Workers Compensation independent review office

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS | RECENT CASES

The case reviews are not intended to substitute the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

[Whether or not a WCD was made, s 38A weekly payments]

Hee v State Transit Authority of NSW [2017] NSWWCC 252

(WCC: Arbitrator Glenn Capel, Date of Decision: 27 October 2017)
(Subject of an arbitral appeal, WCC)

Following surgery and rehabilitation for an injury sustained on 17 October 2013, the worker resumed full pre-injury duties as a bus driver on normal shifts, but without working overtime hours. Medical evidence indicates that the worker had recovered well from surgery. The worker was subsequently medically assessed with 34% WPI, which classified him as a 'worker with highest needs' under s 32A of the 1987 Act.

In May 2017, the insurer issued a notice on heading, 'Written Advice of Work Capacity Decision and its Outcome', which advised that the worker was not entitled to any further weekly payments compensation because he had resumed pre-injury duties on a full-time basis, despite being a worker with highest needs.

The issues before the Commission were: (1) whether the notice dated 17 May 2017 was a work capacity decision (WCD); (2) if there was no WCD, was the worker entitled to receive weekly payments compensation under s 38A; and (3) if the worker was so entitled, the date from which the weekly payments would be payable.

The worker submitted that:

- With reference to *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145 (*Sabanayagam*), the insurer's decision was not a WCD because the decision asserted he was able to perform his pre-injury duties following a full recovery. A WCD required an acceptance that the worker had a present inability to return to work in his pre-injury duties;
- The 'incapacity' in s 33 refers to economic incapacity, and is not limited to the worker's incapacity for his pre-injury employment, but rather refers to incapacity on the open labour market reasonably accessible by the worker prior to the injury.
- The terms of s 38A are clear and unambiguous, and the legislation must be determined by applying the ordinary grammatical meaning of the words in the context of the whole legislation (while asserting that ***O'Donnell v Abroandco Pty Ltd* [2016] NSWWCC 129** (*O'Donnell*) was incorrectly decided). No inference should be made that 'incapacity' is necessary to enable the worker to be entitled to the benefits, as s 38A does not refer to it. If s 38A applied, the worker stated the payments should commence from the date of injury in October 2013.

The respondent argued that:

- A decision that deals with suitable employment is a work capacity decision and s 32A does not preclude pre-injury employment from being regarded as "suitable employment". As s 43(3) applied, the Commission therefore had no jurisdiction to determine the dispute.
- There was no incapacity in the current case and no determination of the weekly amounts of payment could therefore be made. Otherwise, the payments should commence from the date at which the worker became a worker with highest needs (as per the decision in *O'Donnell*).

The arbitrator distinguished the matter from *Sabanayagam*, stating, among other circumstances, that "the insurer advised the applicant that he was not entitled to any further weekly compensation because he had resumed his pre-injury duties on a full-time basis. It did not suggest that the applicant had recovered from the effects of this work injury, as was the case in *Sabanayagam*" (at (136]).

The arbitrator also opined that:

- The insurer did not suggest it has assessed the worker as having "no current work capacity" or "current work capacity" as defined in s 32A. It merely stated that the applicant had no "incapacity" in the relevant sense in terms of s 33 (at [142]);

- Had the legislators intended that a worker's pre-injury employment was to be regarded as "suitable employment" (as argued by the respondent), then they would have included a specific provision to that effect (at [143]);

- In this matter: "At no time did the insurer suggest that it has assessed the [worker] as having 'no current work capacity' or 'current work capacity' and was fit for 'suitable employment'. This was the reason why Ms Sabanayagam was successful in her appeal, as the Court of Appeal considered that this was a crucial requirement of a work capacity decision." (at [146]);

- It may have been a different decision if the insurer in this matter had determined that the worker was 'fit for "suitable employment"' as a bus driver, whether or not that work was his pre-injury employment (at [147]).

The arbitrator then determined that, with regard to the principles of "current work capacity" (as considered in *Sabanayagam*), the insurer's decision on or about 17 May 2017 was not a WCD and was more of a liability dispute (at [147]-[148]).

The arbitrator considered the principles set out in *Hesami v Hong Australia Corporation Pty Ltd* [2011] NSWWCCPD 14 and *Wilson v State Rail Authority of New South Wales* [2010] NSWCA 198 and stated that one needs to consider the text and structure of the legislation and the object of the provisions, despite there being no authority on the application of s 38A in circumstances where a worker has no wage or economic loss.

