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# WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND  
TRENDS  
ISSUE NO 2, AUGUST 2016

## MONTHLY BULLETIN OF THE

Workers Compensation Independent Review  
Office (WIRO)

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# CASE UPDATES

## Recent Cases

The summaries are not intended to substitute the actual headnotes or ratios set out in the cases.  
Lawyers are highly encouraged to read the full decisions.

### ***Spratt v Perilya Broken Hill Ltd; Spratt v Rowe [2016] NSWCA 192***

(NSW Court of Appeal, McColl JA, Gleeson JA, Leeming JA, Date of Decision: 4 August 2016)

**Facts and Issues:** In 2011, the worker was injured at work by a motor vehicle driven by a work colleague. He made a lump sum compensation claim under s 66 of the *Workers Compensation Act 1987* ("1987 Act"). The matter came before Arbitrator Perrignon ("the Arbitrator") in the Workers Compensation Commission ("the Commission"), who in turn determined that the worker, among other things, injured his cervical spine in the course of his employment. The worker also commenced a claim under the *Motor Accidents Compensation Act 1999* ("the MAC Act"), where a medical assessor determined it was unlikely that the worker sustained an injury to the cervical spine in the accident as described. The worker filed reviews of the medical assessor's determination both to the Proper Officer and the District Court. The applications were both declined. The worker then lodged an appeal to the Court of Appeal on the basis that both decision-making bodies refused the review applications in error because the decision of the Commission resulted in an issue estoppel which bound the medical assessor, to the extent of the finding of injury sustained to the cervical spine or that the accident caused the cervical spine injury.

### ***The UGL Rail Services Pty Ltd (formerly United Group Rail Services Pty Ltd) v Attard [2016] NSWSC 911***

(Supreme Court of NSW, Davies J, Date of Decision: 1 July 2016)

**Facts and Issues:** The worker contracted hand dermatitis after being exposed to a chemical called *gunwash* in the course of his employment as a boilermaker and welder. He was subsequently medically assessed by Dr Lobel as suffering 16% whole person impairment (WPI) and later on again assessed by Dr Freeman as suffering 17% WPI. The difference in the degree of permanent impairment percentages led to a medical dispute that came before the the Commission. In the Commission, Dr Sippe, approved medical specialist (AMS), assessed the worker with 13% WPI. The AMS also provided reasons that the worker was 'able to function at work, recently working as a boilermaker cutting steel', and other reasons that slightly differed from the comments expressed by Dr Freeman in estimating the level of WPI. The worker lodged a medical appeal, where the Registrar determined that a ground of appeal for demonstrable error in the medical assessment certificate (MAC) under s 327(3)(d) had been made out and then referred the appeal to the Medical Appeal Panel ("the Panel"). The Panel found that the AMS made an error in fact.

[Read more](#)[Read more](#)***Drosod v Workers Compensation Nominal Insurer [2016] NSWSC 1053***

(Supreme Court of NSW, Garling J, Date of Decision: 5 August 2016)

**Facts and Issues:** The worker injured his right leg in April 1994 and developed a consequential injury to the left knee due to overuse. A dispute arose as to the extent of the permanent impairment of both the right leg and the left knee. In the Commission, an AMS assessed the right leg with 15% permanent impairment following a deduction of one-half for pre-existing injury or condition pursuant to s 323 of the 1998 Act and 0% permanent impairment following a whole figure deduction from a 10% assessment rating of the left knee.

[Read more](#)***Young v Labourpower Recruitment Services Pty Ltd [2016] NSWCCPD 37***

(WCC, Keating J, Date of Decision: 29 July 2016)

**Facts and Issues:** The Arbitrator in the substantive proceedings made orders pursuant to s 36 and s 60 of the 1987 Act in favour of the worker. In determining the issue of weekly payments, the Arbitrator concluded that 'it was more probable than not that the injury was a material cause of the applicant's incapacity for a period of three months' and that she was 'not satisfied to the requisite standard that it did or that the injury continued to be a material cause of any incapacity after a few months'. On appeal, the worker argued that the Arbitrator erred in relying on Prof Ehrlich's opinion on the critical question of incapacity, where the respondent did not rely upon that evidence and which had been excluded from admission into evidence.

