WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND TRENDS

ISSUE No 10
JUNE 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.

Bhusal v Catholic Health Care [2017] NSWSC 838

(NSW Supreme Court, Button J, Date of Decision: 23 June 2017)

(Case report by Wayne Cooper, Director Work Capacity)

The Supreme Court (per Button J) determined that:

i. the word "must" in section 44BB(3)(a) of the *Workers Compensation Act 1987* is to be construed as mandatory;

ii. section 44BB(3)(a) is a prohibition or qualification on the exercise of power, not a pre-condition to the exercise of power; and

iii. the date of receipt by a worker of a work capacity decision (or any subsequent decision in the review process) is not a "jurisdictional fact" determinable by the Court *de novo* in the course of a judicial review.

Wiech v Aldi Stores [2017] NSWWCCPD 19

(WCC, Keating P, Date of Decision: 5 May 2017)

Facts and Issues: (*factual and discretionary errors, capacity for work*) The worker was employed as a buying administration assistant with the employer and injured her elbow and wrist leading to a period of incapacity. Upon returning to work, the worker was involved in a series of work incidents in conflict with management and other staff, culminating in a psychological injury. She made a claim for weekly payments and medical treatment expenses, which was disputed by the respondent on the grounds that she did not suffer a psychological injury and/or that it was a result of its reasonable action with respect to performance appraisal and discipline (s 11A of the *Workers Compensation Act 1987*, "the 1987 Act"). The arbitrator subsequently found in favour of the worker and awarded weekly payments for a closed period of incapacity and medical treatment expenses. The worker appealed the

Section 44BB(3)(a) of the *Workers Compensation Act 1987* is in the following terms, relevantly highlighted:

(3) The following provisions apply to the review of a work capacity decision when the reviewer is the Authority or the Independent Review Officer:

(a) an application for review ***must be made within 30 days after the worker receives notice*** *in the form approved by the Authority of the insurer's decision on internal review of the decision (when the application is for review by the Authority) or the Authority's decision on a review (when the application is for review by the Independent Review Officer),*

The worker had signed an application for merit review in which she stated that she had received the insurer's internal review decision on 2 May 2016. The application for merit review was dated 7 June 2016, being more than 30 days after the stated date of receipt of the internal review, and therefore out of time. The Authority had declined to conduct a merit review for this reason. WIRO also declined to conduct a procedural review, since no merit review had occurred.

In the course of the judicial review proceedings the worker sought to introduce evidence that the date of 2 May 2016 was a mistake, and that she had in fact received the internal review decision on 2 June 2016, only five days prior to the application for merit review. The worker argued that the Authority, bound by the rules of procedural fairness, had an obligation to check with her that the date was correct before dismissing her application.

In the course of the Court's decision his Honour made the following observations:

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Qantas Airways Ltd v Gittoes [2017] NSWWCC 8

(WCC, Keating P, Date of Decision: 24 March 2017)

Facts and Issues: (*hearing aids claim out of time, prior approval by insurer*) The worker claimed hearing aids and lump sum compensation for permanent hearing impairment more than six months but within three years of being aware of the industrial deafness. The insurer disputed the claim on the basis that it breached s 261 of the *Workers Compensation and Workplace Injury Management Act 1998* ("the 1998 Act") without any explanation for the delay in making the claim and that the threshold decision on the basis that the arbitrator erred in limiting her weekly payments to a closed period which was one year short of what was claimed (conceded by the respondent). The worker also alleged error in the arbitrator's findings that the worker had capacity to work for 30 hours per week as a librarian, that "librarian" was reasonably accessible work, that part-time online study undertaken by the worker was seen to be "in addition to" the capacity to work, and that there was insufficient consideration given to the worker's treating doctors' evidence.

Held: The President found that the arbitrator erred in finding that the worker's capacity to work as a librarian included a capacity for work equivalent to the average hours spent studying, which was inconsistent with the treating doctors' evidence. At [64], his Honour stated that: "It is apparent from the Arbitrator's calculation of the award that she found Ms Wiech to have a capacity for work for 30 hours per week. I infer that the calculation comprised of 15 hours as assessed by [the treating doctor], plus an additional 15 hours per week. The additional hours appear to be based on the Arbitrator's inference that time spent studying at home was notionally equivalent to an ability to return to the workforce working in a library. There is no evidence to support that inference [and the evidence was to the contrary]." In making that conclusion, the arbitrator erred. Keating P determined that the worker was fit to resume work, during the relevant period, working in a suitable low stress environment, such as a library, for 15 hours per week. The agreed figures and periods were applied and the order for the weekly payments amount revoked.

for s 66 had not been met. On the evidence before him, the arbitrator found that the worker first became aware of the cause of his hearing loss within s 261(6) in October 2014, following which, he had made the claim outside the prescribed period due to ignorance or other reasonable cause within s 261(4) of the 1998 Act. The arbitrator then awarded the worker the cost of hearing aids and remitted the matter to the Registrar for referral to an approved medical specialist (AMS). The employer appealed on the basis of error on the part of the arbitrator in making the findings and on the basis of s 60(2A), where prior approval must be sought from the insurer before incurring the cost of the hearing aids.

