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WIRO BULLETIN

CURRENT UPDATES, INFORMATION
AND TRENDS
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MONTHLY BULLETIN OF THE

Workers Compensation Independent Review
Office (WIRO)

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CASE UPDATES

Sabanayagam v St George Bank Limited **[2016] NSWCA 145**

(NSW Court of Appeal, Beazley P, Basten JA, Sackville AJA, 27 June 2016)

(Appeal of Sabanayagam v St George Bank Limited
[2016] NSWCCPD 3, O'Grady DP, 21 January 2016)

Facts and Issues: The worker suffered an injury at work in 2006. She received compensation by way of weekly payments and medical treatment expenses. On 24 September 2014 the Insurer sent a Notice to the worker, advising that she had no current work capacity and she was entitled to continue to receive weekly payments. At that time the Insurer calculated that she had received 148 weeks of payments. This decision was based on the medical certificate issued by the treating doctor in 2011. No Certificates of Capacity as required by the then s 44B of the 1987 Act were provided by the worker. By a Notice dated 20 March 2015 pursuant to s 74 of the 1998 Act the Insurer denied liability on the basis that the injury had resolved and that the worker did not suffer from any injury within the meaning of s 4 of the 1987 Act. Weekly payments ceased after the relevant notice period. The Arbitrator determined that the Workers Compensation Commission did not have jurisdiction after the end of the second entitlement period (ie, 130 weeks). Accordingly, the Arbitrator stated that it was not necessary to determine whether the s 74 Notice dated 20 March 2015 was a work capacity decision. On appeal the Deputy President determined that the Commission did not have jurisdiction to determine the dispute as to weekly payments after the

Draca v Formtec Group (NSW) Pty Limited **[2016] NSWCC 161**

(Arbitrator: Linda Ashford; Date of Decision: 1 July 2016)

Facts and Issues: The worker's lawyers sought ILARS funding to make the one further claim for permanent impairment lump sum compensation. On 10 February 2015, the worker's lawyer sought further ILARS funding to proceed to the Commission to pursue the claim on the basis that 'the [worker] has previously had lump sum claims, the latest of which was subject to a Workers Compensation Commission determination on 15 May 2012'. On 23 April 2015, ILARS funding was granted. In the Commission, the insurer argued that the letter of claim on 30 October 2012 was a valid claim for further lump sum compensation, an issue otherwise countered by the worker by submitting that it was an invalid claim because, as per the decision of Roche DP in *Woolworths v Stafford* [2015] NSWCCPD 36, no regard was to be had to lump sum claims made from 19 June 2012 to 12 November 2015, in applying the effect of the 2015 amending Regulation which commenced on 13 November 2015.

Held: At [38]-[39]: 'The Regulations defined further lump sum compensation as a lump sum compensation made on or after 19 June 2012 in respect of an existing impairment. In the present matter a further lump sum claim was made in October 2014 [sic, 2012]. Looking to the Regulation (4) (a) – the further lump sum compensation claim was made, it was not withdrawn but it came to a conclusion by proceeding to the Commission as set out above and it seems clear ... that this constituted a valid claim and thus

end of the second entitlement period. In the course of his decision O'Grady DP found that the s 74 notice was not a work capacity decision by the Insurer, but found that there had been an implied work capacity decision before the s 74 notice was issued.

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the present claim cannot succeed by reason of section 66(1A) ... [T]he claim made in October 2012 was a lump sum compensation claim within the definition of clause 6 and thus the present claim of April 2014 offends section 66(1A) and is not saved by the Regulations. The entirety of the October 2012 claim proceeded to finality by every means available and did not succeed. That does not mean it was not a valid claim.'

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WIRO POLICY UPDATES

As a result of the NSW Court of Appeal's decision in *Sabanayagam v St George Bank Limited* [2016] NSWCA 145, the WIRO has issued an updated policy addressing the funding of matters for which an insurer has denied liability by issuing a notice under s 74 of the *Workplace Injury Management and Workers Compensation Act 1998*, following a determination of whether a worker has total or partial incapacity due to the work injury (under s 33 of the *Workers Compensation Act 1987*).

Such a decision should be distinguished from a decision about the worker's weekly earnings and current work capacity, which is outside the scope of the powers of the Workers Compensation Commission to determine. No ILARS funding is available for this kind of dispute (earnings and current work capacity, as opposed to disputes regarding total or partial incapacity due to the work injury).

LEGISLATION AND REGULATORY UPDATE

Stakeholders should refer to recently introduced regulation and guidelines in relation to workers compensation benefits:

- ***Workers Compensation Amendment (Return to Work Assistance) Regulation 2016***

The *Workers Compensation Amendment (Return to Work Assistance) Regulation 2016* commenced on 29 April 2016, which introduces in the *Workers Compensation Regulation 2010* two new benefits payable for the purpose of assisting an injured worker in returning to work with a new employer and providing education and training assistance. Part 5A of the *Workers Compensation Regulation 2010* now provides:

- \$1000 new employment assistance to a worker returning to work with a new employer (s 64B of the *Workers Compensation Act 1987*);
- \$8000 education and training assistance to a worker with high needs (with more than 20% WPI as per s 32A of the *Workers Compensation Act 1987*), if the worker is receiving or has received weekly payment of 78 weeks or more (s 64C of the *Workers Compensation Act 1987*) – this does not apply to education and/or training that have been commenced before 29 April 2016.

