Independent
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Resolution of disputes under Section 60 of the Workers Compensation Act 1987 (NSW) in the Personal Injury Commission

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Executive Summary

Section 60(1)(a) of the Workers Compensation Act 1987 (NSW) (WCA) provides that an employer is liable to pay the cost of any medical or related treatment (other than domestic assistance) if it is reasonably necessary as a result of a work injury.

A review of decisions published by the Personal Injury Commission (PIC) indicates that a large number of s 60 disputes are proceeding to formal determination and that the PIC has adopted a consistent evidence-based approach to determining them.

This paper focuses upon the relevant test and how the PIC has applied it in determining disputes and it is intended to assist legal practitioners in properly prosecuting or defending s 60 claims.

The relevant test

In *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*), Roche DP adopted the test that was initially stated by Burke CCJ in) *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 (*Rose*) (at 48A-C):

> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
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> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
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> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.

Meaning of "reasonably necessary"

In *Clampett v WorkCover Authority (NSW)* (2003) 25 NSWCCR 99 at [23] (*Clampett*), the Court of Appeal (Grove J, Meagher and Santow JJA agreeing) held that in considering the meaning of "reasonably necessary" there is this statutory obligation specifically to have regard to the nature of the worker's incapacity.

In *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [113] (*Moorebank*), the Court of Appeal (Bathurst CJ, Beazley JA (as her Honour then was) and Meagher JA agreeing) determined that "reasonably necessary" does not mean "absolutely necessary".

The Court stated that if something is "necessary", in the sense of indispensable, it will be "reasonably necessary", because this is a lesser requirement than "necessary". A worker does not have to establish that the treatment is "reasonable and necessary", which is a significantly more demanding test that many insurers and doctors apply.

In *Diab*, Roche DP held that the matters relevant to determining reasonableness, include, but are not necessarily limited to:

(a) the appropriateness of the particular treatment;

(b) the availability of alternative treatment, and its potential effectiveness;

(c) the cost of the treatment;

(d) the actual or potential effectiveness of the treatment, and

(e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

However, Roche DP stated that the effectiveness of the treatment is not determinative and the evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, as all treatment, particularly surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment is not reasonably necessary and each case will depend on its facts. The essential question remains whether the treatment was reasonably necessary (*Margaroff v Cordon Bleu Cookware Pty Ltd* (1997) 15 NSWCCR 204 at 208C).

Determinations by the PIC

The PIC's approach to determining s 60 disputes indicates the importance of medical evidence that is soundly based upon the available evidence in a successful prosecution or defence of a s 60 claim, as indicated by the following decisions.

Shipp v Community First Development Ltd t/as Indigenous Community Volunteers [2021] NSWPIC 2.

Member Beilby found that bariatric surgery for weight loss was reasonably necessary medical treatment for a work-related lumbar spine injury.

The Member applied *Diab* and found that all of the doctors placed significant importance upon weight loss, primarily to ameliorate pain and that the evidence also indicated that the worker tried alternative treatments for pain management, without significant benefit.

The Member also found that the worker did not have to pursue all alternative weight loss paths because the Respondent did not file any evidence that provided a platform to consider the efficacy of alternative treatments.

Heather v Telum Civil (NSW) Pty Limited [2021] NSWPIC 38.

Member Wynyard found that the need for proposed bilateral hip replacement surgery did not result from a lumbar sprain injury suffered at work in 2011 and he declined to make a declaration under s 60(5) *WCA*.

The worker suffered a back sprain injury at work in 2011. In 2018, Dr Oates (an IME qualified by his solicitors) stated that work in 2011 was the main contributing factor to the aggravation and acceleration of osteoarthritis in both hips and in 2020, he recommended bilateral total hip replacement surgery. The insurer disputed that this was reasonably necessary as a result of the work injury.

The Member stated that he was impressed by the worker's statements regarding the cause of his hip condition, but a belief that is honestly held does not necessarily constitute reliable evidence and the difficulty with the worker's evidence is that his earlies complaint of hip symptoms post-dates his employment by 4 years.

Bliss v State of NSW (Illawarra Shoalhaven Local Health District) [2021] NSWPIC 269

Member Snell found that medical cannabis was reasonably necessary treatment for a work-related low-back injury that occurred in 2013.

The evidence indicated that the worker commenced medical cannabis treatment in February 2019. In June 2020, after a complicated recovery from lumbar surgery, he successfully ceased using opioid medication and reported an improved quality of life and that he was better able to manage his pain in order to improve his functional capacity to enable a safe and durable return to gainful employment due to the medical cannabis. However, in September 2020, the insurer disputed the treatment.

The worker complained of an escalation of his pain and a decline in his health and well-being. He then resumed the treatment and claimed compensation under s 66 WCA for 23% WPI, and under s 60 WCA for past costs of medical cannabis treatment and future treatment costs for medical cannabis and psychological/psychiatric treatment. The claims under s 66 and for psychological/psychiatric treatment costs were resolved, but the dispute regarding medical cannabis treatment proceeded to determination.

The Member applied the test in *Diab* and noted that the worker failed to disclose his previous use of marijuana/cannabis in his statement of evidence and histories to the medical specialists, but that his treating GP's clinical notes documented his prior long-term use and attempts to cease under medical supervision.

The Member held that while the worker's failure to disclose his prior use did not allow the medical specialists to provide an opinion with a firm grasp of the past medical history, not all discrepancies are fatal and it is for the tribunal of fact to assess the factual basis for the opinion (*Paric v John Holland Constructions Pty Ltd*, per Samuels JA).

