WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND TRENDS

ISSUE NO 8, MARCH 2017

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.

***State of New South Wales v Stockwell* [2017] NSWCA 30**

(NSW Court of Appeal, McColl JA, Leeming JA, Simpson JA, Date of Decision: 1 March 2017)

Facts and Issues: (*exempt workers*) The worker sought weekly payments compensation on the basis of total incapacity, following an orthopaedic injury sustained in the course of employment as a front line Ambulance Officer. As a result of the injury, the worker became an Operations Centre Officer. At all material times, his work was classified under the relevant 2006 award for ambulance officers. He subsequently ceased working in 2007, following a psychological injury suffered in his capacity as an Operations Centre Officer. The Workers Compensation Commission ('the Commission') awarded the worker weekly payments in 2008. In 2013, the insurer issued a notice under s 54 of the *Workers Compensation Act 1987* ('the 1987 Act'), purporting to be a work capacity decision with the effect of terminating the worker's weekly payments, pursuant to the provisions in the *Workers Compensation Legislation Amendment Act 2012* ('the 2012 amendments'). The worker argued that he was a paramedic and was therefore exempt under cl 25 of Pt 19H of Sch 6 of the 1987 Act (the provision exempts certain workers from the effect of the 2012 amendments,

***Butler v Compass Group (Australia) Pty Ltd* [2017] NSWWCC 30**

(WCC, Arbitrator William Dalley, Date of Decision: 9 February 2017)

Facts and Issues: (*reasonably necessary medical treatment – trial spinal cord stimulators*) In the course of managing her lumbar spine injury, the worker tried numerous medical treatment modalities – including cortisone injections, surgery, acupuncture, nerve root injections and joint injections – to little benefit. Her treating doctors recommended a trial of spinal cord stimulators, which they considered to be reasonable. The insurer's doctors initially felt the proposed treatment was reasonably necessary, but changed their opinion to dispute the procedure after viewing DVD surveillance recordings of the worker's activities. The insurer then denied liability for the proposed spinal cord stimulators.

Held: The arbitrator accepted the opinions of the worker's treating doctors that the limited viewing of the worker's activities over a period of a couple of days did not provide a suitable basis for assessing the worker's level of pain and limitation of movement. The issue of whether or not the proposed treatment was reasonably necessary had to be decided on the whole of the evidence (at [78]). The

including police officers, paramedics and firefighters). The insurer asserted that, although the worker was a 'paramedic' until the end of 2006, he had lost the certification because he had not undertaken refresher courses and examinations as required by the 2006 ambulance award. The arbitrator found that the worker was a 'paramedic', which was confirmed on appeal by the Commission. The insurer appealed to the Court of Appeal on a point of law.

Held: The appeal was dismissed and the findings of the Commission were confirmed. The Court construed the terms of the 2006 ambulance award and found no provisions to indicate that the failure of the worker to undergo refresher courses and examinations did not mean that the worker failed to be a 'paramedic' under the award, and that the only consequence of such a deemed failure was that a worker would cease to be entitled to any additional allowances to which anyone would have otherwise been entitled (at [65]-[86]). The Court followed the decision in *State of New South Wales v Chapman* [2016] NSWCA 237 and held that the construction of cl 25 of Pt 19H of Sch 6 of the 1987 Act required a consideration of whether the worker was employed as a 'paramedic' at the date of his injury (at [66]). The Court determined that there was no indication in the provisions of the 2006 ambulance award that the worker ceased to be a paramedic due to his failure to undergo refresher courses and that the worker lost the status of a 'paramedic' because of that failure. There was no error on the Commission's part and the finding that the worker was a paramedic was confirmed. Hence, the worker was an exempt worker and the 2012 amendments did not apply.

arbitrator considered that the worker's treating doctors pointed to a lack of correlation between the surveillance observations and the level of the worker's pain and disability. "Although the doctors did not view the video footage their opinion is not contradicted by any evidence of an established relationship between observations and level of symptoms" (at [79]). The Commission preferred that opinion and considered the treatment to be appropriate and to constitute reasonably necessary medical treatment. Award made in favour of the worker.

