2002

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Workers Compensation Regulations 2002

Explanatory Statement

Circulated by authority of

Simon Corbell MLA
Minister for Industrial Relations

AUSTRALIAN CAPITAL TERRITORY

Workers Compensation Regulations 2002

Subordinate Law No. SL2002-20

Explanatory Statement

Overview

The new Workers Compensation Regulations provide for modern methods of medical assessment, rehabilitation and dispute resolution. The Regulations also provide for the approval of appropriate insurers, self-insurers and rehabilitation providers.

The Regulations support the implementation of the *Workers Compensation Amendment Act 2001,* by providing clear guidance for the key parties regarding injury management. Requirements for modern medical methods, rehabilitation, referencing and conciliation are intended to reduce unnecessary disputes.

The power to make these regulations is found under section 223 (previously numbered section 30) of the *Workers Compensation Act 1951*.

Detail

Part 1: Preliminary

Part one provides for the name and commencement of the regulations. The *Workers Compensation Regulations 2002* are to commence on 1 July 2002.

Part 2: Interpretation generally

Regulation 5(1)(a) empowers the Minister to approve medical guidelines. The application of guides, in hospital settings, outpatient settings, non-legal rehabilitation settings etc, is a normal, contemporary practice. Any guides or pathways approved by the Minister are intended for doctors' use as a reference. If the doctor determines that the guide's expected path of treatment is not appropriate for their patient they must simply make reference to where and why they have preferred a different path to that set out in the guide.

The medical guides would set out clinically relevant research in a tool which can be used for diagnosis, prognosis and treatment.

Regulation 5(1)(b) empowers the Minister to determine a guide, or methodology, for doctors, to use in assessing a permanent injury under part 4.4 of the Act.

Regulation 7 enables the Minister to approve clinically relevant research material. Clinically relevant research is medical research which has reached a point of refinement, testing and professional scrutiny that enables the research to be applied by doctors when treating their patients.

Under regulation 7, it is intended that licensed internet sites which are established for the use of medical professionals, may be approved as a source of clinically relevant research.

Regulation 8 defines evidence-based methodology. The application of the methodology is explained under part 3, below.

Part 3: Medical assessments

Part 3 outlines the method of medical assessment to be used by all medical practitioners under the scheme and the use of specialists for treatment purposes or reporting purposes.

Regulation 9 stipulates that doctors must use evidence based methodology when conducting and reporting on a medical assessment. Doctors must consider the particular investigations of a person (clinical examination, X-rays, blood tests etc) and any known clinically relevant research, or guidelines, when conducting the assessment. When recording the assessment, the doctor must reference the research or guideline.

The four categories of aetiology, diagnosis, prognosis, and medical treatment provide a structure for all medical assessments to be made. These categories in combination with the requirement to reference clinically relevant research and guidelines will provide the insurer's injury management program with essential medical information to make informed decisions. This essential information will also assist rehabilitation providers to prepare personal injury plans for injured employees.

To remove any confusion, the following are examples of how clinically relevant research or medical guidelines would be applied.

> An example of a medical guideline:
>
> (This example is taken from the British Colombia Workers Compensation Board) A guide for post-surgical rehabilitation for rotator cuff repair could be developed using clinically relevant research as a basis, for approval by the Minister. The guide could outline expected treatment, activities and progress over 0-3 weeks, 4-6 weeks, 7-12 weeks, 12-16 weeks and over 16 weeks. The guide could suggest

that, under normal circumstances, a patient should be returning to full-strength by week 16.

When assessing an injured person with a rotator-cuff injury that requires surgery, it would be expected that the treating doctor would consider the guide when documenting the assessment.

The guide does not replace a doctor's judgement and skill. A patient's particular circumstances may require a different approach or time frame. However, the factors that determine a different approach, or time frame, should be recorded by the treating doctor.

An example of applying clinically relevant research:

A cleaner suffers a needle stick injury emptying a waste paper bin. The injury causes little physical damage but creates great anxiety as the person waits for the outcome of an HIV test. The test is negative but the person has a debilitating psychological reaction to bins. The patient wants to overcome the fear, but is unable to meaningfully engage in their work.

The doctor reviews research into the various strategies to deal with this kind of anxiety. After considering the research and the patient's particular circumstances, the doctor determines that Cognitive Behavioural Therapy is the treatment strategy that holds the greatest probability of success for the person.