Read more

Naumovski v Menzies Property Services Pty Ltd [2017] NSWWCC 137

(WCC, Senior Arbitrator Glenn Capel, Date of Decision: 9 June 2017)

Facts and Issues: (*readiness in proceedings*) The disputed claim for weekly payments and medical treatment expenses came before the Commission. In the initial teleconference, solicitors for both parties attended but the worker presented via telephone link in Macedonia. The worker was observed to be confused and did not have the benefit of an interpreter (the senior arbitrator deemed unsatisfactory the daughter's assistance in translating the proceedings). The worker's solicitor advised upon enquiry that the worker was due to return to Australia at the end of August 2017 and inferred that the matter be relisted no earlier than September 2017. The respondent did not wish to negotiate a settlement and pursued the dispute to a conciliation conference/arbitration hearing at a later date.

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Gajkowski v The Camden Show Inc [2017] NSWWCC 124

(WCC, Arbitrator Ross Bell, Date of Decision: 31 May 2017)

Facts and Issues: (*whether worker was a "worker" in Sch 1 of the 1998 Act following injury at a rodeo show*) The apprentice butcher worker was injured after falling off a horse while participating as a competitor in a rodeo show held by the respondents. The issue before the Commission was whether he was a "worker" under cl 15 of Sch 1 of the 1998 Act.

Held: The worker was found to be a "worker" under Sch 1 because he earned substantial amounts from the show circuit. The worker's opportunity to win substantial prize money to advance his riding career constituted a "reward" for engagement (at [40]-[42]). The respondents engaged the worker to ride bulls, which afforded diversion or amusement for the crowds in a public performance, making the worker an entertainer under cl 15 of Sch 1 (at [46]-[47]). Both respondents were found liable to pay compensation because they each conducted the rodeo shows during which the worker was injured and were therefore significantly involved in the

Barnes v Sandvik Australia Pty Ltd [2017] NSWWCC 94

(WCC, Arbitrator Jane Peacock, Date of Decision: 28 April 2017)

Facts and Issues: (*entitlement to s 67 compensation for an existing claim*) The worker received settlement monies for a s 66 claim for lump sum compensation in 2005, when the insurer made a proactive offer to enter into such an agreement. Following legal advice, the worker then made a claim for s 67 pain and suffering lump sum compensation on 10 February 2015 as a result of the hearing loss deemed to have occurred on 31 August 2005, submitting that the s 66 claim was never finalised by way of a s 66A agreement and the s 67 entitlement was therefore saved by the relevant transitional provisions in the 2012 amendments and the regulation. The respondent argued that the s 67 claim was caught by the repeal of s 67 in 2012. The respondent also argued that the worker's s 66 claim had been finalised in 2005 by way of the payment and

process of holding and conducting the event. The respondents were held to be equally liable to pay compensation. The worker was awarded medical treatment expenses and weekly payments in accordance with the agreed PIAWE as an apprentice butcher at the time of injury.

acceptance of the compensation payment.

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Javed v Mohammed Javed Pty Ltd [2017] NSWWCC 90

(WCC, Arbitrator Brett Batchelor, Date of Decision: 26 April 2017)

Facts and Issues: (*worker sole director/employee, causal link*) The worker, who was sole director and employee of the respondent, conducted a courier business under contract with Harvey Norman to pick up and deliver whitegoods from a warehouse to another place. Prior to making the delivery, the worker returned home to check his fax machine for any communication in relation to jobs. Upon arrival, he was confronted by his son (with whom he previously had violent and intense interactions) about an electricity bill that completely did not have anything to do with the business. To diffuse the situation, the worker's wife accompanied him outside the house. The worker then decided to come back inside the house to finally confront his son's aggression. It was at this moment when he was repeatedly stabbed by his son. The worker claimed weekly payments, medical treatment expenses and lump sum compensation. The insurer disputed the claim on the basis that the injury did not arise out of or in the course of employment (s 4 of the 1987 Act), the employment was not a substantial contributing factor to the injury (s 9A) and, alternatively, the worker's serious and wilful misconduct (s 14) had taken him outside the course of employment at the time of the injury.

