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WIRO BULLETIN

CURRENT UPDATES, INFORMATION
AND TRENDS
ISSUE NO 3, SEPTEMBER 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.
You are strongly encouraged to read the full decisions.

State of New South Wales v Chapman-Davis [2016] NSWCA 237

(NSW Court of Appeal, McColl JA, Gleeson JA, Sackville AJA, Date of Decision: 2 September 2016)

Facts and Issues: The worker was a paramedic under the relevant award who was seconded to a temporary position as a Health Advisor. The worker in 2011 sustained an injury in the seconded position. The insurer accepted liability but on 30 September 2013 informed the worker that her entitlements to medical treatment expenses would expire on 31 December 2013 as a result of the 2012 reforms. The worker argued that she was an 'exempt' worker and therefore the 2012 reforms did not apply to her.

Held: The Court held that, despite her secondment as a Health Advisor, the worker maintained her position as a 'paramedic' because her employment contract as a paramedic subsisted during that secondment. The Court distinguished "position" and "status" and found that worker's "status" as a paramedic was not changed under the existing employment contract by her seconded "position" as a Health Advisor.

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Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine [2016] NSWCA 213

(NSW Court of Appeal, Meagher JA, Leeming JA, Simpson JA, Date of Decision: 18 August 2016)

Facts and Issues: In earlier proceedings in Workers Compensation Commission ("the Commission"), the parties consented to resolve a claim for weekly payments and medical treatment expenses on express terms that the worker "has fully recovered from the effects of any work related psychological injury or condition". Soon after, the worker lodged a claim for lump sum compensation relying on medical evidence that she suffered 24% whole person impairment (WPI) as a result of the psychological injury. The insurer denied the claim on the basis that the consent term — specifically that the worker has fully recovered — created an issue estoppel that precluded her from making a claim for permanent impairment. The Arbitrator determined that "the issue estoppel was not founded on any agreement between the parties, but arose from the Commission's consent orders and findings" and held that the employer/insurer had the benefit of an issue estoppel and found in their favour.

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State Insurance Regulatory Authority v Abdul-Rahman [2016] NSWCA 210

(NSW Court of Appeal, Basten JA, Meagher JA, Gleeson JA, Date of Decision: 15 August 2016)

Facts and Issues: This is a case going to a dispute between the State Insurance Regulatory Authority (formerly WorkCover Authority of NSW) and the respondent employer. SIRA launched a Local Court debt recovery action against the respondent employer for the latter's failure to obtain and maintain a required insurance policy. The Local Court characterised the debt under s 156 of the 1987 Act as a "penalty", for the purpose of s 18 of the *Limitation Act 1969* (NSW). The employer appealed to the Supreme Court and was successful in overturning the decision. SIRA, on further appeal, argued that the recovery of the premium (doubled in amount as per s 156(1) of the 1987 Act) was a "penalty" under s 18 of the *Limitation Act 1969*.

Held: The appeal was upheld. The Court stated that the act of permitting recovery of double the insurance premium payable under s 156(1) of the 1987 Act was a "penalty" for the purpose of the *Limitation Act 1969*. Among other factors, the Court considered that the double premium involves a penalty because "it might be inferred that the amount recoverable was intended to have a deterrent effect on employers who might otherwise fail to pay the premiums required under the legislation".

D'Er v Glemby International (Aust) Pty Ltd [2016] NSWCCPD 42

(WCC, Snell DP, Date of Decision: 31 August 2016)

Facts and Issues: The worker suffered an injury in 1991. Pursuant to awards the insurer continued paying her weekly benefits. By way of a s 54 notice dated 29 October 2012, relying on s 52A which was then operational prior to (but now repealed by) the 2012 amending Act, the insurer discontinued her weekly payments on the basis that she was partially incapacitated and was not demonstrated to be seeking suitable employment. The matter came before the Commission on a dispute regarding the worker's weekly compensation payments at the appropriate statutory rate under s 37 of the 1987 Act (as it was prior to the 2012 amending Act). The worker claimed weekly compensation for the period 10 December 2012 to 31 August 2015. At the arbitration, the respondent's counsel produced evidence of a letter dated 29 November 2012 and asserted that the document was a "work capacity decision" (WCD) made by the insurer. The worker was an "existing recipient of weekly payments" for the purpose of the transitional provisions in Pt 19H Sch 6 of the 1987 Act and that she had not been transitioned.