[Read more](#)***Lymbery v Shoalhaven City Council [2016] NSWCCPD 38***

(WCC, King ADP, Date of Decision: 29 July 2016)

**Facts and Issues:** The Arbitrator dealt with a dispute regarding the worker's entitlement to medical treatment expenses under s 60(5) of the 1987 Act in relation to major spinal surgery as proposed by two treating specialists. The respondent argued that the surgery was reasonably necessary but that there was an issue of the causal connection between the need for it and the injury. The Arbitrator was not satisfied that the proposed surgery was a result of one or both of the subject injuries. On appeal, the Acting Deputy President considered all the expert evidence before the Commission and applied a commonsense view of the balance of probability in

***Demasi v Foundation Marketing Pty Ltd & Anor [2016] 179 NSWCC***

(WCC, Arbitrator Glenn Capel, Date of Decision: 26 July 2016)

**Facts and Issues:** On 16 May 2016, the Arbitrator found, in *Demasi v Foundation Marketing Pty Ltd & Anor* [2016] NSWCC 124, that the worker sustained injuries to multiple body parts or systems and made orders regarding weekly payments pursuant to ss 36(1)(b), 37(2)(b) (dealing with weekly earnings for certain periods and rates) and 60 of the 1987 Act. On the same day, the second respondent (Nominal Insurer) requested a reconsideration of the orders contained in the Certificate of Determination (COD) with respect to the worker's pre-injury average weekly earnings (PIAWE). The Nominal

assessing the available expert evidence for the purpose of forming a decision.

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Insurer submitted that on 9 March 2015, they had made a Work Capacity Decision (WCD), which was unfortunately not included in the evidence made available to the Commission in the first instance.

[Read more](#)

### ***Colley v Broken Hill Musicians Club Ltd [2016] NSWCC 174***

(WCC, Arbitrator Glenn Capel, Date of Decision: 21 July 2016)

**Facts and Issues:** The worker was employed as a bus driver from 2003 to mid-2014 and then as reception staff. He resigned on 23 January 2015. He subsequently made a claim for hearing aids and lump sum compensation for hearing loss. Following a dispute, the matter came before the Commission. It was only on cross examination of the evidence that it was revealed that the worker had previous assessments for hearing loss and had prior binaural hearing loss assessments. On evidence, the worker was also found to be an unreliable witness due to inconsistencies in the proof of exposure to noise, the level of noise exposure, the nature of the duties, the period of time taken in performing those duties, and the non-disclosure of the prior assessments.

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## WIRO POLICY UPDATES

### Recent WIRO Policies

With effect from 1 August 2016, WIRO will pay \$1,400.00 (excluding GST) for ILARS-approved counsel fees for the purpose of a conciliation conference/arbitration hearing (Con/Arb) in the Workers Compensation Commission.

In order to ensure that injured workers receive effective advice about the evidence required to support their claim — where a lawyer believes that in the particular circumstances of a claim it would be beneficial for the conduct of the claim that an advice from counsel should be obtained at an early stage — WIRO will consider applications for funding for a set fee of \$500.00 (excluding GST) for this purpose.

[Read more](#)

## PROCEDURAL REVIEW UPDATES

### Work Capacity Decision Reviews

**Decision WCD8416:** The Insurer made a decision under s 43(1)(a) of the 1987 Act that the applicant had capacity to perform suitable duties for four hours per day, five days per week. This was in accordance with the Certificate of Capacity from the nominated treating doctor. There were other assessments of the applicant's capacity

**Decision WCD8316:** In the circumstances:  
(a) The SIRA's Merit Review Service failed to make a "recommendation" in circumstances where they had made findings inconsistent with the Insurer's decision apropos of suitable employment for the worker. They found that being a helicopter pilot (for instance) was not suitable, but did

contained in the medical evidence suggesting that the applicant was able to return to full time duties. However, the Insurer did not rely upon that evidence when making the Work Capacity Decision (WCD).

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agree that one of the several other types of employment identified by the Insurer would be appropriate. Despite this they said the Insurer had made the best or preferable decision, so they did not interfere and accordingly made no recommendation. This has the bizarre effect of rendering the outcome of merit review no more than an advisory opinion, since only recommendations are binding on the Insurer – see s 44BB(3)(g);

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## CASE STUDIES

### Cases from WIRO's Solutions Group

In the first week of August 2016 alone, WIRO's Solutions Group has dealt with more than 130 new matters through internal and external referrals and finalised around 125 cases.

The Solutions Group continues with its record of providing a timely and efficient way of solving matters of concern between injured workers and insurers. The group deals with myriad issues and the following are examples of cases with successful outcomes within the stated period.