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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 – 4517* (20 June 2017)

Facts: (*application dismissed*) The insurer issued a WCD on 2 February 2017, informing the worker that he did not meet the requirements of s 38(3) of the 1987 Act because he was not working at the time and therefore did not work at least 15 hours per week and did not earn at least $183 per week. The decision stated that the weekly payments would cease as of 10 May 2017. The worker sought internal review, which confirmed the WCD and found that the worker could work in suitable duties as identified. On merit review, SIRA's Merit Review Service (MRS) found the applicant not entitled to weekly payments but made no recommendations. The worker lodged a procedural review application, submitting that he was still injured, that he

Decision *WIRO – 4417* (14 June 2017)

Facts: (*WCD set aside, recommendations made*) The worker lodged a procedural review application to the WIRO of an insurer's WCD, which stated in standard terms that the worker's weekly payments would cease from 6 February 2017 as a result of s 38(3). The worker had received more than 130 weeks of benefits but had not returned to work. The insurer's internal reviewer confirmed the WCD and the MRS determined that the worker was able to return to work in suitable employment, had current work capacity and did not meet the requirements in s 38(3) and was therefore not entitled to weekly payments. The worker submitted that it was not clear in the insurer's advice in the WCD as to the circumstances which would

suffered greater than 10% WPI, and that he could not return to pre-injury duties.

Held: There was evidence before the WIRO that the worker's Nominated Treating Doctor opined that the worker was fit to work for 8 hours per day, 5 days per week. There were no suggestions made that he had no injury. Conversely, there was no evidence proffered by way of a medical assessment that the worker suffered greater than 10% WPI, on which the insurer could be satisfied that the worker had that degree of permanent impairment. The notice requirements for conducting the work capacity assessment and issuing the WCD were fully complied with by the insurer, who took considerable pains to set out in extensive material the explanations required to making the worker aware of his entitlements, both for weekly payments and medical treatment expenses under s 59A. The WIRO did not find procedural errors in the process adopted by the insurer and the application for review was dismissed.

lead to the resumption of weekly payments (if he returned to work for not less than 15 hours per week and earned $183 or more per week), with such failure being an inducement for the worker to believe that his weekly payments had ceased regardless of whether or not he did return to work within such circumstances.

Held: The WIRO held that the insurer set out the possibility of becoming entitled again to weekly payments but within the context of s 59A. At [15], the WIRO stated: "The insurer has correctly explained section 59A(3), but has in no way told the applicant what steps he might take to have his weekly payments restored. The insurer should have told the applicant that in order to be restored to weekly payments he needs to return to work for not less than 15 hours per week, earn at least $183 per week, and convince the insurer to agree that he cannot do any more work than he is then doing." This failure, the WIRO said, had left the worker with the false impression that there was nothing he could do to restore the benefits. The WCD was found to be non-compliant with the legislation and was therefore invalid. The WIRO recommended that the insurer issue a new WCD.

LEGISLATION AND POLICY UPDATES

Recent scheme updates

New guidelines for return-to-work programs

SIRA has just published the new ***Guidelines for workplace return to work programs, May 2017***, which take effect as at 31 May 2017. The new guidelines, issued pursuant to s 52 of the 1998 Act, replace the previous W*orkCover Guidelines for workplace return to work programs, September 2010*. They operate in line with the amended provisions contained in the *Workers Compensation Regulation 2016* regarding rehabilitation and return-to-work initiatives and obligations, and address measures to undertake in appointing a return-to-work coordinator, developing a return-to-work program and its implementation for various categories of workers.

The guidelines may be accessed in SIRA's website here:

Guidelines for workplace return to work programs, May 2017.

CASE STUDIES

Cases from ILARS and the WIRO Solutions Group

Each week, the WIRO Solutions Group and ILARS receive hundreds of inquiries and referrals, and deal with various issues concerning workers compensation claims and disputes. The following notes are examples of those issues.

Incorrect PIAWE calculation: The worker advised WIRO that he believed his current PIAWE was incorrectly calculated. He brought the discrepancy to the attention of the insurer and sent them his bank statements to confirm his earnings. Upon enquiry, the insurer confirmed the worker was unable to provide any payslips and that the employer had not responded to their request for the worker's payment information. The insurer thereafter determined the PIAWE using the Fair Work wage rate for his occupation and advised the worker they would review the PIAWE upon receipt of further information from the employer. Subsequently the employer provided weekly payments information to the insurer. The insurer reviewed the worker's PIAWE by calculating it on the basis of the weekly payments information provided by the employer. When WIRO reviewed the PIAWE, however, the figures indicated incorrect calculations as the insurer was found to have used the worker's net income instead of the gross income figures. WIRO then requested the insurer to re-calculate the PIAWE on the basis of the worker's gross income figures including the average Australian taxation rate. Based on the WIRO's recommendation, the insurer re-calculated the PIAWE to a higher and correct rate and sent the worker the relevant back payments.