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Recyclit Enviro Chutes Pty Ltd v Axisa [2016] NSWCCPD 41

(WCC, Keating J, Date of Decision: 25 August 2016)

Facts and Issues: On 7 December 2010, the injured worker was alighting from his truck when a gust of wind slammed the truck door closed crushing his hand and causing him to fall backwards. In 2015 he claimed lump sum compensation relying on a report which assessed permanent impairment of the thoracic spine, lumbar spine and left upper extremity. The insurer denied liability for any injury to the thoracic spine. The matter came before the

Colleen Jones by the Executor of her Estate Carol Hewston v DHS – Aging Disability & Home Care [2016] NSWCC 202

(WCC, Arbitrator William Dalley, Date of Decision: 25 August 2016)

Facts and Issues: On 16 January 2015, the worker was in the course of employment assisting a client when she fell. She suffered a cystocoele and prolapsed uterus as result. On 14 August 2015, the injured worker died at her home. The Coroner ascribed the worker's death to mixed

Commission. On 29 April 2016, the Arbitrator convened a telephone conference and delivered his reasons for decision orally. On 10 May 2016, the Commission issued a Certificate of Determination. Orders were made in favour of the worker and the matter was remitted to the Registrar for referral to an Approved Medical Specialist. The Certificate of Determination advised a “sound recording of the reasons given is available to the parties”. It later emerged that due to a technical malfunction, there was no transcript available of the ex-tempore decision.

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drug toxicity by accidental overdose. The deceased's sister as Executor claimed the workers compensation death benefit from the respondent on behalf of the Estate on the basis that there was a causal connection between the subject injury and the death. The respondent denied the worker's death was causally related to the subject injury and declined liability. The matter came before the Commission. The only issue in dispute was whether the death of the worker resulted from the work-related injury of 16 January 2015.

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Kirunda v NSW Police Service [2016] NSWCCPD 40

(WCC, Snell DP, Date of Decision: 11 August 2016)

Facts and Issues: The injured worker was a clerk for the NSW Police. He alleged that he suffered psychological injury. The injury was alleged to have occurred as a result of “bullying, harassing due to nature and conditions of employment”. In addition, he alleged that he suffered injury on 27 August 2012, when he was assaulted during a “recess”, within the meaning of s 11 of the 1987 Act. The insurer denied liability, saying the worker's injuries were not related to his employment. In the alternative, they relied on s 11A(1) of the 1987 Act as a defence. The matter came before the Arbitrator who found the worker was assaulted during a recess. On 25 November 2015, the Arbitrator determined an award for the respondent. The Arbitrator was satisfied that the incident of 27 August 2012 did not cause the psychological injury and that, in relation to the allegations of bullying and harassment, the employer had established the provisions of s 11A. The worker appealed.

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Chaouka v The Workers Compensation Nominal Insurer and El Merhbi [2016] NSWCC 201

(WCC, Arbitrator Glenn Capel, Date of Decision: 24 August 2016)

Facts and Issues: The worker sustained injuries when he fell off a ladder while performing jobs for the applicant. The applicant carried on a business as David's Painting and Decorating. It became evident following the injuries that the applicant did not hold workers compensation insurance. The worker lodged a claim pursuant to the provisions in the Uninsured Liabilities Scheme. The first respondent Nominal Insurer determined that the applicant was uninsured and was not exempt as an employer as at the worker's injury. The Nominal Insurer issued a notice under s 145(1) of the 1998 Act to the employer, seeking reimbursement of the amounts paid by way of weekly payments and medical treatment expenses to the worker. The applicant brought the dispute to the Commission where the issue concerned whether or not the second respondent was a “worker” or “deemed worker” in the employ of the applicant as at the date of the injury within the meaning of s 4 and cl 2 of Sch 1 of the 1998 Act. The applicant argued that he engaged the worker as a subcontractor to do painting jobs, that there was no signed contract of employment and that the worker knew the applicant had no worker compensation insurance, among other grounds.

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Quinn v RJ & LF Beard [2016] NSWCC 196

(WCC, Arbitrator Josephine Snell, Date of Decision: 16 August 2016)

Facts and Issues: For an aggravated injury sustained on 9 February 2015, the worker claimed weekly payments from 27 May 2015 “to date and continuing”. The employer had issued notices under s 74 of the 1998 Act. A notice on 11 November 2015 was agreed by the parties to be a “work capacity decision” (WCD), where the PIAWE was accepted to be \$1,209.13. The issue before the Arbitrator was the weekly payments entitlements over certain relevant periods.

