



THE LAW SOCIETY  
OF NEW SOUTH WALES

## FACT SHEET: WORKERS COMPENSATION

In June 2012 the NSW government introduced sweeping changes to the workers compensation scheme with the Workers Compensation Legislation Amendment Act 2012 (the 2012 Act). The 2012 Act amended the Workers Compensation Act 1987 and the Workplace Injury Management and Workers Compensation Act 1998.

There have been substantial changes to entitlements, the claims process and claims dispute process which in turn impact on the matters that are now dealt with by the Workers Compensation Commission. The 2012 Act established an independent external complaints resolution mechanism through the appointment of an independent statutory office, the WorkCover Independent Review Office (WIRO) one of whose responsibilities is the administration of the new Independent Legal Assistance and Review Service.

### CHANGES TO BENEFITS

The new entitlements for weekly benefits are dependent on:

- the period (in aggregate weeks) for which the worker has been receiving weekly payments
- capacity for work – as assessed by the insurer – and work status

0-13 weeks	The lesser of: <ul style="list-style-type: none"> <li>• 95% of pre-injury average weekly earnings (PIAWE) less any current weekly earnings</li> <li>• maximum weekly compensation amount (prescribed) less any current weekly earnings</li> </ul>
14 – 130 weeks (2.5 years)	If working 15 or more hours per week, the lesser of: <ul style="list-style-type: none"> <li>• 95% of PIAWE less any current weekly earnings</li> <li>• maximum weekly compensation amount less any current weekly earnings</li> </ul> If not working 15 hours per week, the lesser of: <ul style="list-style-type: none"> <li>• 80% of PIAWE less any currently weekly earnings</li> <li>• maximum weekly compensation amount less any current weekly earnings</li> </ul> NOTE: after one year, overtime and shift allowances are excluded from PIAWE
130 – 260 weeks (2.5 – 5 years)	If no work capacity indefinitely, or if working 15+ hours and earning a specified sum per week and unable to increase how much work/earn indefinitely, the lesser of: <ul style="list-style-type: none"> <li>• 80% of PIAWE less any current weekly earnings</li> <li>• maximum weekly compensation amount</li> </ul> If some work capacity but not working 15+ hours and earning a specified sum, or if worker could increase how much worked/earned then payments cease
260 weeks + (5 years)	Benefits will cease except for <ul style="list-style-type: none"> <li>• seriously injured workers (30 + % permanent impairment)</li> <li>• workers with greater than 20% permanent impairment who have no work capacity or are working 15 hours or more and earning a specified sum per week who will receive the lesser of               <ul style="list-style-type: none"> <li>– 80% of PIAWE less any current weekly earnings</li> <li>– maximum weekly compensation amount</li> </ul> </li> </ul>

For all workers, benefits cease when they reach retirement age.

## PIAWE

Weekly payments are based on the workers pre-injury average weekly earnings rather than 'current weekly wage rate' which incorporates shift allowance and overtime but only in the first 52 weeks of weekly payments.

The distinction between award and non-award workers is removed.

## EXEMPT CLAIMANTS

Claimants exempt from all the 2012 changes include:

- police officers
- paramedics
- fire fighters
- coal miners
- workers who make dust diseases claims

However, these workers do need to submit the new certificate of capacity which has replaced the old medical certificate.

## PERMANENT IMPAIRMENT COMPENSATION

Injured workers can only be assessed once for degree of permanent impairment for threshold purposes and to claim once for lump sum payment for permanent impairment.

Lump sum compensation for permanent impairment is only payable when a worker is assessed as having more than 10% permanent impairment.

For psychiatric and psychological injury claims, the minimum level is 15% permanent impairment. Lump sum compensation for pain and suffering has been abolished.

The Court of Appeal decision of *Goudappel v ADCO Constructions Pty Ltd* [2013] NSWCA 94 ruled that the 2012 amendments which sought to restrict a worker's entitlements to lump sum compensation had little retrospective operation. The Court held that amendments to s 66 and s 67 of the *Workers Compensation Act 1987* do not apply if a claim of any kind in respect of the same injury was made prior to 19 June 2012. This would have allowed workers with pre 19 June 2012 claims to bring claims for impairment under s 66 of less than 11% whole person impairment and pain and suffering under s 67 if the applicable threshold (10% WPI) is satisfied. In 2014, the decision was successfully challenged in the High Court which held the amendments did apply to claims for compensation pursuant to s66 made on or after 19 June 2012 where the worker has not made a claim specifically seeking compensation under s66 or s67 before 19 June 2012.

