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WIRO BULLETIN

CURRENT UPDATES, INFORMATION
AND TRENDS
ISSUE NO 4, OCTOBER 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.

Avni v Visy Industrial Plastics Pty Ltd **[2016] NSWCCPD 46**

(WCC, Keating J, Date of Decision: [16 September 2016](#))

Facts and Issues: The injured worker suffered an injury to both wrists on 30 March 2005 (deemed). A claim for workers compensation was made and liability was accepted. On 14 July 2010, the parties entered into a complying agreement where the worker received compensation in respect of 8% whole person impairment (WPI) for the upper extremities.

On 21 June 2012, the worker made a claim for further lump sum compensation. This claim proceeded to the Workers Compensation Commission ("the Commission"). The worker was reviewed by an Approved Medical Specialist (AMS) and a Medical Assessment Certificate (MAC) was issued, after which the worker discontinued the claim for permanent impairment. In February 2016, the worker commenced proceedings in the Commission claiming lump sum compensation for a further 7% WPI with a date of injury 30 June 2005. The Respondent denied liability on the basis that the worker had already made a further lump sum compensation claim and was not entitled to make one more.

Hopkins v Skilled Group Limited [2016] **NSWWCC 210**

(WCC, Arbitrator Gerard Egan, Date of Decision: [5 September 2016](#))

Facts and Issues: The applicant brought a claim for weekly compensation payments and medical expenses arising from an injury said to have occurred as a result of exposure to toxic fumes while undertaking work in the employer's manufacturing plant while working in the vicinity of new laser etching machines. Particulars of the injury include injuries to the lung, respiratory system, chronic fatigue syndrome and subsequent development of psychological injury, acquired brain injury with acquired memory loss. In a notice issued under s 74 of the 1998 Act, the employer accepted that the fumes had caused acute irritant symptoms. However, it also alleged that any injury suffered had ceased and therefore did not result in incapacity or the need for reasonably necessary medical treatment. The real issue was whether the chronic fatigue syndrome (CFS) had been caused by the injury as a result of exposure to the fumes during the course of employment. The worker had no known history of smoking or asthma and a lung function assessment carried out three years prior to the date of injury demonstrated an above-average lung capacity.

[Read more](#)[Read more](#)

Crowley v Pybar Mining Services Pty Ltd [2016] NSWCC 224

(WCC, Arbitrator Glenn Capel, Date of Decision: [23 September 2016](#))

Facts and Issues: The worker alleged that he sustained an injury while participating in a game of rugby league between two work crews at a period where he was off work or during an interval from his work duties. He made a claim for lump sum compensation and medical treatment expenses, alleging that the employer was liable for the injury because the game was organised, actively encouraged or sanctioned the match. The employer/insurer disputed liability, asserting that the injury did not arise out of or in the course of the worker's employment.

[Read more](#)

Ward v Allambi Care Ltd [2016] NSWCC 213

(WCC, Arbitrator John Wynyard, Date of Decision: [5 September 2016](#))

Facts and Issues: The applicant suffered an injury to her lumbar spine on 4 January 2012 in the course of her employment as a care worker looking after youths with disabilities. She remained at work performing full duties, although suffering ongoing symptoms. On 4 August 2015, the injured worker reported the onset of further back problems, which caused her to cease work. A claim was duly made for weekly payments and s.60 expenses. Liability was disputed by the insurer who maintained the return of symptoms was not related to the original injury. The matter came before the arbitrator on the issues of injury and incapacity.

[Read more](#)

PROCEDURAL REVIEW UPDATES

Work Capacity Decision Reviews

Decision WCD10816 (16 September 2016):

The worker lodged a procedural review of the insurer's work capacity decision on the basis that, among others, the insurer (a) had not complied with the Fair Notice provisions in the Work Capacity Guidelines, (b) had altered the description of suitable employment, (c) made a decision not reviewable by SIRA's Merit Review Service, (d) had not taken full consideration of all available information in making the decision, and (e) had refused to abide by the Merit Review Service's recommendation.

The insurer did not provide arguments to counter the worker's assertions, particularly on the question of fair notice. The WIRO stated that "it is clear that the

Decision WCD11416 (7 October 2016):

The worker commenced a procedural review of the insurer's previous work capacity decision that was already subject to a previous review. On review, the worker submitted that there were numerous discrepancies, omissions and errors on the part of the insurer and service providers in the management of his claim.

WIRO determined that there is no power on procedural review to review the conduct of the insurer which did not occur during the making of the work capacity decision. Having found that the definitions of "current work capacity" and "suitable employment" had been properly set out, that the method of calculating ongoing weekly payments were

Guidelines were breached, and in a material way". At [15], the WIRO found that "since that finding concerning suitable employment did not form any part of the original work capacity decision ... it is clear that the applicant was not on notice that this was an issue likely to arise in the course of internal review.

correctly explained, and that there were no errors in explaining the impact of s 59A, the WIRO could not identify any errors on procedural review of the insurer's work capacity decision. The review application was dismissed and the binding recommendation was made by virtue of s 44BB(3)(h) of the 1987 Act.