#### Delay in weekly benefits

The worker had not been paid for three months following a secondary injury claim. The Insurer finally made a decision to accept liability and processed the back payment. The worker was suffering severe financial stress by this stage. Following a number of follow-ups with the Insurer after the payment did not go into his account, the worker contacted WIRO for assistance.

[Read more](#)

#### Delay in insurer's decision

The worker's lawyer advised that a claim had been served on the Insurer in late January and that a claim form had been forwarded to the Insurer in March, but that a decision on liability had yet to be made. WIRO inquired with the Insurer who subsequently declined the claim. When WIRO inquired on the reason for the delay, the Insurer advised it was a clerical error by the case manager who had been counselled about the importance of timeframes and appropriate file noting. The Insurer apologised for the inconvenience.

#### Weekly payments

The worker received written advice from the Insurer, accepting provisional liability for 12 weeks. The PIAWE form however also itemised a non-pecuniary benefit amount for the use of the car, where the car had already been returned to the employer. The WIRO pointed out with the Insurer that no deduction should be applied as the worker did not benefit from it. The Insurer responded to WIRO by admitting the error and adjusting the payments to the worker appropriately without making a deduction.

#### Insurer response to s 126 request

The worker's solicitor contacted WIRO in relation to a documents

#### Rehabilitation

The worker advised he sent through a request to the Insurer for a change in rehabilitation providers.

#### Medical treatment

The worker advised that his treating specialist had sent a referral to the Insurer for an ultrasound only a few

request under s 126 of the 1998 Act. The Insurer noted that the original documents were destroyed and that they had since made enquiries of known providers to obtain duplicate copies of the documents to satisfy the request. These documents were forwarded to the worker's lawyer soon after.

He alleged that the Insurer refused to accept the change. The Insurer confirmed receipt of this request. However they required an interpreter to discuss the change with the worker. They subsequently contacted the worker with an interpreter and informed him the change had now been accepted.

days ago. However, as he had an appointment with the same treating specialist within the week, he had hoped that the Insurer would approve the procedure on an urgent basis due to the ultrasound being required for the consultation with the treating specialist. The Insurer approved the ultrasound within 24 hours and notified the treating specialist and the worker of the approval without delay.

# WIRO MILESTONES

## Recent WIRO Outcomes and Successes

Where a lawyer has indicated there is no response to a claim for workers compensation or s 287A request for review, WIRO will contact the Insurer to verify this and obtain its position on the claim. As these matters deal with allegations of a failure to respond, outcomes in these cases are measured by whether the WIRO Inquiry elicits a response to the claim. For the period from 1 January 2016 to 31 July 2016 WIRO dealt with a total of 470 cases where the Insurer allegedly had not responded to a claim within the prescribed timeframes. In 186 matters (40%) the Inquiry elicited a response to the claim, where the claim was either accepted or denied.

[Read more](#)

## FROM THE WIRO

IMPORTANT EVENTS AND  
ANNOUNCEMENTS



### Business Nomination for WIRO

WIRO congratulates the WIRO Solutions Group (formerly the Complaints Services) on its nomination for "Best Contact Centre Under 30 FTE" in the *Government Contact Centre Summit's GovCC Excellence Awards 2016!*

### WIRO Regional Seminars

WIRO has booked several Regional Seminars in Newcastle (7 October 2016), Ballina (14 October 2016), Albury (21 October 2016), Bathurst (28 October 2016) and Wollongong (11 November 2016). Formal registration invitations and details will issue shortly.

### WIRO Course

WIRO is pleased to announce the inaugural course, *Workers Compensation for Paralegals and Support Staff*, a one-day program designed and provided in conjunction with The College of Law, on 31 August 2016.

[Read more](#)

## WIRO SEMINAR - FRIDAY 30 SEPTEMBER 2016

Our Sydney Seminar guest list is filling up fast, do not forget to register if you have not done so already. Our guest speakers include Clayton Barr (Shadow Minister), David Shoebridge (Greens MP), Mark Coyne (EML), Dr Roger Pillemer (Surgeon) and various speakers from icare, SIRA and also a taxation expert. If you have any questions please email [editor@wiro.nsw.gov.au](mailto:editor@wiro.nsw.gov.au)

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### FEEDBACK ON THE WIRO BULLETIN

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[editor@wiro.nsw.gov.au](mailto:editor@wiro.nsw.gov.au)

How WIRO can help you



[HOW WIRO CAN HELP YOU](#)

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