Spence v Roofsafe Services Pty Ltd [2017] NSWWCC 27

(WCC, Arbitrator Gerard Egan, Date of Decision: 3 February 2017)

Facts and Issues: (*reasonably necessary medical treatment – surgery*) The worker injured his left knee as a result of an incident in January 2015 when he slipped on a ladder. The medical evidence obtained suggested that a total knee replacement was reasonably necessary. The insurer accepted that the procedure was reasonably necessary in such circumstances but disputed that the worker's need for the surgery resulted from the injury. This raised the issue of causation in the Commission.

Held: The arbitrator considered all the available approaches to dealing with the issue of causation and acknowledged that "the evidence is that the applicant was performing his duties with little or no restriction in significantly active pursuits of climbing ladders and walking on sloping rooves. These activities, by the application of common sense, place significant stresses on one's knees" (at [29]), and stated at [34] that the "applicant's work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment for the cost of that treatment to be recoverable". In considering the relevant authorities, the arbitrator opted to apply the reasoning that the injury materially contributed to the need for the surgery (at [36]). In accordance with the relevant authorities, the arbitrator held that the total knee replacement was a result of both the worker's pre-existing disease and the aggravation, the contribution of which to the need for surgery was sufficient for the injury to be the relevant cause for the requirement for the surgery. The proposed total knee replacement is reasonably

necessary medical treatment as a result of the injury in January 2015.

Haines v National Rugby League Ltd [2017] NSWWCCPD 26

(WCC, Arbitrator Paul Sweeney, Date of Decision: 3 February 2017)

Facts and Issues: (*worker as defined in s 4*) The worker, employed as a match official by the NRL, injured his left knee during one of the training sessions. The insurer disputed his claim for workers compensation benefits on that basis that he was excluded from the definition of a 'worker' under s 4(1)(d) of the *Workplace Injury Management and Workers Compensation Act 1998* ('the 1998 Act') and that the claim therefore fell under the *Sporting Injuries Insurance Act 1978*.

Held: The arbitrator found that the worker was a registered participant of a sporting organisation and that he was injured during his preparation to participate in an authorised activity. The employer failed to establish that the worker was not entitled to remuneration, except for refereeing rugby league games or training or practice for it, or travelling to or from such a game. The arbitrator placed emphasis on the different roles the worker was required to perform in the course of his work outside of the scheduled training and match days, including attending media events and functions, as well as providing analysis of the games via video commentary, taking part in courses about the rules of the game, and training junior referees. The worker was "remunerated for activities other than refereeing a match or practising or preparing to so do" (at [57]), and was therefore not excluded from the definition of a 'worker' in s 4 of the 1998 Act. Order made in favour of the worker, and the 1998 Act applied.

Note: (On another discussion of "worker" as defined in s 4, see also *Mardini v Divine Formwork & Construction Pty Limited* [2017] NSWWCC 25.)

Baldock v Sargents Pies Pty Ltd [2017] NSWWCC 19

(WCC, Arbitrator Tim Wardell, Date of Decision: 23 January 2017)

Facts and Issues: (*hearing aids in 2014 fee order and 2015 fee order*) The worker was exposed to a noisy workplace with the employer and suffered noise-induced hearing loss. Following a medical examination by his medical specialist, he made a claim on 8 March 2016 for the provision of hearing aids, which was subsequently denied by the insurer on the basis that the insurer's own doctor found that the worker did not satisfy the compensable threshold of more than 10% whole person impairment (WPI) under s 66(1) of the 1987 Act and/or there was no 6% binaural hearing loss (BHL) at the least as required in the Workers Compensation (Hearing Aids) Fees Order 2014 ('the 2014 fee order'), and that hearing aids were therefore not reasonably necessary.

Held: The Commission determined the relevant date on which the claim for hearing aids was made and found that the claim was subject to the Workers Compensation (Hearing Aids) Fees Order 2015, ('the 2015 fee order') (in lieu of the asserted 2014 fee order), which came into effect on 4 December 2015, and was applicable to claims made after that date. The arbitrator acknowledged that the 2015 fee order deleted the requirement for a medical assessment of at least 6% BHL, which meant

Kitson v Secretary, Department of Family & Community Services [2017] NSWWCC 12

(WCC, Arbitrator R J Perrignon, Date of Decision: 12 January 2017)