## MEDICAL RELATED EXPENSES

Medical and related expenses are generally time limited to 12 months from when the worker ceases to be entitled to weekly payments. If the injured worker has not received weekly benefits, these expenses are time limited to 12 months after the claim was made.

If the worker is 'seriously injured' (more than 30% whole person impairment) the 12 month limit does not apply.

Pursuant to the Workers Compensation Amendment (Existing Claims) Regulation 2014 a worker with an existing claim, being a claim in respect of an injury made before 1 October 2012 is exempt from this 12 month limit until retirement age, if the worker's injury has resulted in impairment of greater than 20%. Compensation payable in respect of artificial aids is also exempt from the 12 month limit, with respect to these existing claims.

## CHANGES TO ENTITLEMENTS

**Journey claims** can only be made if there is a real and substantial connection between the employment and the incident out of which the injury arose

**Heart attacks/stroke claims** can only be made if the nature of the employment concerned gave rise to a significantly greater risk of the worker suffering the injury

**Disease claims** can only be made if the employment was the main contributing factor

**Nervous shock claims** can only be made where the nervous shock is a work injury (and so cannot be made by the relatives of an injured or deceased worker).

## WORK CAPACITY ASSESSMENTS

Work capacity is the injured worker's capacity to return to work in suitable employment (not necessarily pre-injury employment).

The insurer will assess the worker's capacity throughout the life of the claim and it is therefore not a one-off 'test'. Work capacity decisions will determine the worker's entitlement to weekly payments.

A new 'certificate of capacity' provided by a doctor replaces the WorkCover medical certificate for all claims from 1 October 2012 and is used together with other sources of information in determining work capacity.

## WORK CAPACITY REVIEW PROCESS

There is a three stage review process.

If a worker disagrees with the insurer's work capacity decision, workers can request reviews by (in this order)

1. the insurer
2. WorkCover
3. the new WorkCover Independent Review Officer (WIRO) (in effect from 1 October 2012)

Workers have 30 days after being notified of each work capacity decision to apply for a review.

Section 44(6) of the *Workers Compensation Act 1987* provides that legal practitioners who provide advice with respect to the review of a work capacity decision are not entitled to be paid.

## WIRO

WIRO is an independent office established as part of the changes to oversee the Workers Compensation Scheme in New South Wales, which was operational from 1 October 2012.

WIRO's functions and responsibilities are to:

- investigate complaints by workers about insurers' decisions
- review work capacity decisions
- administer the Independent Legal Assistance and Review Service (ILARS)

## ILARS

The Independent Legal Assistance and Review Service (ILARS) is designed to facilitate access to free independent legal advice to injured workers where there is a disagreement with insurers regarding entitlements.

Legal advice is provided by external lawyers. Lawyers wanting to advise injured workers must apply to WIRO for approval as a legal service provider, providing details of workers compensation experience. WIRO will then assess grant applications forwarded by lawyers and provide written authorisation for activity and notification of fees payable.

## WORKERS COMPENSATION COMMISSION

Certain disputes including most weekly payment matters, excluding liability disputes will no longer be dealt with in the Commission.

Matters remaining in the Commission will include:

- disputes concerning liability and causation such as issues relating to 'injury', 'worker', s9A relating to substantial contributing factor
- some journey claims – those arguing a 'real and substantial connection' with employment

- heart attack and stroke – ‘significantly greater risk of injury’
- disease cases – disputes concerning what is a ‘main contributing factor’ and disputes over deemed dates
- permanent impairment claims for more than 10%
- medical appeals with potential activity around the new permanent impairment thresholds of 11, 20 and 30%.

## **COSTS**

Prior to the 2012 amendments insurers met injured worker’s costs at rates regulated by WorkCover. Section 341 of the *Workplace Injury Management and Workers Compensation Act 1998* now provides that each party is to bear the party’s own costs in or in relation to a claim for compensation. ILARS was introduced to meet the needs created by s 341 amendments. However, ILARS cannot assist with respect to issues arising from work capacity decision reviews. Section 44(6) of the *Workers Compensation Act 1987* provides that a legal practitioner acting for a worker is not entitled to be paid or recover any amount for costs incurred in connection with a review under this section of a work capacity decision of an insurer.