Section 39 - The insurer sent the worker to their doctor to have her degree of permanent impairment assessed in order to determine the application of s 39 of the 1987 Act. The worker was not satisfied with the insurer's doctor's medical assessment and asserted that the doctor did not assess all compensable injuries (assessed the impairment of the back only). WIRO suggested that the insurer assess all compensable injuries, and that it would be helpful if they served the worker their doctor's medical assessment report. The insurer initially declined to serve the worker their report and stated they had referred the matter to icare. The insurer responded and deemed the worker to be a 'worker with high needs'. The insurer had communicated this to the worker, who was then satisfied with the outcome of the enquiry.

Section 126 request – The worker's claim was settled by way of a Certificate of Determination (COD), which included terms that the worker agreed to discontinue his claim for medical treatment expenses and that the insurer would pay for such reasonable and necessary expenses on a voluntary basis upon production of accounts, receipts or Notice of Charge. The worker's solicitor provided the insurer with a schedule of medical treatment expenses prior to the hearing, which were then made available in the proceedings. Upon receiving the Notice of Charge, the worker's solicitor had updated the worker's schedule of medical treatment expenses and provided this to the insurer. The insurer then requested an extensive list of further particulars. The worker's solicitor believed the request to be excessive and to be beyond what was required in accordance with the terms of the COD. The WIRO wrote to the insurer, noting that the request for further particulars could largely be answered by requesting clinical notes from the worker's treating practitioners. The WIRO then asked the insurer to consider obtaining the required information in this manner. The insurer agreed with WIRO's suggestion and endeavoured to request clinical notes instead.

WIRO ACTIVITIES

Recent WIRO outcomes and activities

WIRO tax invoicing issues

A number of issues have arisen in ILARS regarding the issuing of tax invoices to WIRO in a manner that does not comply with WIRO policy. WIRO reiterates the importance of getting the tax invoices correct in order to facilitate the fast and efficient processing of payments to legal services providers.

The WIRO Office has issued a policy document in June 2015, the ILARS Tax Invoice Guide.

It is important to be mindful that the WIRO Office, like any other agency, is subject to the legal requirements on tax invoicing and payment processing as put in place by the Australian Tax Office, the *Legal Profession Uniform Law*, and through the relevant departmental and agency guidelines. Kim Garling encourages everyone in the scheme concerned with this process and procedure to fully cooperate with the WIRO Office in ensuring that tax invoices are properly issued and paid expeditiously.

WIRO Solutions Brief Issue 7

Issue 7 of the ***WIRO Solutions Brief*** has 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 7 is also up on the WIRO website.

Scheme agent workshops

WIRO is inviting insurers/scheme agents to put forward expressions of interest if you want the office to conduct workshops. Send your EOIs to Jeffrey Gabriel, Director Solutions Group, at Jeffrey.Gabriel@wiro.nsw.gov.au.

Successful 2017 seminar season

The recently held WIRO Sydney Seminar at the brand new International Convention Centre (ICC) in Darling Harbour, was one of the most successful events for the WIRO, with attendance numbers reaching more than 650 participants and the calibre of speakers outperforming previous seminars.

The Honourable Victor Dominello MP, Minister for Finance, Services and Property, opened the seminar and spoke about the achievements in the CTP scheme and the developments leading up to proposals for the establishment of a one-stop-shop entity that would deal with various workers compensation claims, disputes and issues, as part of a wider developmental plan for the whole scheme. WIRO has an active role in the mapping and advancement of such an entity as part of the office's inherent role and function as set out in the legislation.

Key stakeholders in the scheme and the WIRO staff also participated and provided insights into the interplay of the various agencies and how scheme players operate in addressing the often-confusing impact of the 2012 legal reforms as they start to crystallise.