The arbitrator stated that (at [196]-[199]):

- Section 38A allows a minimum indexed payment per week as adjusted for a worker with highest needs and that a worker can be compensated in excess of that amount per week as adjusted according to the formulae set out in ss 35 to 38;

- However, it is clear from the Explanatory Note, the Second Reading Speeches and the Benefits Guide that a worker who has no entitlement to the calculated weekly amounts under ss 34 to 38 will not be entitled to receive a further amount of the minimum indexed payment per week as adjusted, as this would lead to overpayments;

- The Commission would only have jurisdiction to order payments under s 38A for the first 130 weeks (first entitlement period), while payments for the second entitlement period are dependent on an assessment of the worker by the insurer, with the calculations to be made under ss 36 and 37, subject to the minimum indexed amount in s 38A for a worker with highest needs.

The arbitrator determined that:

> [201] It is true that the Commission retains jurisdiction to make orders in respect of weekly payments after the second entitlement period, but such orders must not be inconsistent with any work capacity decision undertaken by the insurer.
>
> [202] In the circumstances, the applicant is not entitled to a weekly compensation pursuant to s 38A of the 1987 Act. Accordingly, there will be an award for the respondent.
>
> [203] … I see no reason to disagree with the reasoning … in *O'Donnell*, namely that the entitling factor is the assessment in excess of 30 per cent in accordance with s 32A of the 1987 Act, and any payments pursuant to s 38A would commence from that date, rather than the date of injury.

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['Worker with highest needs', entitlement to s 38A weekly payments, cl 9(2) Pt 19I of the 1987 Act]

Paulo v Playbill Pty Ltd **[2017] NSWWCC 226**

(WCC: Arbitrator William Dalley, Date of Decision: 20 September 2017)

The worker was assessed as a "seriously injured worker" (assessed as having more than 30% WPI). By letter dated 29 July 2015, the insurer informed her that her weekly payments were being terminated as she was earning more that the transitional amount of compensation at the time under the 1987 Act.

In the Commission, the respondent argued that the worker was not entitled to weekly payments as her ability to earn exceeded the relevant transitional amount as prescribed at the time in cl 2 of Pt 19H of Sch 6 of the 1987 Act. The dispute was whether the worker was entitled to the weekly payments under s 38A of the 1987 Act.

The worker was an existing recipient as determined under the former legislation until the amendments in 2012 were applied under cl 6 of Pt 19H of Sch 6 of the 1987 Act. Clause 10 of that provision in Pt 19H provided that her PIAWE were deemed to be equal to the transitional amount at the time.

Following the amendments in 2015, the concept of "seriously injured worker" was replaced with the categories, "worker with high needs" (assessed as having more than 20% WPI) and "worker with highest needs" (assessed as having more than 30% WPI). The insurer had accepted the worker as a "worker with highest needs" as a result of the injury on 10 April 1994 pursuant to s 32A of the 1987 Act.

Further, the 2015 amendments provided in cl 9 (2) Pt 19I Sch 6 of the 1987 Act that "the regulations may make provision for or with respect to the adjustment of the amount of weekly payments of compensation payable to an injured worker as a result of the operation of s 38A of the 1987 Act and this clause". Clause 35(2) Sch 8 of the 1987 Act now also provides that: "Section 38A of the 1987 Act does not apply to a worker whose pre-injury average weekly earnings have been deemed to be equal to the transitional amount for the purposes of the application under clause 9 or 10 of Part 19H of Schedule 6 to the 1987 Act of the weekly payments amendments (within the meaning of that Part) to the worker."

The worker argued that cl 35(2) of Sch 8 was inconsistent with the power to make regulations provided in cl 9(2) of Pt 19I Sch 6, and submitted that the decision in ***O'Donnell and Abroadco Pty Ltd*** **[2016] NSWWCC 129** (*O'Donnell*) was incorrect because it did not engage with the same argument being advanced in the current case.

The arbitrator rejected the worker's submissions and observed that the arguments were directed more at the form of the provision rather than at its substance. The Commission determined, at [35], that: "Clause 9(2) does place any restrictions upon the adjustment of weekly payments pursuant to section 38A and the power to make such adjustment would include the power to adjust the amount to nil."