Facts and Issues: (*leave to admit late documents; WCC's power to make a general order*) The worker's claim for weekly payments and medical treatment expenses came before the Commission. During the teleconference, the worker discontinued the claim for weekly payments; the arbitrator set down the issue of the medical treatment expenses for a conciliation conference/arbitration hearing (Con/Arb) at a later date. The worker sought a general order under s 60 of the 1987 Act. The insurer disputed the making of a general order, but that, if one was to be made, it should be limited to the costs of the expenses incurred prior to the cessation of the aggravated injury. Finding no sufficient evidence to support the claim, the arbitrator raised the issue and directed the parties to make further submissions before the Con/Arb. The worker lodged late documents and sought their admission into the proceeding on the basis that there was no prejudice caused to the employer in doing so. The late documents included a treating GP's report indicating the worker's future

that hearing aids could be provided in any case where hearing aids had been indicated to be reasonably necessary (at [35]). In the circumstances, the arbitrator said, the insurer's doctor based his opinion on the assumption (relying on the 2014 fee order) that the worker was required to have a 6% BHL medical assessment and made the inference that hearing aids were not warranted because the doctor assessed the worker as only having 5.5% BHL. Award was made in favour of the worker.

medical treatment needs. The employer/insurer disputed the admission of the late documents.

Read more

Hill v S L Hill & Associates Pty Ltd (deregistered) and 2 Ors [2017] NSWWCC 11

(WCC, Arbitrator Glenn Capel, Date of Decision: *12 January 2017*)

Facts and Issues: (*failure to prosecute claim*) The worker commenced proceedings in the Commission, which was set down for four teleconferences. On each of those occasions, the matter was deemed not ready to proceed and was therefore discontinued at an arbitration hearing. New proceedings were commenced, which was scheduled for two teleconferences, following which the matter was still not in a position to be listed for a Con/Arb. At a third teleconference, the worker's lawyers indicated that they were awaiting further information and evidence. The arbitrator considered the quality of preparation of the proceedings.

Held: The matter was found to have been poorly prepared with the worker's claim having a poor history, and had not progressed in accordance with the model rules under which the Commission operates. The arbitrator opined that there was little or no prospect of the matter being advanced. The arbitrator considered the proceedings a nullity and struck it out for want of prosecution.

Note: ILARS had declined funding at all stages of the claim on public policy grounds. This is a stark reminder for all law practices to ensure that model rules in the Commission, including public announcements contained in E-Bulletins issued by the tribunal in relation to "unprepared matters", are adhered to at all stages of a claim, dispute or proceeding.

OTHER DECISIONS OF NOTE

Pel-Air Aviation Pty Ltd v Casey [2017] NSWCA 32

(NSW Court of Appeal, Macfarlan JA, Ward JA and Gleeson JA, Date of Decision: 9 March 2017)

In the context of international law, the concept of "bodily injury" cannot be imported to prove a claim that justifies entitlements for post-traumatic stress disorder (PTSD) developed after sustaining significant physical injuries.

In quashing the primary judge's findings (that PTSD was a "bodily injury"), the Court of Appeal held that, (per Macfarlan JA, Ward and Gleeson JJA concurring):

[46] The expression "bodily injury" connotes damage to a person's body, but there is no reason to regard this as excluding consideration of damage to a person's brain. Thus if the evidence in a particular case demonstrates that there has been a physical destruction of a part or parts of the brain, "bodily injury" will have been proved ...

[47] … there was no proof here that Ms Casey's PTSD resulted from actual physical damage to her brain. However the more difficult question that arises is whether the biochemical changes in her brain, of which there is evidence in the present case … constitute "bodily injuries". My conclusion is that they do not.

and

[51] Consistent with [the] case authorities, I consider that it is insufficient for a claimant to prove that the function of his or her brain has changed or even that chemical changes have occurred in it. In the absence of compelling medical evidence to the contrary, such malfunctioning or chemical changes cannot fairly be described as “injuries” to the body. Moreover, importance must be attached to the adjective “bodily” as a limiting word. It clearly draws a distinction between bodily and mental injuries: mental injuries are covered only if they are a manifestation of physical injuries, or if they result from physical injuries (including physical injuries to the brain).

The impact of such findings in statutory compensation and damages claims for personal injury within the context of the Workers Compensation Acts remains to be seen.