[Read more](#)

CASE STUDIES

Cases from WIRO's Solutions Group

Each week, the WIRO's Solutions Group receives hundreds of inquiries and referrals, and deals with various issues concerning workers compensation claims and disputes. The following notes are examples of those issues.

Work Capacity Decision – The insurer issued a work capacity decision and a notice under s 74 to deny liability on the same day. The two notices relied upon the same grounds for discontinuation of benefits. The work capacity decision was issued on the basis of s 33 of the 1987 Act, contrary to the decision of the Court of Appeal in *Sabanayagam v St George Bank Limited* [2016] NSWCA 145. The insurer responded to WIRO by stating that following discussions with icare, they conceded that the decision in question did not meet the requirements of the *Guidelines for Claiming Workers Compensation*. The insurer then confirmed that it made an invalid work capacity decision and no longer relied on that decision.

Weekly benefits – A lawyer contacted WIRO stating that he had been attempting to contact the insurer on behalf a worker for a few months but had not received any response. The lawyer stated that his client had not been paid her weekly benefits since April 2016 in circumstances where the insurer had not issued a s74 notice. The insurer replied stating the claim had been accepted, and advised that the worker only recently supplied the certificates of capacity. The insurer subsequently agreed to process a payment to the worker in the amount of approximately \$20,000.

Work Capacity Decision and s 74 notice issued – On 11 February 2016 an insurer issued a s74 notice purporting to cease the worker's weekly benefits and medical expenses. On 4 May 2016 the insurer issued a Work Capacity Decision which reduced the worker's payments to "nil". On 24 May 2016 the worker requested an internal review of the Work Capacity Decision and the s74 notice. This resulted in the insurer overturning the s74 notice. The insurer maintained the Work Capacity Decision and the worker ultimately sought a review of the Work Capacity Decision through the Merit Review Service. On 8 August 2016 the Merit Review Service determined that the insurer's Work Capacity Decision (an internal review decision) was not a Work Capacity Decision. Despite the merit review decision, the worker's payments were not recommenced. Following further discussions with icare, the insurer conceded that, in the absence of a valid Work Capacity Decision or decision to deny liability, payments would be reinstated.

Rehabilitation - The worker alleged that the insurer denied her request to attend a rehabilitation program because she had allegedly attained capacity to work for 24 hours per week and that the program offered only 16 hours per week. The insurer advised that there had been no formal request for such a program, that the rehabilitation provider had not recommended the requested program and that they were assisting the

Reasonable Excuse - The worker advised his claim was provisionally accepted, however, his work capacity had been downgraded from suitable duties to no capacity. The worker had not received any weekly entitlements and had no correspondence from the insurer in relation to the status of his claim. The insurer advised they were not required to give notice because at the time that the worker was downgraded he was not losing any wages. The

worker in finding suitable employment. Following further liaison with the worker, the insurer then received a formal request for the program from the worker's rehabilitation provider and employer. The insurer subsequently approved the rehabilitation program.

insurer also confirmed to WIRO that a decision regarding liability would be made shortly. The insurer subsequently accepted liability and paid the worker for the relevant period of incapacity and would continue to pay ongoing weekly benefits.

WIRO MILESTONES

Recent WIRO Outcomes and Activities

WIRO Sydney Seminar - 30 September 2016, The Westin, 1 Martin Place, Sydney

On 30 September 2016, WIRO presented one of its most successful seminars to date at The Westin Sydney, with record participant numbers (over 650 attendees).

On the theme of "*2012 Reforms – Success or Failure?*" the WIRO and his staff engaged the various stakeholders — including lawyers, administrative staff, scheme agents and key personalities within the scheme and the political arena — in facilitating discussions of the numerous issues that arise in the regular management of workers compensation claims and disputes.

Key presenters included **Clayton Barr MP** (Shadow NSW Minister for Finance, Services and Property), **David Shoebridge MLC** (Greens Member of the NSW Parliament), **Mark Coyne** (Chief Executive of EML), **Dr Roger Pillemer** (orthopaedic specialist and veteran medico-legal practitioner in the scheme), **Mick Colliss** (author, poet, sports commentator and motivational speaker), **Carmel Donnelly** (Executive Director of the Workers & Home Building Compensation Regulation at SIRA), **John Nagle** (Executive General Manager of Workers Insurance at icare), **Cameron Player** (Executive Director of Dispute Resolution Services at SIRA) and **Steve Di Leo** (Partner of Titan Partners). The affair was graciously hosted by **Anne Fulwood**, television anchor and journalist.

