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

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.

Some decisions are linked to AustLii, where available.

Secretary, Department of Family and Community Services v Colleen Jones by Executor of her Estate Carol Hewston [2016] NSWWCCPD 63

(WCC, Snell AP, Date of Decision: 23 December 2016)

Facts and Issues: The executor of the Estate of the deceased worker pursued a claim for lump sum death benefits, where the worker did not have dependants at the time of her death. In the Workers Compensation Commission ("the Commission"), the arbitrator issued a Certificate of Determination (COD), noted in his reasons several factors that may have led to the worker's death, and awarded the lump sum death benefits to the Executor. The employer appealed on the basis that the arbitrator erred in making findings of fact and in assessing whether the worker's death came as a result of the work injury (causal link).

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Lilyvale Hotel Pty Limited t/as The Shangri-La Hotel v Bradley [2016] NSWWCCPD 62

(WCC, King SC ADP, Date of Decision: 22 December 2016)

Facts and Issues: The worker alleged injury due to the nature and conditions of employment as a painter and decorator, and aggravation of a disease of gradual process. The employer argued that there was no injury and, alternatively, the employment was not a substantial or main contributing factor. Aided by notes, clinical and medical evidence, the arbitrator found that the worker sustained a disease injury, and that the disease was aggravated by the employment. The employer appealed on the basis of errors in fact and law.

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McLennan v Roads and Maritime Services [2016] NSWWCCPD 59

(WCC, Keating P, Date of Decision: 7 December 2016)

Facts and Issues: The worker suffered injuries prior to and subsequent to 30 June 1985 (including on various dates in 1989, 1998, 2001, 2002 and 2003). He received an award in the Commission in May 2006 for weekly payments from a certain date and continuing, with liability apportioned between two insurers on risk. The worker turned 65 years old in January 2011 and became eligible for an aged pension. Under section 52(1) of the Workers Compensation Act 1987 ("the 1987 Act"), the worker reached retirement age on 21 January 2012 and the insurer terminated the weekly payments previously awarded in May 2006. The worker disputed the termination, leading to the arbitrator declining to make a declaration that weekly payments be reinstated. On appeal, the worker argued that the arbitrator failed, among others, to correctly apply section 52 of the 1987 Act.

Held: Keating P concluded that the worker was entitled to ongoing weekly payments pursuant to the award despite his reaching the retirement age, stating, at [69], that based on the relevant authorities the ongoing entitlement continues "because his incapacity was due to injuries sustained before and after 30 June 1985 … s 52 did not operate to bring the entitlement to compensation under the award to an end upon the worker reaching retirement age". Further, at [71], the President stated that even if the insurer may consider terminating payments under section 52, the worker "had the benefit of an award of the Commission in his favour, It was not open to [the insurer] to determine, on its own volition, that it was free to decline further indemnity merely because it had formed the view it was open to do so". The insurer ought to seek an order from the Commission to vary the terms of the previous award. The arbitrator's conclusions were found to be incorrect and the determination revoked. Orders were made for weekly payments to continue in favour of the worker on or after 21 January 2012.

Qu v N & A Fruit Distributors Pty Ltd t/as Pacific Fruit Brokers [2017] NSWWCC 18

(WCC, Senior Arbitrator Catherine McDonald, Date of Decision: 20 January 2017)

Facts and Issues: The injured worker was employed with the respondent for around four months when on 3 April 2014 he allegedly suffered an injury to his left shoulder while moving a tray of avocados. The insurer accepted the injury, although it disputed its nature and extent. The worker tried to return to work and later alleged the adverse treatment by the management and fellow workers, including an alleged assault, resulted in a primary psychological injury. The worker claimed the assault injured his right shoulder, which subsequently required surgery. The insurer denied these later injuries. The worker also claimed that, as a result of these injuries, he is no longer fit for work from April 2015.

Held: The arbitrator found that the left shoulder injury had resolved and that the proposed surgery was not reasonably necessary treatment. In respect of the right shoulder injury arising from the alleged assault, the arbitrator made an award in favour of the respondent as there were no findings that the assault occurred as alleged. The worker did not allege any secondary injury arising out of over reliance on his previously uninjured shoulder. However, the arbitrator found that, although the worker was not injured in an assault, there was considerable conflict which arose on the day alleged and that the worker's employers had managed his return to work in a way which the worker perceived as humiliating and disregarding of his level of incapacity. Further, the worker had become totally unfit for work as a result of the psychological injury. The arbitrator's reasons contain discussions of the current authorities on how a worker's perception of actual events, whether flawed or not can result in liability to the employer. (See Roche DP's findings in *Attorney General's Department v K* (2010) 8 DDCR 120, [2010] NSWWCCPD 76.) The arbitrator remitted the worker's psychological condition to the Registrar for referral to an approved medical specialist (AMS).