In confirming the decision in *O'Donnell* and determining in favour of the respondent employer, the arbitrator held that cl 9(2) of Pt 19I empowers a regulation that reduces to nil the weekly payments to a worker with highest needs but whose PIAWE has been deemed equal to the transitional amount (at [37]). The orders sought by the worker were declined.

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[Redundancy and workers compensation payments]

Joanne Chater v Tomaree Neighbourhood Centre Inc (WCC004119/17, unreported, Order for an IPD)

(WCC: Arbitrator William Daley, Date of Decision: 7 September 2017)

The worker's employment was terminated upon receipt of a redundancy payment. In lieu of notice pursuant to s 117 of the *Fair Work Act 2009* (Cth), she became entitled to payments at normal rates equivalent to five weeks. The employer made these payments. At the time of the termination, SIRA on merit review determined that the worker was entitled to weekly payments compensation.

The employer declined to pay the weekly payments compensation for the five-week period during which the worker received the redundancy payments. The employer submitted that the worker did not suffer any loss during the period because she had received the equivalent redundancy payments.

The worker argued that she was entitled to both payments (under s 37(1) of the 1987 Act and s 117 of the *Fair Work Act 2009* (Cth).

The arbitrator determined that the worker's rights under the 1987 Act are independent of, and operate in addition to, her rights under the *Fair Work Act 2009* (Cth), and that there was no clear legislative intention to the contrary. The arbitrator stated that, at [13]: "Entitlements under each of the two Acts are mandated in clear and unambiguous terms by the respective Commonwealth and State Acts."

Orders were made for the employer to pay the worker the weekly payments compensation under s 37(1) of the 1987 Act equivalent to the five-week period, "in addition to any sum or sums plaid pursuant to any other legislation".

This decision appears to be in contrast with that in ***Buckland v Woolworths Limited*** **[2012] NSWWCC 177** (*Buckland*), determined on 21 June 2012 by Arbitrator Jeffrey Phillips SC.

In *Buckland*, the worker's employment was terminated. The employer stated that had the employment not been terminated, suitable duties would have remained available to Mr Buckland and he would not have suffered any loss of income as a result of the injury. In a deed of release signed by both parties, Mr Buckland was paid a gross amount for five weeks' pay in lieu of notice.

In considering the weekly payments entitlement, the arbitrator determined that Mr Buckland was incapacitated and his earnings capacity on the open labour market had been reduced. Orders were made for the employer to pay Mr Buckland the reduced rate, but that credit should be given to the employer for payments made to the worker for the five-week period of payments received under the deed of release.

(*** It should be noted that *Buckland* was decided on 27 June 2012, at a time when the 2012 legislative amendments were just coming into effect.)

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[Section 60AA, domestic assistance]

Bellamy v Watertech Resources Pty Limited **[2017] NSWWCC 195**

(WCC: Arbitrator Paul Sweeney, Date of Decision: 22 August 2017)

The worker sustained various injuries from 2001 to 2015. Following several episodes of surgery to various body parts, the worker's treating GP issued a WorkCover certificate which purportedly noted he was fit for pre-injury duties but required continuing treatment and assessment of the need for domestic and general house maintenance assistance. The worker then sent to the insurer the GP's certificate, accompanied by an estimate of the cost of internal and external painting of his residential premises in Bradbury and a request for an assessment for domestic assistance.

The insurer's occupational therapist assessed the worker's Bradbury premises and accepted that the worker did not have the physical capacity to perform the house painting, but concluded that painting assistance was not a task that was necessary to engage in ongoing ADLs with regard to ongoing domestic activities. The worker thereafter paid for the cost of house painting on his own.

On 23 February 2017, an AMS medically assessed the worker for 32% WPI. In April 2017, the worker sold his Bradbury premises and moved into new premises in Harrington Park, which contained a saltwater swimming pool. The worker arranged for monthly cleaning of the pool by a commercial cleaning company at $97.00 per month, and claimed such costs against the insurer. The insurer declined the costs and sent another occupational therapist to assess the worker's need for pool maintenance assistance. The inspector accepted the worker's difficulty in cleaning the pool but instead recommended that he utilise the cleaning company's services.