Videos and slide presentations of the Sydney Seminar are now available at the WIRO website: <http://wiro.nsw.gov.au/publications>



The WIRO Sydney Seminar was one of the most-attended gatherings of stakeholders to date



Over 650 participants attended the WIRO Seminar in Sydney



The Westin Grand Ballroom was filled to capacity



Kim Garling, Independent Review Officer, warmly welcomed the participants



Anne Fulwood, journalist and television presenter, compered the seminar to perfection



Clayton Barr MP, Shadow Minister for Finance Service and Property, delivered the first presentation



David Shoebridge MLC, Greens Member for NSW, presented the Greens' perspective of the scheme



Mark Coyne, EML's Chief Executive, spoke from the scheme agents' point of view



Ashley Russell, Director Solutions Group, WIRO



Wayne Cooper, Director Work Capacity Reviews, WIRO



Dr Roger Pillemer, Orthopaedic Surgeon, expert and independent medical assessor



Mick Colliss, author, poet and sports commentator, provided light and inspirational relief



Carmel Donnelly, Executive Director of SIRA's Workers & Home Building Compensation Regulation



John Nagle, Executive General Manager of Workers Insurance at icare



SIRA's Executive Director of Dispute Resolution Services, Cameron Player



Ramon Loyola, Principal Lawyer ILARS, WIRO, highlighted relevant cases



Steve Di Leo, Partner, Titan Partners, discussed taxation and GST issues



Paul Gregory, Director ILARS, WIRO, provided insights into ILARS funding and policies



Phil Jedlin, Director Operations, WIRO



All smiles from the WIRO staff at the success of the Sydney Seminar



Satisfied attendees



Breaking into smiles and laughter in the sessions



Kim Garling (WIRO), Linda Wilson (WIRO) and Anne Fulwood



Hallmarks of a successful Seminar



The WIRO and his staff

WIRO Regional Seminar – Newcastle, 7 October 2016

The first of the WIRO regional seminars was held in Newcastle at Noah’s On the Beach, with discussions spearheaded by Bruce Collins QC, who talked about “Reliability of Eye Witness Testimony”, a relevant consideration in evidential arguments in many a workers compensation claim or dispute. The other highlights included a reiteration of the implications of recent cases and adherence to ILARS policies and various impacts of lawyer and stakeholder performance statistics.

Apart from Kim Garling, WIRO speakers included Paul Gregory, Con Ktenas, Michael Vella, Ramon Loyola, Phil Jedlin and Ashley Russell.



View from the Seminar room - Noah's on the Beach

Newcastle was the first stop for the WIRO regional Seminars

Bruce Collins QC



Attentive participants

Paul Gregory, Director ILARS, WIRO

Con Ktenas, Principal Lawyer, ILARS, WIRO

WIRO Regional Seminar – Ballina, 14 October 2016

The Ramada Hotel saw in the WIRO’s Ballina regional Seminar with keen participants from the stakeholder groups in the area, including rehabilitation service providers. Kim Garling also opened up the table for discussion of several scheme hotspots with the view to addressing the potential risk and consequences faced by scheme players at the maturity period of the various 2012 reforms.



Kim Garling at the Ballina regional Seminar

Keen Ballina attendees



Paul Gregory, Director ILARS, WIRO, speaking on ILARS policies



Kim Garling capping off the day with scheme updates

WIRO Regional Seminar – Albury, 21 October 2016

Kim Garling and his team travelled south to hold the southern NSW edition of the WIRO Regional Seminars at The Quest in Albury, focusing on the key points as presented in the previous seminars to date.



Paul Gregory, Director ILARS, WIRO, at the Albury Regional Seminar



Albury Regional Seminar attendees

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS



Review of the workers compensation scheme

The WIRO has made submissions to The Standing Committee on Law and Justice of the NSW Legislative Council's current review of the workers compensation scheme. The Committee will publish their recommendations soon and we endeavour to report them in due course.

WIRO Regional Seminars

The WIRO Regional Seminars are coming to an end but registrations are still being accepted for the Bathurst and Wollongong seminars.

The main topic will be: "The 2012 reforms to the workers compensation scheme: Success or Failure?" There will also be discussions on the recent changes to the legislation as well as case law. Information and enquiries about the regional seminars should be directed via email to the WIRO at editor@wiro.nsw.gov.au

If you wish to attend please use the links provided below:

**BATHURST - Friday 28 October 2016
Rydges Mount Panorama (1 Conrod
Straight) 10.00am – 2.00pm**

**WOLLONGONG - Friday 11 November
2016 Sage Hotel (60 - 62 Harbour Street)
10.00am – 2.00pm**

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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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Information and enquiries about the WIRO Bulletin should be directed via email to the WIRO at editor@wiro.nsw.gov.au

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

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