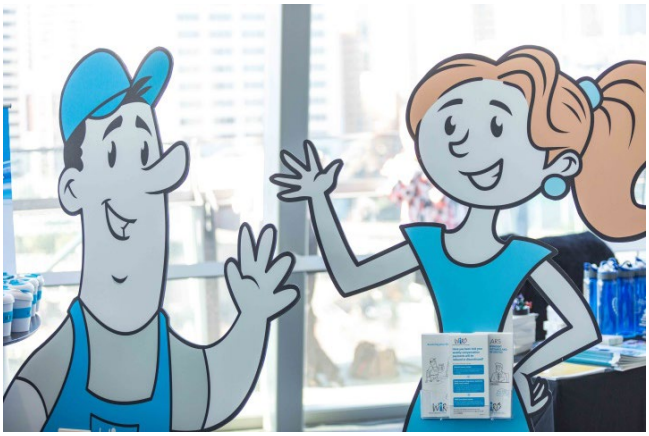
Complementing the Sydney Seminar are the various regional sessions in Ballina, Wollongong, Orange and Newcastle, which

provided outreach points-of-contact to regional players and practitioners. The last of the regional seminars is scheduled for Albury on 21 July 2017.

Here are some of the stunning moments in the various seminars.

SYDNEY

(5 June 2017, International Convention Centre, Sydney)

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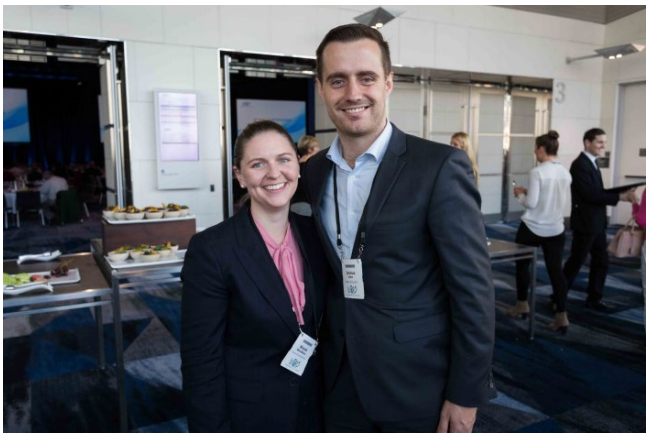

BALLINA

(19 May 2017, Ramada Hotel, Ballina)

WOLLONGONG

(26 May 2017, Novotel Northbeach, Wollongong)


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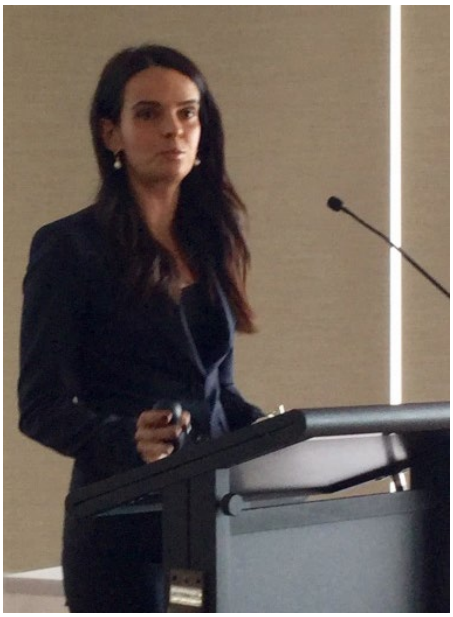
ORANGE

(16 June 2017, Duntry League, Orange)

NEWCASTLE

(23 June 2017, NOAH's on the Beach, Newcastle)

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FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS

The 2017 WIRO seminar series is a resounding success and I am very pleased to report that the feedback we've received on them has been positive all around. Each seminar session we conduct, whether in the metropolitan or regional area, is always a monumental task. I extend my gratitude and appreciation to my staff for pulling off every single event with flying colours. I also extend my appreciation to each and every one who attended our seminars, which are facilitated for your benefit. There is one last regional seminar in this series scheduled for Albury on 21 July 2017. I encourage you to send your RSVPs to my office for this.

As expected, the hot topics raised in the seminars focused on the still-confusing process of addressing the requirements of section 39 and assisting the impacted workers in meeting those requirements. I am in continuous liaison with icare, SIRA, scheme agents, the Workers Compensation Commission, and, indeed the injured workers, with the view to providing a collaborative and efficient method of assisting these severely-impacted workers while adhering to the objectives of the legislative reforms. It is often a challenging interaction, but, rest assured, that my office and I will maintain the necessary skill, resilience and courage in dealing with this challenging process in the hope of improving the scheme's capability to address the issues concerned.

I can also report on our active participation in the Minister's Office's initiative to introduce a one-stop-shop facility, which hopes to streamline the processes and procedures involved in enhancing and improving the dispute resolution model in the scheme. It is a promising prospect and involves novel measures. If you have any concerns or wish to raise an issue on this topic, please don't hesitate to contact me and my office.

Kim Garling

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

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 wiro.nsw.gov.au

Level 4, 1 Oxford Street