The insurer submitted that both tasks were not reasonably necessary, that "house painting" was outside the ambit of "domestic assistance", and that the worker was not entitled to "pool maintenance" assistance because he did not perform the task prior to the injury and therefore failed to meet the requirement in s 60AA(1)(b).

The arbitrator considered the decision of Roche DP in ***Hesami v Hong Australia Corporation Pty Ltd*** **[2011] NSWWCCPD 14** (*Hesami*) and other authorities, and the operation of the then *WorkCover Guidelines for Claiming Compensation Benefits* introduced in 2004. It was accepted that, as per *Hesami*, the worker needed to establish compliance with each of the requirements in s 60AA(1)(a) – (d) of the 1987 Act in order to ground the insurer's liability for the claim for domestic assistance.

In relation to the need for a care plan, the arbitrator determined that the assessment reports provided by the occupational therapists constituted "care plans" as anticipated in the fourth limb of s 60AA(1) (at [42]). Nevertheless, the arbitrator stated that the worker would not probably meet all four requirements in the provision.

It was found there was sufficient evidence to establish that the need for both tasks resulted from the injury and that both occupational therapists made positive findings that the worker could not perform either task (at [44]).

In considering the 2004 Guidelines, the arbitrator noted the lack of a specific definition of "domestic", but found that "the primary meaning of 'domestic' – relating to the home or the running of the home – is probably sufficiently wide to encompass periodic painting of a worker's home. If a worker previously performed such a task himself, assistance to perform it is probably caught by section 60AA" (at [48]).

In relation to the pool maintenance, the arbitrator reiterated that, as per s 60AA(1) and the 2004 Guidelines, "not only must the need for the assistance result from the injury but it must [also] be established that the assistance would not be provided 'but for the injury' (because the worker provided the assistance himself prior the injury)" (at [50]).

The arbitrator construed the provision in s 60AA(1) to establish "some rough equivalence between the assistance that is to be provided and the assistance which the worker provided prior to the injury" (at [58]). He then determined that:

> [59] The fact that the applicant did painting and other domestic chores is insufficient to permit a finding that the need for assistance with swimming pool maintenance results from the injury … [I]n the circumstances of the case, I have concluded that the applicant has not established that swimming pool maintenance would not be provided to him but for the injury, because he did not provide the assistance himself prior to the injury.
>
> [60] While the language of [subsection] 60AA(1)(b) is difficult, all the words of the subsection must be given due weight. My construction of the meaning of the subsection does cut down the width of the scheme for domestic assistance. However, it does not produce an arbitrary or capricious result. The subsection, in the context of the entirety of the section, appears to restrict compensation for domestic assistance to that category of workers who provided the domestic assistance before the injury.

The arbitrator awarded the worker domestic assistance for house painting, but found him not entitled to the cost of pool maintenance.

(See also the decision in ***Piercy v Trimex Pty Ltd*** **[2017] NSWWCC 218**, where the worker was found to be entitled to domestic assistance in accordance with the respondent's care plan.)

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[100% WPI following death of a worker, "permanency", MMI]

Agricultural & Development Holdings Pty Ltd v Marian Renay Parker (as Executrix of the estate of the later Matthew Luke John Nowlan **[2017] (M1-001422/17, unreported)**

(WCC: Medical Appeal Panel, Date of Decision: 5 September 2017, medical appeal against decision of AMS, Dr Sophia Lahz dated 16 May 2017)

The 27-year-old worker had been working on a farm with his father when he jumped out from an all-terrain vehicle he was riding in to prevent a sheep from being hit by another vehicle. He fell in front of the vehicle being driven by his father, was run over by it, and was crushed underneath it. There was some time before the worker was freed from the stalled vehicle. Thereafter, emergency services personnel administered CPR for 45 minutes and eventually airlifted the worker to a hospital.

The worker was then treated for "unsurvivable crush injuries to his chest and abdomen" and was placed on life support. On the next day, the worker was taken off life support and succumbed to the extensive injuries, including "irrevocable brain injury".

The AMS considered the medical evidence before her and applied paragraphs 1.6 (under *Part 2 – Principles of assessment*) and 1.15 (under *Maximum medical improvement*) of the SIRA's *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, Fourth Edition* ("the Guidelines").

The AMS stated that the worker's clinical circumstances met the criteria under paragraph 1.15 of the Guidelines and that the worker had reached MMI in that he would inevitably die from the catastrophic injuries.