Jackson v TAFE Commission t/as Sydney Institute of Technology [2017] NSWWCC 1

(WCC, Arbitrator Josephine Snell, Date of Decision: 4 January 2017)

Facts and Issues: The applicant suffered an injury to his right knee on 19 November 2008. Liability was accepted. On 13 December 2012 the worker sustained a recurrence of this

Brooks v RHJ Industries Pty Ltd [2016] NSWWCC 299

(WCC, Senior Arbitrator Catherine McDonald, Date of Decision: 20 December 2016)

Facts and Issues: On 30 September 2010, the worker injured his right thumb. Following recovery, he returned to work in suitable duties including lifting

injury. A further incident occurred on 25 October 2014 when the applicant's right knee gave way causing his left knee to twist. It was common ground the worker had received more than 130 of weekly payments and that his entitlement would be determined under section 38 of the 1987 Act. The respondent insurer disputed injury to the worker's left knee and proposed bilateral arthroscopic surgery. On 16 March 2016 the insurer also suspended the applicant's weekly benefits pursuant to section 44A(6) of the 1987 Act. This suspension was on the basis that the worker refused to attend an appointment with a doctor to assist in the completion of a work capacity assessment. The parties agreed the remaining issues in dispute were injury to the left knee, the proposed bilateral arthroscopic surgery, the validity of the suspension of the worker's weekly benefits and whether or not the Commission could make an order to reinstate the worker's weekly payments.

Read more

Miller v Hahn Corporation Pty Ltd [2016] NSWWCC 289

(WCC, Arbitrator Elizabeth Beilby, Date of Decision: 12 December 2016)

Facts and Issues: The truck driver worker died as a result of an accident while driving his employer's truck from Merbein to Griffith in New South Wales. The deceased worker's dependants made a claim with the insurer in South Australia. The SA insurer declined liability on the basis that the worker's employment was in NSW, pursuant to section 9AA(3)(a) of the 1987 Act. Notably, the employer had business activities in SA, NSW and Victoria. The only issue before the arbitrator in the proceeding was the state of connection.

Held: The arbitrator applied the "cascading test" provisions in section 9AA and found that the business was carried out in multiple States, but that the employer's principal place of business was located in SA where most practical decisions were made by the management and the directors. The SA business location was also referred to as the "head office" where the majority of employees and the three business directors were based. Upon consideration of all the submissions made, the arbitrator agreed with the arguments made that "the principal place of business in this is case is where the employer conducted the chief part of that business and that leads to a finding that must be in South Australia" (at [36]). Despite heavy buckets with his left arm due to the restricted right thumb. On 19 December 2012, the worker made a claim for an aggregated permanent impairment lump sum compensation for both the right thumb injury and the alleged left shoulder condition (which developed as a consequence of the right thumb injury).

Held: The senior arbitrator, at [44], found: 'While the evidence supports the contention that Mr Brooks suffered a consequential condition in his left shoulder, the same facts support the contention that he suffered an injury in accordance with s 4 of the 1987 Act. The previous injury to the right thumb contributed to the injury to his left shoulder but the lifting of heavy buckets was a separate injury. He would have been able to claim compensation in respect of it regardless of the right thumb injury."

Read more

Bell v Jayola Pty Limited trading as Harvey Norman Computers [2016] NSWWCC 284

(WCC, Arbitrator R J Perrignon, Date of Decision: 8 December 2016)

Facts and Issues: The worker made a claim for further lump sum compensation for a frank injury sustained to the left knee on 28 May 1997. There was no dispute of the said injury, but the insurer asserted that the claim was barred pursuant to section 151A(1)(a) of the 1987 Act because the worker recovered damages in respect of the injury when he received payment as a result of a Deed of Release dated 18 January 2008. The worker argued that the Deed of Release did not cover the injury in May 1997, which was entered into by the parties to only include other injuries due to the "nature and conditions of employment".

Held: The arbitrator considered all the terms of the deed, including specific Recitals that contained specific references to "all claims and liability directly or indirectly out of the Employment … and/or the Proceedings". Citing the term "the proceedings" contained in a Recital as "to include claims for various forms of workers compensation and work injury damages which the applicant had brought or was entitled to bring", the arbitrator also considered the specific clauses in the deed which released the employer from any liability and found in favour of the employer. The arbitrator held that: "As 'the proceedings' was defined in

the ambiguous order reflected in the COD, it was clear that the arbitrator determined that the state of connection in relation to any claim arising from the death of the worker as a result of the injury was SA.

the Recitals to include the claims made in respect of injury on 28 May 1997, the release in clause 4.2 included a release from all claims and liability in respect of that injury" (at [37]).

