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South Australia

Return to Work (Employment and Progressive Injuries) Amendment Act 2024

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

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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 2024*.

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 (regardless of 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.

(20) The regulations may provide that a medical practitioner is not able to act under subsection (19)(b) unless the medical practitioner—

(a) complies with any requirements prescribed by the regulations; or

(b) holds qualifications prescribed by the regulations; or

(c) satisfies any other criteria prescribed by the regulations.

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(b) cannot be withdrawn by the worker.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; and

(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—Insertion of section 17A

After section 17 insert:

17A—Employer and Corporation not to be present at examination or treatment of worker without consent

(1) Subject to this section, a worker's employer or the Corporation must not be present while a worker is—

(a) being physically or clinically examined, or treated, by a health practitioner; or

(b) undergoing any diagnostic examination or test required for the purposes of the worker's treatment by a health practitioner.

(2) A worker's employer or the Corporation may be present while the worker is at an examination, treatment or testing referred to in subsection (1)(a) or (b)—

(a) if the worker gives written agreement to their presence in the designated form; or

(b) in circumstances prescribed by the regulations.

(3) Nothing in this section prevents a worker's employer or the Corporation from being present during a consultation involving the worker and a health practitioner for the purposes of discussing the worker's recovery and return to work.

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

(1) Section 18(1)—after "previous employment)," insert:

, including if the worker has ceased to be incapacitated for work in consequence of the work injury

(2) 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

(3) Section 18(2)(d)—delete "between the worker, the employer and the Corporation under section 25(10)" and substitute:

to by the worker under section 25(10a)

(4) 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—containing a statement to that effect; and

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

(4) A subsection (3) notice must be supported by evidence of the worker's capacity for work.

(4a) 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 and the supporting evidence under subsection (4) as soon as is reasonably practicable after giving the notice to the pre-injury employer.

(4b) The pre-injury employer must, within 1 month 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).

(4c) 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 (4b) the grounds on which the refusal is made; or

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

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

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

(4d) 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 (4b)(b) is not suitable, the worker may apply to the Tribunal for an order under subsection (5)—

(a) within 1 month after the date on which the pre-injury employer provided written notice under subsection (4b); or

(b) if the pre-injury employer failed to provide written notice under subsection (4b)—within 1 month after the end of the 1 month period in which the employer was required to give the notice under that subsection.

(4e) Subsections (1) to (4d) operate subject to the qualification that the worker cannot apply to the Tribunal for an order under subsection (5) if, at the time of giving a subsection (3) notice to the employer, the worker had ceased to be incapacitated for work in consequence of the work injury and did not give that notice within 6 months of ceasing to be incapacitated.

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

subsection (4d)

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

(5a) In making an order under subsection (5), the Tribunal may—

(a) specify any 1 or more of the following:

(i) the nature and range of duties to be provided in the suitable employment;

(ii) the nature of any adjustments the employer must make to enable the worker to perform those duties;

(iii) the number of hours each day or week that the worker is to be provided with suitable employment; and

(b) as part of the order, order that any of the specified matters set out in paragraph (a) be implemented in stages, in accordance with a recovery/return to work plan or on some other reasonable basis.

(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 comply with subsection (16a) (and a host employer has the right to be heard in any proceedings in which such an order is sought).

(5c) Subject to subsection (5d), 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) In a case where subsection (5c)(a) applies and the Tribunal determines to make an order under subsection (5), the order should require that the employment be provided by the pre-injury employer unless there are good reasons for it to be provided by another member of a self-insured group.

(5e) If the Tribunal makes an order in favour of a worker under subsection (5), the Tribunal must make an order that the employer pay an amount (the ***prescribed amount***) to the worker to reflect the wages or salary the worker would have been expected to receive in the suitable employment if it were provided during the period from the day on which the worker provided the subsection (3) notice to the employer until the making of the order (the ***relevant period***).

(5f) In determining the prescribed amount, the Tribunal must—

(a) apply the principle that the purpose of ordering the payment of the prescribed amount is to put the worker in the financial position that they would have been in, in terms of relevant remuneration during the relevant period, if the suitable employment had been provided during the relevant period; and

(b) adopt the worker's notional weekly earnings during the relevant period for the purposes of the determination, unless the Tribunal is satisfied that there is good reason to adopt a different amount to represent the worker's weekly earnings during the relevant period (or part of the period); and

(c) in relation to any part of the relevant period where the worker was entitled to weekly payments under Part 4 Division 4, order payment of an amount that represents the difference between—

(i) the relevant remuneration the worker would have been entitled to receive if the suitable employment had been provided during the period; and

(ii) the weekly payments the worker received during the period; and

(d) in relation to any part of the relevant period where the worker was not entitled to weekly payments under Part 4 Division 4, take into account any remuneration earned by the worker from employment or other work during the period.

(5g) For the purposes of subsection (5f), ***relevant remuneration*** during the relevant period means the sum of—

(a) the wages or salary the worker would have been expected to receive from suitable employment during that period (determined in accordance with subsection (5f)(b)); and

(b) any weekly payments the worker would have been entitled to receive under Part 4 Division 4 during that period if the worker had received the wages or salary referred to in paragraph (a).

(5h) Despite subsection (5e) or (5f), the Tribunal may reduce the prescribed amount in a particular case having regard to the circumstances of the case.

(7) 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) 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.

(7a) 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 relevant compensating authority.

(7b) Within 21 days of receiving a copy of an application under subsection (7a), the compensating authority must provide to the Tribunal any document or thing in the relevant compensating authority's possession or control relevant to the application.