The AMS also reviewed previous decisions (in ***Sharon Joy Duskovic as Administrator of the Estate of the late David John Duskovic v Basin Sands Logistics Pty Ltd*** **[2016] NSWWCCMA 91** (*Duskovic*) and ***Alexandra Mexon as Administrator for the Estate of the late Ryan Messenger v Hunter Quarries Pty Limited*** M2-007064/15, unreported, (***Messenger*****)***********This is the subject of a judicial review decision, noted below*), where considerations of MMI and 100% WPI ratings were made. She stated that, in the current matter (at [10], p 11 of the MAC):

> "Had the worker remained on life support, his life (body, besides brain) would have been prolonged although there would have been no change in (futile) prognosis of the extremely severe hypoxic brain injury. He would never have resumed a functional life due to irreversible brain damage (brain death). I am satisfied that the brain impairment from the subject accident, had the worker survived, would have been severe and permanent, without any prospect of improvement…"

The AMS certified a 100% WPI, determining that the worker's condition met the criteria at the top end of the assessment ranges for irreversible coma requiring total medical support, respiration, bowel and bladder function, with the worker's situation in the final hours being dire and which was something that could not have been worse.

The employer appealed on the following bases, among other grounds:

- The AMS utilised incorrect criteria in the application and interpretation of the term "permanent" in ss 65 and 66 of the 1987 Act (referring to the decisions in *Duskovic*, *Messenger*, ***Bourke v State Rail Authority (NSW)*** **(1999) 18 NSWCCR 429** (*Bourke*), ***Hillier v Gosford City Council*** **NSWCC**, unreported as per Armitage CCJ, 22 June 1998 (*Hillier*), and ***Ansett Australia v Dale*** **[2001] NSWCA 314** (*Dale*); the submission was that the current appeal could be distinguished from *Dale*;

- It was an error on the face of the record for the AMS to conclude "permanency" in finding it was inevitable the accident would lead to death;

- The AMS failed to provide full and proper consideration to the definition of MMI in paragraph 1.15 of the Guidelines by erroneously focusing on "whether the worker's 'impairment' would 'improve', and not whether his 'condition' would 'change substantially';

- The worker's condition had never reached MMI, such that an assessment of permanent impairment could not have been made, and that the AMS should have found that the worker's "condition was inevitably going to lead to substantial change via death, such that permanent impairment could not be assessed in his 'final hours'".

The respondent argued no error in the MAC and that while the method of assessment has changed since the decisions in *Bourke*, *Hillier* and *Dale*, the definition of "permanent" has not been changed, and that *Dale* remains relevant in the circumstances. The Medical Appeal Panel rejected the employer's submissions and, in relation to "permanency", adopted the reasoning of the Court of Appeal in *Dale,* which stated at [42] that: "If the injury is permanent in relation to the worker, that is sufficient.

The term is not one which carries the meaning or implication that the worker should be expected to survive the injury, or to survive for a significant or a substantial or an indefinite period. That is not the nature of the word or the function which it plays in the Act." The panel opined that "it is a matter of semantics" (at [88]) and that the AMS applied the correct criteria in the Guidelines in finding that the injury was permanent at the time of suffering, that the condition was irreversible without any prospect of improvement, that it was unlikely to improve further or to change substantially, and that MMI had been attained. The panel found no error on the part of the AMS and confirmed the MAC.

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*** DECISION OF NOTE:

The decision of the Medical Appeal Panel in ***Messenger*** cited above was confirmed by the Supreme Court on judicial review in ***Hunter Quarries Pty Limited v Alexandra Mexon as Administrator for the Estate of Ryan Messenger*** **[2017] NSWSC 1587** (Schmidt J, 22 November 2017), where the Court dismissed the summons and determined that the relevant test for a successful claim under s 66 is not the duration of survival of a worker, but the permanence of the impairment (see [22]-[25]).

PROCEDURAL REVIEW UPDATES

WCD reviews

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

Decision WIRO – 6317 (3 November 2017)

[Inadequate notice, breach of notice requirements, leading to serious consequences to worker]

The insurer issued a WCD dated 10 June 2017 to cease the worker's weekly payments on 26 June 2017.