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Kazaphaniotis v ISS Property Services Pty Ltd & Anor [2016] NSWCC 190

(WCC, Arbitrator John Harris, Date of Decision: 9 August 2016)

Facts and Issues: The injured worker sustained an injury on 8 October 2007 (deemed) in the course of her employment as a cleaner. A claim for permanent impairment was made in April 2016 pursuant to cl 11A in Sch 8 of the *Workers Compensation Regulation 2010*. The clause allowed injured workers with an “existing impairment” to make one further claim for permanent impairment compensation on or after 19 June 2012. The injured worker’s 2016 claim was based on reports assessing permanent impairment in relation to injuries to both upper extremities, the cervical spine, the upper digestive tract, lower digestive tract and scarring.

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Dryburgh v Dwyers Mazda Pty Limited [2016] NSWCC 184

(WCC, Arbitrator William Dalley, Date of Decision: 3 August 2016)

Facts and Issues: The worker suffered a fall on 16 December 2011 sustaining an injury to the left ankle and a subsequent fall on 11 August 2012 sustaining an injury to the left ankle and the neck. She was medically assessed by Dr Roger Pillemer, orthopaedic specialist, for the degree of permanent impairment (7% WPI for the left lower extremity and 27% WPI for the cervical spine, with the combined value of 20% WPI), who also opined that the pathology in the cervical spine resulted from “the disabilities and impairments arising out of the injury to the left ankle”. The insurer accepted the injury to the left ankle but denied the worker’s claim that the pathology in the cervical spine was causally related to the employment or the other two injuries. The matter came before the Commission on claims for lump sum compensation, medical treatment expenses and weekly payments compensation over three separate periods (each of which was incurred while the worker was undergoing surgery), where the insurer had denied liability for all the claims. The question before the Commission focused on whether or not the worker suffered an injury to the cervical spine on 16 December 2011 and/or 11 August 2012, and whether the pathology in the cervical spine resulted from the worker’s injury to the left ankle.

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Basin Sands Logistics Pty Ltd and Sharon Joy Duckovic as administrator of the Estate of the late David John Duskovic [2016] NSWCCMA 91

(An summons for judicial review at the Supreme Court of NSW)

(Medical Appeal Panel: Arbitrator John Wynyard, Dr Mark Burns, Dr Phillip Harvey-Sutton, Date of Decision: 9 June 2016)

Facts and Issues: The claimant in this matter is the widow of the deceased worker, David Duskovic. The deceased worker suffered injuries in a motor vehicle accident in the course of his employment and died at the scene. A claim for compensation

was made pursuant to s 66 of the 1987 Act. The claim was disputed by the employer. Proceedings were commenced in the Commission and the matter referred to an Arbitrator. On 11 September 2015 Consent Orders were entered into, following which the delegate of the Registrar referred the matter to an Approved Medical Specialist (AMS) for assessment of permanent impairment related to injuries to the right upper extremity, left upper extremity, left lower extremity, right lower extremity, urinary and reproductive system, respiration and cervical spine which occurred on 30 October 2012. On 7 October 2015 the AMS issued a medical assessment certificate (MAC) assessing 100% WPI.

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WIRO POLICY UPDATES

Recent WIRO Policies

Following the WIRO WIRE issued on 28 July 2016 and effective from 1 August 2016 on additional counsel fees funding, the **ILARS Policy on Funding** document has now been updated on the WIRO website to reflect the adjustments.

The updated **ILARS POLICY - Funding of application by injured workers to pursue claims for compensation** may be accessed here: <http://wiro.nsw.gov.au/seeking-grant-funding/ilars-policies>

LEGISLATION UPDATE

Recent Legislation Changes

On 1 September 2016, the **Workers Compensation Regulation 2016** ("the 2016 Regulation") commenced and effectively repealed the Workers Compensation Regulation 2010. The key changes contained in the 2016 Regulation focused on the removal of the option for employers to establish a shared return-to-work program, new provisions for licensing requirements for insurers and self-insurers, new provisions to notify a medical practitioner to attend the Workers Compensation Commission for cross-examination on the contents of a medical report, and the removal of offences regarding penalty notices. Other minor amendments are made in line with recent legislative reforms in the workers compensation scheme and the legal profession law and removal of redundant clauses, re-numbering of clause provisions and clarification of ambiguous clauses. To the extent of costs, Pt 17 and Sch 6 remain substantially unchanged.