When completing the medical certificate the doctor would make reference to this research under the heading of 'treatment'. This draws the attention of the rehabilitation provider and the insurer's injury management program to the research, and enables the parties to reference the research when developing the personal injury plan.

In developing the personal injury plan for the person, the doctor, in consultation with the patient and the rehabilitation provider, incorporates the treatment into the plan.

An example of applying a medical guideline:

A guide to diagnose and treat low back pain could be approved by the Minister. The guide provides a number of clinical determinants to distinguish between serious spinal injury, a nerve root problem and acute low back pain. The guide is based upon clinically relevant research, and provides indicators of recovery time and probabilities of particular diagnoses.

The guide also provides a guide to expected time frames for recovery and possible treatment strategies for acute low back pain, that is not a serious spinal injury or a nerve root problem.

A mechanic suffers a lower back strain, causing pain and restricted mobility. The doctor examines the patient and considers the guide. The doctor determines the patient is not suffering from serious spinal injury nor nerve root damage.

After examining the patient and considering the guide, the doctor determines that the guide's expected path of treatment and recovery is applicable to the patient. The doctor explains the treatment plan to the patient and sets the first steps into motion. In completing the medical certificate, the doctor would note the aetiology of the injury and make references to the guide when documenting the diagnosis, prognosis and treatment.

An example of considering a medical guideline but not applying a medical guideline:

Using the above example of the mechanic, after examining the patient and considering the guide, the doctor determines that the guide's expected path of treatment is not appropriate for their patient. The doctor maps out a treatment plan, explains the plan to the patient and sets the first steps into motion. In completing the medical certificate the doctor would make reference to where and why they have preferred a different path to that set out in the guide.

Regulation 10 distinguishes between medical assessments by specialists that are referred by a person's treating doctor and those that are referred by a worker, employer or their representatives.

This provision is made to distinguish between assessments that are conducted by specialists who are assisting the treating doctor to treat the patient, and assessments that are conducted to confirm or challenge a person's medical condition. This separation of a treatment stream and a reporting stream is intended to prevent the stagnation of medical treatment of an injured person due to litigious factors.

The notice required by regulation 10 ensures that the reasons for any referral to a specialist to confirm or challenge a person's medical condition is known by all parties. The imperative to provide notices also dissuades all parties from 'doctor shopping'.

Any medical assessments conducted by medical specialists must be consistent with evidence based methodology.

Regulation 11 states that reports made for the purpose of confirmation or challenge must identify any differences between the specialist's assessment and any assessments conducted by other doctors of the person's injury. The specialist's report must also outline the specialist's medical assessment of the person, and why the specialist prefers their own assessment.

Copies of any and all medical specialist reports for the purpose of confirmation or challenge must be disclosed by the requesting party to the other parties mentioned in regulation 10.

Regulation 12 enables the treating doctor to refer the injured worker to a specialist for treatment. Provided the worker agrees, the medical specialist becomes the worker's treating doctor. The first assessment by the new treating doctor (the medical specialist) must address the four categories of medical assessment (aetiology, diagnosis, prognosis and treatment) using evidence based methodology.

Part 4: Medical referees

Part 4 sets out the purpose and function of medical referees and provides for the appointment of medical referees. Medical referees are expert advisers that can be called upon by a conciliator or a Court. Medical referees do not make decisions about a persons claim, but assess all existing medical evidence and provide a report on the worker's medical condition to the parties involved in the conciliation and the conciliator, or the Magistrate.

Regulation 13 refers to consultation that may be initiated by the Minister when considering appointing medical referees.

Regulation 14 explains what a medical referee must do when asked to provide professional advice on a person's medical condition by a conciliator or the Court. The medical referee is an expert for the use of the conciliator or the Court. Medical referees do not make legal or administrative decisions about a person's claim. In a court setting the medical referee may be cross examined by the parties to the hearing, with the Magistrate's consent.

The medical referee's report must be provided to the conciliator or the Magistrate for disclosure to the parties as soon as practicable.

Part 5: Rehabilitation providers

Part 5 sets out the role of rehabilitation providers and provides for the approval of rehabilitation providers. Part 5 enables the Minister to approve providers based upon criteria determined by the Territory, this contrasts with the previous arrangement of relying upon approvals from other jurisdictions.