On internal review, the insurer varied that decision in relation to the PIAWE. SIRA's Merit Review Service confirmed this on further review.

It became evident on procedural review that the insurer was of the view that the worker had received 18 weekly payments, when it would have been clear that he had received at least 12 weekly payments as at the date of the WCD. This entitled the worker to a notice period of at least three months, pursuant to s 54(2)(a).

The WIRO determined that, at [6]:

> "The inadequate notice given to the applicant had already expired prior to his application to the insurer for internal review, received on 10 July 2017. This had serious consequences for the applicant, since the insurer did not back-date its findings on internal review that there was an ongoing entitlement to weekly payments. There is therefore a period from 26 June to 31 July 2017 for which the applicant was not compensated according to his legal entitlement."

The breach was more than a "technical breach" as it had caused serious financial consequences for the worker, and it was a breach of the insurer's legislative obligation that would usually attract a penalty.

For these reasons, the WCD was set aside and recommendations were made for the insurer to issue a new decision in accordance with the requirements of the legislation.

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Decision WIRO – 6217 (26 October 2017)

[Purported WCD]

In a WCD to cease the worker's weekly payments, the insurer reasoned that the worker had an ability to perform his pre-injury duties, and that "suitable employment" was the same employment the worker engaged in prior to the injury.

On procedural review, the insurer repeated its determination that the worker "has a current incapacity for work whereby he cannot return to his 'pre-injury employment' due to his termination, which prevents such a return to work in the same conditions of that pre-injury employment, however he has the functional capacity to perform his pre-injury role".

The WIRO considered this basis for the insurer's determination as an industrial decision made by the employer, rather than a decision that dealt with the conditions stated in s 32A of the 1987 Act and the definition of "current work capacity".

In considering the decision of the Court of Appeal in ***Sabanayagam v St George Bank Limited* [2016] NSWCA 145**, the WIRO indicated that:

- A decision to dispute liability to make weekly payments is specifically excluded from the definition of "work capacity decision" under s 43(2)(a);
- "current work capacity" in a WCD must be premised on the worker's present inability to perform pre-injury employment, with the inability arising from injury

Due to the insurer's premise that the worker could not return to his pre-injury employment because of his termination of employment, the WIRO determined that the decision was not a true WCD, but more a decision to dispute liability.

The WCD was invalidly made and was therefore set aside.

Decision WIRO – 6117 (24 October 2017)

[Fair notice, denial of procedural fairness]

In a notice dated 4 April 2017 of an impending WCD, the insurer requested further information from the worker to be provided before 11 April 2017. However, the insurer thereafter issued a WCD three days later, on 7 April 2017.

The WIRO made a clear observation that the insurer imposed a deadline itself which it failed to honour. In doing so, the insurer failed to provide the worker with sufficient opportunity to respond to the 'fair notice'.

The worker was denied procedural fairness. The WCD dated 7 April 2017 was set aside.

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.

Notices under s 54 and/or under s 74 for weekly payments entitlement

The worker received a s 74 notice, which purported to discontinue his weekly payments pursuant to s 33 on 29 September 2017. The insurer did not issue a s 54 notice. The s 74 notice stated that liability was declined as at 19 May 2017. It was also issued at a time when the worker's PIAWE calculation was the subject of a WIRO procedural review under s 44BB.

WIRO indicated to the insurer the operation of s 44BC, which provides that the effect of a WCD on a worker's weekly payments (including issues about the PIAWE) is stayed during the course of a review.

Following the procedural review, the insurer re-issued a s 74 notice, with effect from the date of the procedural review decision. Once again, the insurer did not issue a s 54 notice.

WIRO requested the insurer to re-issue a s 74 notice and to separately issue a s 54 notice, which should state that the weekly payments would cease two weeks after the date of such notice. Two weeks after WIRO's request, the insurer declared that they had not re-issued a s 54 notice but had made weekly payments to the worker up until two weeks after the date of the re-issued s 74 notice. This course of action appears permissible under s 54(3)(a). The worker then subsequently received additional weekly payments.

Revived entitlement to medical treatment expenses due to s 59A(3)

The worker complained that the insurer had not responded to her request for approval of surgery. The insurer denied receiving the original request and advised WIRO that the worker's entitlement to medical treatment expenses had expired, with the last date of weekly payments being made in April 2012.

