

the injury being stabilised

(10) Appendix 3 of the Impairment Assessment Guidelines—delete the item relating to "MMI".

(11) A reference to "MMI" in the *American Medical Association Guides to the evaluation of permanent impairment, 5th edition (AMA5)* (as adopted by the Impairment Assessment Guidelines) will be taken to be a reference to one of the conditions in section 22(7)(a) of the Act.