Division 5.1 defines psycho-social factors. This is a new conceptual tool used by modern workers compensation schemes internationally. The regulations require rehabilitation providers to develop reasonable rehabilitation strategies to deal with psycho-social factors that may be restricting a person's rehabilitation, in the context of assisting the person to return to work.

Division 5.2 outlines what the Minister must take into account when considering a person or entity's application to be approved as a rehabilitation provider.

The intention of regulation 19(e) is to require disclose of any ownership, or management relationships, approved rehabilitation providers might have with insurers or other

organisations that have a material involvement in the Territory's workers compensation scheme.

Division 5.3 outlines the conditions on a provider's approval. Regulation 22 sets out the qualifications or pre-conditions required of professionals who will be working as, or for, rehabilitation providers.

Regulation 23 requires rehabilitation providers to keep detailed written records about cases referred to them by insurers. The requirements are consistent with the intention that personal injury plans should be in writing and tailored to the particular worker. The record should accurately reflect the deliberations leading to the personal injury plan, the specifications of the plan itself and anything that led to a change in the plan.

Regulation 24 requires providers to keep a database of statistics arising from results of referred claims. If a provider is no longer approved or ceases operation for what ever reason, the records must be passed to the Minister or the Minister's delegate. Alternatively the Minister may ask providers to pass on the data to a Government agency.

Division 5.4 outlines the rehabilitation provider's role. Regulation 30 emphasises the rehabilitation provider's role in leading and initiating the development of personal injury plans. Regulation 30 also outlines what rehabilitation providers must consider when developing a personal injury plan. Regulation 30(4) only requires providers to develop reasonable strategies to address factors inhibiting rehabilitation in the context of assisting the person to return to work.

Division 5.5 sets out what actions the Minister may take to redress a breach of the rehabilitation provider's obligations under the Act or Regulations. The division allows the Minister to revoke a rehabilitation provider's approval, or take other actions, including imposing penalties or conditions on approval.

Should there be further guidance or clarification required, regulation 31 empowers the Minister to make protocols.

Part 6: Conciliation

Part 6 introduces a pre-court dispute resolution process for workers compensation claims. The intention of conciliation is to resolve disputes that may arise in the context of injury management. The aim of conciliation is to enable injury management to continue. The focus of conciliation is intended to be the particular issue(s) in dispute rather than the claim as a whole (regulation 37).

Regulation 38(2) stipulates that the rejection of a worker's claim cannot be addressed by conciliation. Workers disputing the rejection of their claim may file an application with the Magistrate's Court.

Regulation 40 ensures that the parties exchange information about the matter before the conciliator at least seven days prior to the conciliation hearing.

Regulation 41 provides that a party may be represented at the conciliation hearing. A representative could be an advocate, a union official, a solicitor etc.

Regulation 44 outlines the conciliator's powers to: decide that an issue is not appropriate for conciliation; assist the parties to reach agreement and record the agreement; and make a recommendation if the parties cannot reach an agreement. The deliberations and discussion can not be used as evidence in arbitration. However, a recommendation can be admitted in evidence for arbitration.

Regulation 46 requires the Minister to review the effectiveness of the conciliation process after August 2004.

To facilitate any administrative or procedural matters, the Minister has the power to make a protocol about conciliation under regulation 47.

Part 7: Arbitration

Part 7 sets out the arrangements for arbitration of issues arising from a workers compensation claim.

Regulation 48 clarifies under what circumstances an employer or worker may apply for arbitration.

Regulations 50, 51 and 52 allow for the establishment of a tripartite committee to conduct arbitration. The tripartite committee would be appointed as a dispute resolution body. The committee is not in existence at the time the regulations were made. Unless and until a committee is established, arbitrations are conducted by the Magistrates Court. It the committee is established, the Magistrates Court's role would include determining questions of law referred to the Court by the committee and arbitrating matters that cannot be arbitrated by the committee (for instance, because of a party objects to arbitration by committee).

Regulation 55 stipulates that only one medical referee should be used to assist with arbitration, unless the referee is unavailable.

Regulation 56 empowers the Magistrates Court to determine procedures in relation to matters arbitrated by the Magistrates Court.

Regulations 57 and 58 provide for costs orders regarding arbitration.

Part 8: Compulsory insurance policies — contents

Part 8 outlines what must be contained in a workers compensation insurance policy. The previous arrangements required insurers to use a prescribed policy. The regulations allow insurers to tailor policies to their clients, provided they include the compulsory elements identified in part 8. Any other elements must be consistent with the Act.