LEGISLATION UPDATES

Recent legislation and guidelines

New indexation amounts April 2017

SIRA has released the *Workers Compensation Benefits Guide April 2017* edition, which indexed amounts for various benefits and workers compensation entitlements. The next indexing occurs in October 2017.

Check out the new guide here: Workers Compensation Benefits Guide April 2017.

NSW Parliament releases first workers compensation scheme review report

The Legislative Council of the NSW Parliament’s Standing Committee on Law and Justice has tabled the first report on the workers compensation scheme review, since the structural reforms in 2014. The review makes several recommendations on the regulation, management and operation of the scheme that address the various issues and challenges that arose out of the 2012 legal reforms. The NSW Government is required to respond to the committee’s recommendations within six months.

The full report and list of recommendations can be accessed on the NSW Parliamentary website.

First review of the workers compensation scheme

PROCEDURAL REVIEW UPDATES

Work capacity decision reviews

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

Decision WIRO – 2217 (14 March 2017)

Facts: The insurer advised the worker that his weekly payments would cease. The worker was within the second entitlement period and had not returned to work. A calculation of the weekly payments for the relevant period and the worker’s PIAWE under s 37(3) resulted in nil entitlement. On internal review, the insurer confirmed the work capacity decision (WCD) with the following remarks:

Decision WIRO – 1017 (30 January 2017)

Facts: The worker sought procedural review of a WCD issued on the basis that the worker was no longer entitled to weekly payments because he did not meet the requirements in s 38(3) after the expiration of the second entitlement period of 130 weeks.

Held: The WIRO found that the insurer issued the WCD in

"[the applicant's] PIAWE (AWE) has been previously assessed to be $817. I note that there is no information before me to suggest that the [applicant] does not agree with this figure; therefore, I accept this rate as [the applicant's] AWE". On merit review, SIRA disagreed with the insurer's internal review decision but declined to make a recommendation because it also found, upon their own calculations under s 37, that the worker's entitlement to weekly payments amounted to nil. The worker sought a procedural review on the basis that the indexation of PIAWE was not explained in detail and was erroneous, and that the insurer incorrectly advised him about the indexation of his PIAWE.

Read more

accordance with the previous guidelines. At [12], the WIRO stated that: "It is clear that while the decision may well have been conducted in accordance with the previous Guidelines, the wrong Guidelines were applied. It being a statutory requirement in section 44A that the Guidelines be applied, this must be read as a requirement to apply the Guidelines in force as at the date of the work capacity decision. The failure to do this is therefore a breach of the statute as well as a breach of the Guidelines." This amounted to a procedural error which invalidated the WCD. The WIRO recommended that a new WCD be issued based on the correct guidelines.

WIRO POLICY UPDATES

Recent WIRO policies

WIRO collects respondent data

One of the main objectives of the WIRO's operation is to provide an effective information management system that captures data relevant to a claim or dispute. In this light, the WIRO has called out to respondent lawyers (legal representatives of employers, insurers and other agents in the scheme, apart from those of lawyers for injured workers) to be included in the office's collection of relevant data for legal representation in a claim or dispute.

Approved legal services providers are encouraged to let the WIRO know of the law practice/firm that has/had carriage of the claim, dispute or proceeding on behalf of the respondent employer or insurer.

The WIRO Wire issued on 17 February 2017 can be found here: WIRO Wire – Collection of Data

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.

Insurer must provide worker with a choice of doctors and with the most appropriate medical speciality – The insurer advised a worker that he was required to attend a medical examination by a chosen doctor from a list of three medical experts. The purpose of the medical examination was to ascertain the worker's degree of permanent impairment in order to review his entitlement to ongoing weekly payments pursuant to s 39 of the 1987 Act. The worker became

Provisional liability and reasonable excuse – The insurer sent a letter to the worker, advising that they are declining to make provisional payments of weekly benefits due to a reasonable excuse. After several correspondence between the worker and the insurer, the worker contacted WIRO to assist in clarifying the issues with the claim. In reviewing the insurer's letter, the WIRO noted that the reasonable excuse letter stated that provisional weekly payments of compensation will not

concerned that the three medical experts the insurer provided and from which the worker could choose were all orthopaedic specialists. The nature of the worker's injury had always been addressed, treated and managed by a neurological specialist. The worker sought WIRO's assistance to inquire as to the reasons why the insurer had limited the choice of doctors to only orthopaedic specialists. The insurer advised WIRO that, following a review of the nature of the injury and the evidence that supported the claim, they agreed the most appropriate medical specialist to conduct the medical assessment was a neurological specialist.