The full 2016 Regulation may be accessed on the **NSW Legislation** website or via **AustLii** at: www.austlii.edu.au/au/legis/nsw/consol_reg/wcr2016346/

PROCEDURAL REVIEW UPDATES

Work Capacity Decision Reviews

Decision WCD10616: The worker sought procedural review of a work capacity decision (WCD) made by the insurer on 20 December 2013, which advised that the weekly payments compensation would be reduced to "Nil" commencing on 29 March 2014. It became apparent on the application that the worker did

Decision WCD10516: The Insurer made a WCD on 25 May 2016, advising the worker that the weekly payments compensation would be reduced commencing on 31 August 2016. The worker sought an internal review with the insurer, which issued a decision on 8 July 2016, advising the worker that weekly payments would cease on

not seek an internal review with the insurer and that there had also been a merit review application. SIRA's Merit Review Service, in that application, advised the worker that they had no jurisdiction to conduct a merit review because there had not been an internal review by the insurer. Subsequently, the worker lodged an internal review with the insurer, the decision of which maintained the original WCD. The worker next sought a merit review with SIRA two months outside the prescribed period. The SIRA Merit Review Service declined to conduct a merit review on the grounds that more than 30 days had elapsed since receipt of the internal review decision (s 44BB(3)(a) of the 1987 Act prescribes that the application for review must be made within 30 days after the worker receives the internal review decision). The worker then sought a procedural review with WIRO on the basis that the worker had been subject to a medical condition and that he relied on new medical evidence. WIRO declined to conduct a procedural review of the actions of the SIRA Merit Review Service (as it could only examine the procedures of the insurer in the course of making the WCD). The application was dismissed.

15 October 2016. The worker sought a merit review on 29 July 2016 with SIRA Merit Review Service, which on 17 August 2016 found (without making a recommendation) that the worker did not meet the special requirements under s 38(3) of the 1987 Act such that the weekly payments would continue. On 19 August 2016, the worker sought a procedural review with WIRO. The WIRO determined that the WCD was procedurally correct, but found that the insurer breached their requirements under the guidelines and the legislation in that: it failed to explain to the worker the effect of s 38 of the 1987 Act regarding the special requirements that the former needed to meet for the continuation of weekly payments; and, it failed to calculate the worker's ongoing entitlement in accordance with the correct provisions. The WIRO set aside the WCD and made recommendations to the effect that, by virtue of the stay under s 44BC of the 1987 Act, the worker's ongoing weekly payments were to continue until a new WCD has been made.

CASE STUDIES

Cases from WIRO's Solutions Group

Delay in determining liability – The worker submitted a workers compensation claim in April 2016. The insurer failed to determine the claim within the prescribed period. At the instigation of the WIRO's Solutions Group, on 19 May 2016, the insurer issued a letter to the worker. On 26 August 2016, the insurer notified the worker and the WIRO that liability had finally been accepted. The insurer will organise reimbursement of wages and medical expenses.

Weekly benefits on ILARS referral of the matter – An injured worker's solicitor lodged an ILARS grant application for funding for the purpose of following up payment of settlement monies from the insurer, following the issuing of a Certificate of Determination on 17 June 2016. ILARS referred the matter to the Solutions Group for potential negotiation with the insurer. The insurer confirmed that payment was processed at the end of August 2016 and was made directly to the worker and provided copy of the list of payments to WIRO.

WIRO MILESTONES

Recent WIRO Outcomes and Activities

WIRO informal resolution outcomes

In the period from 1 August 2016 and 1 September 2016, the ILARS Group received a total of 68 outcomes in ILARS-funded matters referred for preliminary inquiries

WIRO Course for Paralegals and Support Staff

With the assistance of the College of Law, the WIRO has successfully presented the first ever *Workers Compensation for Paralegals and Support Staff* course on

with the insurers where the injured worker has not received a response to a claim or dispute.