Regulation 60 determines that employers are to be indemnified for compensation, not other liabilities. 60(2) specifies that any amounts that should not be indemnified by the insurer, as specified in the Act, should not be written into the insurance policy as if they are being indemnified by the insurer.

Regulation 66 stipulates the insurer must include a provision in policies which requires an employer to pay an additional amount if the employer under estimates their wages bill by at least 10%. The additional amount is equivalent to twice the difference between the actual premium the employer paid and the premium that the employer would have paid if they had correctly identified their wages.

Part 9: Approved insurers

Part 9 deals with the Minister's power to approve an insurer to sell insurance policies under the *Workers Compensation Act 1951*. Part 9 also sets out the conditions insurers must comply with to remain approved insurers and what actions can be taken by the Minister to redress a breach of these conditions.

Regulation 68 outlines what must be included in an insurer's application for approval. The regulation requires written commitment to give effect to the insurer's injury management program and personal injury plans (see chapter 5 of the Act).

Regulation 72 stipulates that, upon request, insurers must inform the Minister of any changes that affect their approval, specifically: their ability to meet their liabilities; their liquidity; and their ability to meet obligations under chapter 5 of the Act.

Regulation 75 sets out the principles insurers must apply when working out premiums.

Regulation 77 requires insurers to allocate new rehabilitation providers to workers whose existing rehabilitation provider's approval has been suspended or revoked. This ensures that workers who have started vocational rehabilitation are not disadvantaged if their rehabilitation provider is suspended or loses their approval.

Regulation 81 outlines actions available to the Minister to deal with a breach by an insurer of their obligation under the Act and Regulations, short of the insurer's approval being revoked. This regulation is intended to provide options for sanctions for insurers who breach their conditions or the Act. The history of any actions taken against the insurer after 1 July 2002 may be considered by the Minister for the purposes of renewing an insurer's approval when their existing approval expires at the time set by the Minister at regulation 70.

Regulation 84 stipulates that compulsory insurance policies issued by insurers who have had their approval revoked are no longer valid seven days after the revocation takes effect. Despite this circumstance, employers are still required to hold compulsory insurance policies. An employer must, therefore, engage a new compulsory insurance policy with an approved insurer before the end of the seven day period.

Part 10: Self-insurers

Part 10 deals with the Minister's power to approve an employer to act as a self-insurer under the Act. Part 10 sets out the conditions employers must comply with to remain self-insurers, and what actions can be taken by the Minister to redress a breach of conditions.

Regulation 95 outlines what happens if the Minister decides to suspend or revoke a self-insurer's exemption. If an employer's status as a self-insurer is suspended or revoked, the employer must purchase a compulsory insurance policy from an approved insurer.

Part 11: Miscellaneous

Regulation 96 relates to section 28 of the Act. The section refers to employment-related diseases, where the nature of the employment contributes to specific kind of diseases. These diseases are primarily related to working with chemicals. The schedule is consistent with the Territory's commitment to International Labour Organisation protocols.

Regulation 99 relates to section 132 of the Act, 'Rejecting claims from 1 year'. In order for an insurer to reject a worker's claim for compensation one year after the claim was made, the insurer must seek leave from the Magistrates Court. Regulation 99 stipulates that the insurer must notify the worker of its intention to apply to the Magistrates Court to reject the claim. Regulation 99(4) provides that if a claim is rejected in these circumstances, the insurer cannot cease compensation payments to the worker for at least eight weeks.

Regulation 100 enables the Minister to approve protocols regarding the contents of forms made by entities mentioned in the Act, such as insurers, rehabilitation providers or employers. The intention of the protocols would be to create consistent recording and reporting of data and to provide the scheme participants with consistent wording for forms, if required.

Schedule 1 relates to regulation 98 and section 28 of the Act. The schedule lists employment-related diseases, where the nature of the employment has a high probability of contributing to specific kind of diseases. These diseases are primarily the result of working with chemicals. The schedule is consistent with the Territory's commitment to International Labour Organisation protocols.

Schedule 2 is a list of on-the-spot offences for which infringement notices may be served under chapter 12 of the Act. The schedule also sets out the relevant fines for on-the-spot offences.

Schedule 3 lists the reviewable decisions under the Act and the Regulations.

The Dictionary defines terms in the Regulations and refers to terms defined in the Act.