be commenced due to "insufficient factual information". WIRO noted with the insurer that there is no provision in the *Guidelines for Claiming Compensation Benefits* that allows provisional liability payments to be reasonably excused on the basis of insufficient factual evidence. In addition, if it is alleged that the injury was wholly or predominately caused by reasonable action taken or proposed to be taken by the employer, then this must be supported by evidence and the claim could then be declined thereafter. WIRO pointed out that the Guidelines state that "suspicion, innuendo, anecdotes or unsupported information from any source, including the employer, is not acceptable". WIRO then informed the insurer that, for the identified reasons, it appeared that the reasonable excuse notice was deficient. In response, the insurer agreed to commence provisional liability payments from the date of injury.

WIRO MILESTONES

Recent WIRO outcomes and activities

WIRO Solutions Brief - Issue 4

The fourth issue of the *WIRO Solutions Brief* has just been issued. 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 4 is also up on the WIRO website.

WIRO Course in Bathurst

WIRO has brought its successful Course for Paralegals and Administrative Staff to Bathurst on 22 February 2017. WIRO staff spearheaded the presentations on what the WIRO looks out for in performance and conduct behaviour, communicating with the WIRO and other stakeholders, how to prepare and lodge an ILARS grant application, how to pursue proceedings in the Workers Compensation Commission and the intricacies of the costs scheme and tax invoicing to WIRO.

2017 WIRO Courses for Paralegals and Clerks

Following the Bathurst course, the WIRO has also conducted two full courses for paralegals and legal clerks in Sydney in March 2017. WIRO is currently sending out expressions of interest for future course dates, with the next course being held again in Sydney in May 2017. If you have interested paralegals and clerks who wish to

Insurer Workshops

WIRO is inviting insurers/scheme agents to put forward expressions of interest if you want the office to conduct workshops. The first workshop was scheduled on 6 April 2017 at the Primus Hotel (Sydney).

The first workshop in Sydney featured speakers from the WIRO, including Kim Garling himself, and guest presenters who talked about what we do in the Solutions

attend these courses, please send your EOIs to editor@wiro.nsw.gov.au

Group, Operations and procedural reviews. The workshop also featured hot topics, including s 39 and s 59A, as well as recent case law relevant to these issues. Regional workshops are also anticipated.

WIRO Seminars 2017

The successful WIRO Seminars are back in 2017. Please tentatively mark your calendars for the following dates. Watch out for the full invitations and programs for each of the seminars.

19 May 2017 (Friday) – Ballina
26 May 2017 (Friday) – Wollongong
5 June 2017 (Monday) – Sydney
16 June 2017 (Friday) – Orange
23 June 2017 (Friday) – Newcastle
21 July 2017 (Friday) Albury

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS

By now, you have all been made aware of the report of the NSW Upper House Standing Committee on Law and Justice on the first review of the workers compensation scheme, published in the NSW Parliamentary website.

I am pleased to let everyone know that the WIRO's submissions to the committee had been included and highlighted in the report, including the issues that I believe are most relevant in dealing with the challenges ahead.

The recommendations made to the NSW Government include, among others:

- the completion of the WIRO's Parkes Review;
- the removal of the distinction between a work capacity decision and a notice or decision to dispute liability;
- the introduction of a single notice for both work capacity decisions and decisions to deny liability;
- the amendment of s 322A of the 1998 Act so that two further medical assessments of permanent impairment may be allowed;
- the development of a more comprehensive specialist personal injury jurisdiction in New South Wales and the establishment of a single forum for resolution of all workers compensation disputes.

The NSW Government is expected to provide their response to the committee's recommendations within six months. In the meantime, I encourage everyone to review the report – which can be found on the NSW Parliamentary website or through this link (First review of the workers compensation scheme) – and engage with me if there's anything you can suggest, propose or indicate towards the enhancement and improvement of the scheme.

My office is also open to any enquiry about the impact of the legal reforms, particularly with the operation of s 39 and the relevant obligations of all the parties concerned in its implementation.

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