The worker, however, asserted that she had received weekly payments in October 2015. The insurer determined that the payment had been made in error.

The WIRO suggested that the insurer consider the operation of s 59A(3) and the decision in ***Flying Solo Properties Pty Ltd t/as Artee Signs v Collet* [2015] NSWWCCPD 14**, where the entitlement to medical treatment expenses may be revived to the extent that the surgical procedure itself would give rise to an incapacity to work (and thereby re-enlivening the entitlement to weekly payments). The insurer agreed with the WIRO that if the surgery is approved, then s 59A (3) will apply. The insurer then agreed to determine the request for surgery approval.

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WIRO ACTIVITIES

New WIRO Wires

New WIRO Wires have been published on urgent issues about funding and other issues:

- **Section 39 Alert** can be accessed here.
- **ILARS Travel and Allowances Policy** can be accessed here.
- **Claims for Replacement Hearing Aids** can be found here.

Please ensure you review each of these new Wires to be apprised of developments in the various WIRO and ILARS policies.

WIRO representations

The WIRO has made extensive submissions to the NSW Legislative Council Law & Justice Committee's statutory review of the *State Insurance and Care Governance Act 2015*. All the submissions and the transcript of the parliamentary hearing held on 7 November 2017 may be viewed at www.parliament.nsw.gov.au/lawandjustice.

Upon the kind invitation of Mr David Shoebridge MLC, Kim Garling also presented before colleagues and stakeholders in a Parliamentary Forum hosted by the Member on the workers compensation scheme and the impact of s 39 on 8 November 2017.

In October, Kim Garling also attended the conference of the International Association of Industrial Accident Boards and Commissions (IAIABC) in Oregon. The meeting of workers compensation administrators, regulators and leaders from all around the globe discussed major policy and regulatory issues that affect the workers compensation schemes from various jurisdictions.

WIRO ILARS Policy Review

The extensive review of the ILARS funding policy is in full swing and all your feedback and suggestions have been taken on board. The review aims to enhance the integrity of the policy document and to clarify the complex areas of the funding scheme. A WIRO announcement on the revised policy will be issued in the new year.

WIRO Paralegal Courses

The series of WIRO Paralegal Courses is back with scheduled sessions in Sydney, and later on in Newcastle, Wollongong and Orange. The first of the new courses will be held in Sydney on 6-7 December 2017 at the Pullman Hotel, College Street, Sydney. For more information on the WIRO Paralegal Courses, you may send a query in the first instance to editor@wiro.nsw.gov.au or simply watch out for our regular announcements.

WIRO Solutions Brief

Issue 12 of the *WIRO Solutions Brief* has been published. 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 12 is now available on the WIRO website.

WIRO meets with insurers

WIRO invites all insurers to undertake a meeting with the office to discuss the general operation of the workers compensation scheme and the operation of the WIRO Solutions Group. WIRO regularly meets with insurers to provide insurer-specific feedback on performance and to discuss systemic issues identified by the WIRO Solutions Group.

If you would like to arrange a meeting with the WIRO Solutions Group, please contact Jeffrey Gabriel at jeffrey.gabriel@wiro.nsw.gov.au or (02) 8281 6308.

FROM THE WIRO

The last few weeks have been very busy.

I was pleased to provide a submission to the Law and Justice Committee's first statutory review of the *State Insurance and Care Governance Act 2015*. You may review the submissions and unproofed transcript of the parliamentary hearings at www.parliament.nsw.gov.au/lawandjustice. There was a certain consistency in the problematic issues raised by stakeholders.

I was also invited by Mr David Shoebridge MLC to a parliamentary forum to present on the issues arising from the operation of s 39, particularly on its serious consequences to disadvantaged workers. It appears there are still inconsistent patterns of behaviour occurring among scheme agents and icare in the course of dealing with the issue.

As many of you also know, I have attended the International Association of Industrial Accident Boards and Commissions (IAIABC) convention in Oregon in October 2017. As usual, the conference was interesting and informative. I am happy to discuss the main issues raised at the conference with anyone interested.

My office is also continually enhancing our systems and policies in order to address various issues. Please ensure that you are familiar with the WIRO Wires that have been issued of late, particularly on lawyer practice and behaviour and revised forms for seeking ILARS funding.

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office through editor@wiro.nsw.gov.au in the first instance.

Kim Garling

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