Read more

OTHER DECISIONS OF NOTE:

Bechtel Constructions (Australia) Pty Ltd v Muhannad Alkhattab [2016] NSWSC 1749

(Supreme Court of NSW, Campbell J, Date of Decision: 6 December 2016)

The worker suffered an injury as tradesman painter at a work site in the State of Queensland. The worker was a fly-in-fly-out worker in Queensland but was at all times a resident of New South Wales. The worker had also stated that the work entailed had been completed in Queensland. Damages proceedings were commenced in the District Court of NSW. The employer sought an order from the Supreme Court of NSW under section 8(1) *Jurisdiction of Courts (Cross-Vesting) Act 1987* to remove the District Court of NSW proceeding into the Supreme Court of Queensland.

Campbell J considered various factors and determined, at [24], that 'the test is what the interests of justice require, not what the applicable law is," finding that "there is no evidential connection with Queensland inasmuch as the witnesses are … spread throughout the country, the proceedings are well advanced in the State of New South Wales; the District Court is able to dispose of its civil business expeditiously; and the case is likely to be heard here in 2017; the interests of justice do not favour a transfer to the Supreme Court of Queensland". The employer's summons was dismissed.

PROCEDURAL REVIEW UPDATES

Work capacity decision reviews

All the procedural reviews of the WDC's are published by the WIRO and can be accessed at:
http://wiro.nsw.gov.au/information-lawyers/work-capacity-decisions

Decision WIRO – 517 (17 January 2017)

Facts: The worker injured his knee on 23 June 2016. The insurer accepted liability and made weekly payments for 11 weeks. On 7 September 2016, the insurer issued a work capacity decision (WCD) that reduced the weekly payments to a certain amount. The WCD was issued at the time when the insurer was informed that the worker was outside Australia between 7 September 2016 and 8 October 2016. Upon his return, the worker lodged an internal review, but was advised by the insurer that there was no stay of the decision because he had been paid for 12 weeks and there was no section 54 notice required. Nevertheless, the insurer on 24 October 2016 issued a decision on internal review, which effectively reduced the amount of weekly payments to $nil and found that the worker could return to his pre-injury duties, could work in

Decision WIRO – 617 (19 January 2017)

Facts: A WCD issued on 15 July 2016, stating that the worker's weekly payments would be reduced to a certain amount because the worker was approaching the 130-week period of entitlement, following which 80% of the PIAWE would apply (the notice to this effect referenced an incorrect provision in section 38 of the 1987 Act). On internal review, the insurer corrected the reference to section 38(7) and confirmed the original WCD. On merit review, SIRA confirmed the decision.

Held: On procedural review, the WIRO's delegate found that the incorrect reference to section 38 may have been a "technical breach". However, with reference to the concept of "substantial compliance" inserted into the new work capacity guidelines, the WIRO's delegate opined that the

suitable employment and was entering the second entitlement period. It also advised cessation of payments on 6 February 2017. On merit review, the SIRA made similar findings but made no recommendations.

Held: In became apparent in the WIRO review that the insurer based its decision in the WCD on the *WorkCover Work Capacity Guidelines*, which were no longer in effect at the time that the WCD was made (ceased to be in effect on 31 July 2016). The WIRO's delegate stated, at [19], that: "A failure to cite the correct Guidelines must result in a procedural unfairness to the applicant. This is because a worker must be able to check whether or not an Insurer has complied with the relevant legislation, regulations and Guidelines before deciding whether or not to take steps to have the decision reviewed under section 44BB." The failure of the insurer on this point was a breach of the rules of procedural fairness. The WCD was set aside and recommendations made for the insurer to pay the worker for all relevant periods at the appropriate rate immediately prior to the WCD being made, and for payments to continue until the insurer makes a new WCD and any required notice period expires.

decision will not be invalidated due to the "technical breach" unless the worker is misled, suffers disadvantage or suffers procedural unfairness. The WIRO's delegate found that despite the insurer's error, the effect of the erroneous WCD was identical to that of the correctly-decided internal review. The worker therefore did not suffer any disadvantage. The insurer had been thorough in its explanation to the worker of the operation of section 38(3), the clarification of the entitlement periods and the reasons by which the WCD was made, which complied with the Guidelines. No error on procedures undertaken in the course of making the WCD (apart from the "technical breach", which did not result in a disadvantage to the worker). The WCD was validly made. The procedural review was dismissed.

WIRO POLICY UPDATES

Recent WIRO policies

No ILARS funding for replacement hearing aids

From 9 January 2017, the WIRO declared that ILARS funding is no longer applicable for claims for provision of replacement hearing aids. However, lawyers may seek ILARS funding if the insurer has refused the request for replacement hearing aids and it is apparent that the decision would most likely be overturned by the insurer. If this transpires, the WIRO Solutions Group will invite the insurer to review the decision to decline the request, prior to the grant of ILARS funding.