The Member stated that while the weight given to the specialists' opinions is diminished because they were not aware of the prior history, the evidence as a whole clearly demonstrates that the worker suffers significant ongoing pain as a result of the work injury and that his use of medical cannabis effectively alleviates his pain, assists him in reducing his long term reliance on opioid medication, and improves his day to day function and his mental health.

German v International Floor Coverings Australia Pty Ltd [2021] NSWPIC 273

Member Perry held that proposed surgery for a spondylolisthesis is not reasonably necessary for a work-related injury.

The worker alleged that he suffered a knee injury and an aggravation etc of an underlying disease in his lumbar spine due to the nature and conditions of his employment and a frank incident on 3 September 2019. He sought approval for surgery for a spondylolisthesis. However, the insurer accepted liability for the knee injury, but disputed that the proposed surgery was reasonably necessary.

The Member found that there was a lack of contemporaneous complaints of back pain.

The worker argued that the clinical notes did not record a proper history of his back injury because he is deaf and he had difficulties communicating with the doctors, but the Member found that it was unlikely that he complained of low back pain before April 2020, and the alleged communication difficulties did not explain this. Therefore, the worker's evidence needed to be assessed by reference to the contemporaneous medical records.

The Member held that there was an exacerbation of a pre-existing spondylolisthesis and/or spondylosis as a result of the frank incident in 2019 to which the worker's employment was the main contributing factor, but that this exacerbation was temporary and its effects had ceased. He concluded that it was more likely that the symptoms in late-January 2020, for which surgery was proposed, were due to a recurrence or manifestation of the disease.

Honarvar v Professional Painting AU Pty Ltd [2021] NSWPIC 282

Member Wynyard declined to make a declaration under s 60(5) *WCA* with respect to proposed lumbar fusion surgery and an orthopaedic bed and mattress (valued at $33,700), the latter being claimed as a "curative apparatus".

The worker injured his right ankle and lumbar spine at work in July 2017. He had several surgeries for his ankle injury and extensive conservative treatment for his lumbar and cervical spines and psychological/psychiatric treatment. The insurer disputed the claims for the proposed surgery and mattress/bed.

With respect to the surgery dispute, the Member applied the test in *Diab*.

The Member held that the worker based his case on the assumption that all he had to prove is that alternative treatment has not been effective. However, the potential effectiveness of available alternative treatment is only one of the factors that the worker must satisfy and this requires further proof than simply his own subjective view.

The Member also held that:

- the treating doctors' reports were not helpful because they supported the need for the proposed treatment on the basis that nothing else had worked;
- the failure of the alternative treatments raised a question about whether the worker's mental state was preventing him from recovering; and
- while the worker has been under psychiatric care for many years, there was no evidence from that source.

Ultimately, the Member accepted medical evidence that the proposed surgery was unlikely to result in any significant improvement or associated functional gains.

In relation to the curative apparatus claim, the Member held that the treating specialist recommended these items to assist the worker's recovery from the proposed surgery and for pain management. He stated that while a firm mattress may assist in minimising the worker's pain, this does not impose an obligation on the respondent to supply one and that there are no particular therapeutic or curative qualities in the purchase of a mattress of a type that is commonly used by members of the public. Further, there was no explanation regarding the exorbitant cost of these items.

Proctor v Paragon Risk Management Pty Limited [2021] NSWPIC 382.

Member Haddock held that further proposed decompression/fusion surgery from the L3 to S1 levels was reasonably necessary treatment for a work injury that occurred in 2012.

The Member noted that in 2018, the WCC determined that decompression/fusion surgery from L3 to L5 was reasonably necessary treatment for the work injury and that the insurer relied upon an opinion from Dr Casikar (its IME), which was partly based on his view that the need for the prior surgery was not due to the work injury. However, that opinion was contrary to the previous determination.

After discussing the evidence in detail and applying *Diab*, the Member found that the treating specialist and the worker's IME agreed that the proposed further surgery was reasonably necessary to manage back pain and sciatic symptoms. While the Insurer's IME opined that the outcome of the proposed surgery would be poor, there was no evidence that any further alternative treatments would be effective and while the costs would not be insubstantial, the insurer did not dispute liability based on cost. It found that the proposed surgery was potentially effective in reducing pain and improving function.

Summers v Sydney International Container Terminals Pty Limited t/as Hutchison Ports [2021] NSWPICPD 35

President Phillips DCJ set aside a Certificate of Determination issued by Member Wynyard, which found that proposed cervical spine surgery was not reasonably necessary as a result of a work injury that occurred in October 2019 (deemed date).

President Phillips DCJ re-determined the dispute. In so doing, he stated that while the PIC is a specialised tribunal and can be seen as having experience enabling it to "draw inferences from facts which an ordinary tribunal may not", this expertise can only be deployed to interpret or draw inferences from existing evidence and cannot be used to create evidence.

His Honour found that all of the doctors stated that the appellant suffered from various pathologies at the C3/4, C5/6, and C6/7, but there was a debate about which was the more serious pathology, and there were 3 main opinions that the Member was required to grapple with. However, the Member failed to do this and as a result, he was not able to properly construe the medical opinion, which was to the effect that the proposed surgery was reasonably necessary.

His Honour concluded that this was not a matter in which a specialised tribunal could draw an inference in opposition to the specialist medical evidence.