- ***NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, Fourth Edition***

On 1 April 2016, SIRA has published the NSW *Workers Compensation Guidelines for the Evaluation of Permanent Impairment, Fourth Edition*, to replace the *WorkCover Guidelines for the Evaluation of Permanent Impairment, 3rd edition*. The guidelines continue to adopt the permanent assessment principles in AMA 5, where relevant, but also introduce a new chapter to address the assessment of chronic pain and/or CRPS (see Ch 17). WIRO particularly refers to changes to the definition of 'maximum medical improvement' and to additional requirements for the assessment of the digestive system (see parag 16.9, Ch 16).

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PROCEDURAL REVIEW UPDATE

Decision WCD7216: The applicant sought procedural review of a "work capacity decision" made by the Insurer on 20 November 2014. The Decision was conveyed to the applicant in the form of "*Notice under section 74 of the Workplace Injury Management and Workers Compensation Act 1998*" (1998 Act) and informed the applicant that liability to pay compensation was disputed on the basis the applicant had no ongoing incapacity as required by s 33 of the *Workers Compensation Act 1987* (1987 Act).

The applicant sought Merit Review from SIRA which made a finding that it had no jurisdiction to conduct a merit review on the grounds the Insurer's decision to dispute liability for weekly payments of compensation was not a "work capacity decision" under s 43(2)(a) of the 1987 Act; the entitlement provisions of Section 38 are not engaged if liability under s 33 is disputed; the decision to dispute medical expenses with reliance upon ss 59 and 60 of the 1987 Act is not a decision which falls within ss 43(1)(a)-(f) and/or s 43(2)(b) and finally as a result of the above the applicant has not referred a work capacity decision for review.

The applicant then made an application for procedural review. In the recent Court of Appeal decision in *Sabanayagam v St George Bank Limited* [2016] NSWCA 145 it is clear that a s 74 notice cannot substitute for a work capacity decision. The failure to follow the Work Capacity Guidelines also means that any work capacity decision embedded within a s 74 notice must be invalid on procedural grounds.

WIRO CASE STUDY

A Worker suffered severe lower back injury while delivering bread and jumping from a loading dock to the ground. The Insurer initially accepted liability but a dispute eventually arose as to reasonably necessary treatment. That dispute was resolved in the Workers Compensation Commission in favour of the Worker.

On 12 March 2015, the Worker consulted with his treating orthopaedic specialist. The treating specialist then recommended further lumbar spine surgery, On 13 March 2015, the treating specialist sought approval for the surgery from the Insurer. On 13 May 2015, the Insurer approved the surgery in writing. On 2 June 2015, the treating specialist performed the surgery on the Worker's lumbar spine. Thereafter, the treating specialist rendered an invoice on the Insurer for the amount of more than \$15,000 for the comprehensive surgery and treatment costs. On 23 July 2015, the Insurer sent a written notice to the treating specialist, declining the payment of the treating specialist's costs of the surgery on the basis of s 60(2A)(d), which provides:

(2A) The worker's employer is not liable under this section to pay the cost of any treatment or service (or related travel expenses) if:

(d) ... the treatment is given or provided by a health practitioner whose registration as a health practitioner under any relevant law is limited or subject to any condition imposed as a result of a disciplinary process, or who is suspended or disqualified from practice.

The Worker sought legal representation and an Approved Legal Service Provider (ALSP) consequently obtained ILARS funding for the purpose of pursuing the treating specialist's surgery costs, among other entitlements. Following preliminary investigations, the ALSP re-made the claim for the treating specialist's surgery costs. On 28 June 2016, the Insurer issued a notice under s 74 of the 1998 Act, denying liability but only for any consultations and medical treatment costs provided by the said treating specialist (on the basis that the treating specialist was the subject of disciplinary proceedings in 2014). The ALSP sought extended ILARS funding to proceed to the Workers Compensation Commission.

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WIRO MILESTONES

Statistical detail in the past 2015-2016 financial year has seen considerable progress in the way the WIRO has been assisting workers and employers in resolving claims and disputes. In that period, records show that around 10,521 ILARS matters went through the ILARS gates. Of this figure, over 2,500 funded matters eventually resolved without going to the Commission.

The recently recorded figure of 2,505 funded matters resolved without going to the Commission is over half of the figure of matters recorded as being resolved, overall, in the Commission (4,158). This indicates that, of the 10,521 funded matters, almost 25% were resolved without going to the Commission and thereby mitigating any further delays in the resolution or determination of claims and disputes.

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS



Lawyers, scheme agents, representatives from the workers compensation agencies and other stakeholders are reminded of the upcoming WIRO Seminar on **30 September 2016** (Friday), from 8:30 am to 4:00 pm at The Westin Sydney (1 Martin Place, Sydney – Grand Ballroom). Early registration details have been sent via email with a further invitation forthcoming in August 2016. Please mark your calendars and register early.

FEEDBACK ON THE WIRO BULLETIN

If you have any feedback on the WIRO Bulletin please let us know, we would appreciate hearing any suggestions or ideas

email us at
editor@wiro.nsw.gov.au

How WIRO can help you



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