(See WIRO WIRE - 9 JANUARY 2017 - URGENT - ILARS FUNDING CHANGE - REPLACEMENT HEARING AIDS

Section 39 of the *Workers Compensation Act 1987* and the 2016 transitional arrangements for weekly payments

Following the commencement of the *Workers Compensation Amendment (Transitional Arrangements for Weekly Payments) Regulation 2016* — which inserted new provisions into Schedule 8 of the *Workers Compensation Regulation 2016* for the purpose of workers impacted by section 39 of the 1987 Act — the WIRO has identified several issues that may arise in the application of that provision.

The WIRO's full statement on the issues is found in the WIRO WIRE - 12 JANUARY 2017 - ISSUES ARISING FROM SECTION 39 OF THE WORKERS COMPENSATION ACT 1987 AND THE EFFECT OF THE WORKERS COMPENSATION AMENDMENT (TRANSITIONAL ARRANGEMENTS FOR WEEKLY PAYMENTS) REGULATION 2016

ILARS funding is also available for section 39 applications

(see WIRO WIRE - 24 NOVEMBER 2016 - SECTION 39 FUNDING

CASE STUDIES

Cases from ILARS and the WIRO's Solutions Group

Each week, the WIRO's Solutions Group and ILARS 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.

Stay of work capacity decision – The worker sought procedural review of a WCD a few days before the weekly payments were to cease. She was receiving weekly payments at the relevant transitional rate. The worker was concerned that the weekly payments will be discontinued while the review was on foot and that her payments would be made at a different rate. WIRO contacted the insurer to inquire if the WCD was subject to the stay. The insurer advised the worker's application for an internal review was made within 30 days of issue of that decision and, therefore, it was applying the stay of the WCD pending the decision of the WIRO's procedural review.

Approval of continuing rehabilitation – The insurer accepted that the worker required reasonably necessary medical treatment by way of physiotherapy. However, it declined the worker's ongoing physiotherapy sessions on the basis that treatment with that particular rehabilitation provider had been exhausted as there had been no functional gains or pain reduction achieved. The worker sought WIRO's assistance when he received a notice from the insurer, referring him to an independent physiotherapy consultant (IPC) of their own choosing. On the same day, the insurer also issued a section 74 notice.

Read more

WIRO MILESTONES

Recent WIRO outcomes and activities

WIRO Solutions Brief - Issue 3

The third issue of the *WIRO Solutions Brief* was issued in January 2017. The newsletter is a regular insurer brief distributed to scheme agents on updates and other information relevant to the operations of the WIRO. To subscribe to the *WIRO Solutions Brief* and/or the *WIRO Bulletin*, please make sure you send an email to editor@wiro.nsw.gov.au

WIRO Solutions Brief – Issue 3 is also up on the WIRO website.

WIRO Seminar 2017

WIRO will once again be holding its annual seminar on Monday 5 June 2017, addressing all recent changes to and developments in the workers compensation scheme. It will be an all-day event in Sydney and numbers will be strictly limited. A formal invitation will issue closer to the seminar date with all the relevant information and event details.

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS

The New Year is upon us and everyone is without a doubt refreshed and informed by the most recent changes to the scheme, including the latest ministerial changes.

Please join me in congratulating: Mr Victor Dominello MP on his appointment as Minister for Finance, Services and Property; Mr Matt Kean MP on his appointment as Minister for Innovation and Better Regulation (within which the icare portfolio is held); and, Mr Alister Henskens SC MP on his appointment as Parliamentary Secretary for Finance, Services & Property.

There appears to be a lot of anticipation among scheme users as to what other legislative and/or policy changes will be realised this year. The most significant issue on hand is the effect of the 2012 reforms regarding the management of injured workers severely impacted by the 2012 amendments and whose entitlements are due to cease in December 2017. I am continually working with all the stakeholders so that a concerted effort could be made in order to minimise or eliminate any disruption or ambiguity that the operation of such provisions may bring about.

I encourage all stakeholders, particularly the insurers, to adhere to best practice methods and transparent procedures in working through the variety of possible scenarios that may arise in helping injured workers to return to work in a safe and expeditious manner. I urge insurers to recommend that affected workers may be referred to my office for no-cost independent legal advice through the WIRO's extensive network of lawyers in the scheme. That will remove any suggestion that workers were not given the correct information by their insurer.

I also encourage workers to take advantage of the valuable assistance provided by insurers so that their return to work occurs with the desired efficiency and in the most practical way possible.

I am confident of our capacity to work together towards the fulfilment of the objectives of the scheme. I look forward to working with all of you in the robust year ahead.

Kim Garling

Problem with a workers comp...	Independent Legal Assistanc...

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

Level 4, 1 Oxford Street