Of the 68 outcomes, ILARS received a response from the insurer in 32 referred cases (accounting for 47% of the matters in the given period). These cases were referred back to the ILARS Group for further funding determination.

Of the total outcome figure, ILARS successfully resolved 36 referred cases where, through informal resolution procedures, the insurers have accepted the claim or resolved the disputes without the matters going to the Commission. This represents 53% of ILARS-funded matters successfully resolved by referral to informal dispute resolution processes in the given period.

31 August 2016, which provided a historical basis of the workers compensation scheme and facilitated practical assessment tasks involving course participants to test their knowledge of and skills in the scheme.

Topics raised during the course include a review of the relevant policies and legislative provisions, procedures and considerations to make in preparing tax invoices and completing the ILARS application for a grant of funding. Further courses are now earmarked in the next few months.

WIRO at the Transport Workers' Union Conference

The annual Transport Workers' Union Conference was held on 25 August and 26 August 2016 at the Rooty Hill RSL, where the WIRO maintained a solid presence and participated in disseminating information about the workers compensation scheme and the services that the office can provide to stakeholders. Kim Garling was a guest speaker in the conference and was welcomed by a huge and enthusiastic audience comprising approximately 800 union delegates and workers in the aviation, mining, oil and gas, road transportation and freight logistics, public transport and waste management industries.



ILARS Principal Lawyers at the WIRO stand

The WIRO stand

NSW Leader of Opposition, Luke Foley, with ILARS Principal Lawyers

WIRO on social media

The WIRO has been more active than usual on social media in line with recent activities and professional engagements. To keep updated regularly with what's happening with the WIRO, follow us on our Facebook page and LinkedIn accounts:

www.facebook.com/wiroNSW/

www.linkedin.com/company/wiro

Business nomination for WIRO Solutions Group

The WIRO Solutions Group has been nominated for Excellence in Achievement (individual and small teams) in the Department of Finance, Services and Innovation's Secretary's Awards. The winners will be announced in late September with the award ceremonies in October 2016.

FROM THE WIRO

IMPORTANT EVENTS AND
ANNOUNCEMENTS



Review of the workers compensation scheme

The WIRO will make submissions to The Standing Committee on Law and Justice of the NSW Legislative Council's current review of the workers compensation scheme. Stakeholders are invited to let the WIRO know of any matters you wish to be included in his recommendations to the committee. Email: editor@wiro.nsw.gov.au

WIRO SYDNEY SEMINAR - FRIDAY 30 SEPTEMBER 2016

Mark your calendars for the WIRO Seminar on 30 September 2016 at The Westin Sydney (at the Sydney Grand Ballroom on 1 Martin Place, Sydney) from 8:30am to 4:00pm. It is a highly relevant seminar that highlights the impact of certain case law and recent legislative amendments on the current workers compensation scheme. Guest speakers include Clayton Barr (NSW Shadow Minister), David Shoebridge (Greens MP), Mark Coyne (EML), Dr Roger Pillemer (orthopaedic specialist) and various speakers from iCare and SIRA. Places are limited and WIRO encourages you to let us know your attendance (or inability to attend) in order to accommodate attendees on the waiting list, through editor@wiro.nsw.gov.au

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WIRO Regional Seminars

The WIRO has now arranged the venues and exact details below for the WIRO regional seminars throughout October and November 2016. The main topic will be: "The 2012 - Success or Failure?" There will also be discussions on the recent changes to the legislation as well as case law. Formal invitations have been sent out. Information and enquiries about the regional seminars should be directed via email to the WIRO at editor@wiro.nsw.gov.au

Newcastle - Friday 7 October 2016 - 10.00am to 3.00pm - Noah's on the Beach (Crn of Shortland Esplanade and Zaara St)

Ballina - Friday 14 October 2016 - 10.00am to 2.00pm - The Ramada Hotel (2 Martin Street)

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Albury - Friday 21 October 2016 - 10.00am to 2.00pm - Quest (550 Kiewa Street)

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Bathurst - Friday 28 October 2016 - 10.00am to 2.00pm - Rydes Mount Pamorama (1 Conrod Straight)

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Wollongong - Friday 11 November 2016 - 10.00am to 2.00pm - Sage Hotel (60 - 62 Harbour Street)

Register

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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



[HOW WIRO CAN HELP YOU](#)

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For any other enquiries, please visit the WIRO website at www.wiro.nsw.gov.au

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