(7c) The Tribunal may, in acting under this section—

(a) hear and determine an application concurrently with another proceeding under this Act; and

(b) determine whether the worker has been incapacitated for work in consequence of a work injury if that question has not been previously determined (and in those circumstances the relevant compensating authority has the right to be heard on that question).

(7d) 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.

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

party

(9) Section 18(14)—delete "subsection (3)(a)" and substitute:

subsection (3)

(10) Section 18(16)—delete “subsections (12) to (15) (inclusive)” and substitute:

this section

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

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

(a) communicating with a labour hire employer about co-operation in the provision of any suitable employment requested by a worker under a subsection (3) notice; and

(b) participating in discussions with the employer and the worker about the return to work planning, including in relation to the establishment of a recovery/return to work plan; and

(c) providing the labour hire employer, the worker and other parties involved in the return to work process with access to the workplace, including for the performance of duties by the worker in their employment with the labour hire employer; and

(d) complying with any other requirements prescribed by the regulations.

(16b) Nothing in subsection (16a) requires a host employer to enter into an employment relationship with a 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).

(12) Section 18(17)—delete subsection (17) and substitute:

(17) In this section—

host employer, in relation to a labour hire worker, means the person who obtained, at the time of the occurrence of the relevant work injury, the services of the worker as part of labour hire services (within the meaning of section 7 of the *Labour Hire Licensing Act 2017*);

labour hire employer, in relation to a labour hire worker, means the employer who has supplied, at the time of the occurrence of the relevant work injury, the services of the worker to the host employer as part of labour hire services (within the meaning section 7 of the *Labour Hire Licensing Act 2017*);

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

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;

relevant compensating authority means the Corporation or a self-insured employer, depending on which entity has paid compensation under this Act, or is liable to pay compensation under this Act, in the particular case.

7—Amendment of section 19—Payment of wages for alternative or modified duties

Section 19—delete "unless otherwise determined by the Corporation"

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

9—Amendment of section 22—Assessment of permanent impairment

(1) Section 22(6a)—delete "If" and substitute:

Subject to subsection (6b), if

(2) Section 22—after subsection (6a) insert:

(6b) If the Impairment Assessment Guidelines are amended or substituted, the guidelines in operation immediately before the commencement date of the amendment or substitution will continue to apply in relation to the assessment of permanent impairment of a worker's injury if, before that commencement date—

(a) the worker's injury satisfies the requirements of subsection (7)(a); and

(b) the worker attended an appointment with an accredited medical practitioner selected in accordance with the Impairment Assessment Guidelines for the purposes of an assessment of permanent impairment of that injury.

(3) 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;

(4) 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)(A) 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.

10—Amendment of section 25—Recovery/return to work plans

(1) Section 25(3)—delete "and the Corporation" and substitute:

, the Corporation, and where relevant, the host employer

(2) Section 25(4)—delete "and on the employer (and, in the case of a dispute, will continue to bind the worker and the employer" and substitute:

, the employer and, where relevant, the host employer (and, in the case of a dispute, will continue to bind the worker, the employer and, where relevant, the host employer

(3) Section 25(5)(a)—after "the employer" insert:

and, where relevant, any host employer

(4) Section 25(5)(c)(i)—delete "or" and substitute:

and

(5) Section 25(7)—delete "the worker and the employer a copy of the recovery/return to work plan." and substitute:

—

(a) the worker and the employer and, where relevant, any host employer; and

(b) as far as reasonably practicable, any health practitioner who is treating the worker for a relevant work injury,

a copy of the recovery/return to work plan.

(6) Section 25—after subsection (10) insert:

(10a) Any proposed new or other employment options for a worker referred to in subsection (10) must be agreed to by the worker before being adopted as part of the recovery/return to work plan.

(7) Section 25—after subsection (11) insert:

(12) If, in relation to a pre-injury employer that is a member of a group of self-insured employers comprised of related bodies corporate, the duty to provide suitable employment to a particular worker is extended in accordance with section 18 to a related body corporate in the group, a reference in this section to an employer includes a reference to the related body corporate.

(13) If, in relation to 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, the duty to provide suitable employment to a particular worker is extended in accordance with section 18 to another agency or instrumentality of the Crown, a reference in this section to an employer includes a reference to the other agency or instrumentality.

(14) In this section—

host employer and ***related bodies corporate*** have the same meanings in this section as in section 18;

pre-injury employer—see section 18(1).

11—Amendment of section 37—Prescribed benefits

Section 37—after paragraph (b) insert:

(ba) any prescribed amount ordered by the Tribunal to be paid to the worker by the employer under section 18(5e);

12—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

13—Amendment of section 48—Reduction or discontinuance of weekly payments

Section 48(2)(e)—delete "the worker is dismissed from employment for" and substitute:

the worker's employment has been properly terminated on the ground of

14—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)(A) 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.

15—Amendment of section 129—Self-insured employers

Section 129—after subsection (12) insert:

(12a) The Corporation must publish, on a website determined by the Minister, the name of the employer nominated in any application for registration referred to in subsection (12) and that employer's phone number and address.

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 6 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 8 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 first edition of the Impairment Assessment Guidelines is 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 2.22 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

(5) 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

(6) 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

(7) 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

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

the injury being stabilised

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

(10) 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.

(11) To avoid doubt, a reference to an injury being at MMI in a report prepared (whether before or after the commencement of this clause) for the purposes of an assessment of permanent impairment is to be taken to be a reference to the injury being stabilised.