

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

JULY/AUGUST 2017

ISSUE NUMBER 11/12

Regular 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.

[Application of Sch 8 Pt 2A cl 28D of the *Workers Compensation Regulation 2016* and s 329(1)(b) of the 1998 Act]

Pidcock Panel Beating Pty Ltd v Nicolia [2017] NSWCCPD 32

(Workers Compensation Commission: Snell DP, Date of Decision: 25 July 2017)

On 26 June 2012, the worker made a claim for s 66 permanent impairment lump sum compensation in relation to injuries he sustained to both knees in 2008. An approved medical specialist (AMS) assessed him to be suffering a total of 14% WPI of both lower extremities. On appeal in 2014, the medical appeal panel confirmed the AMS's MAC. On 11 April 2014, the Commission issued a Certificate of Determination (COD) for 14% WPI.

Following bilateral knee surgery, the worker was assessed by his doctor for a combined 48% WPI. On 26 July 2016, the worker made a claim for 48% WPI. The insurer denied the further claim because the worker had already made a s 66 claim after 19 June 2012.

The worker asserted that the application was made pursuant to s 329(1)(b) of the 1998 Act for reconsideration of the previous award. The arbitrator remitted the matter to the Registrar for referral to an AMS for further medical assessment of both lower extremities. It was determined that cl 28D Pt 2A of Sch 8 of the *Workers Compensation Regulation 2016* had effect in the circumstances, which then allowed the worker to rely on s 329(1)(b) to obtain a further medical assessment.

The Deputy President set aside the arbitrator's order of referral, stating, at [76]-[77], that:

[76] The dispute the subject of earlier proceedings had been determined, in a way which was final and binding, and was not susceptible to referral for further assessment pursuant to s 329(1)(b). The claim dated 26 July 2016 did not give rise to a 'medical dispute' within the meaning of s 319 of the 1998 Act, as the only issue raised by the appellant was, in general terms, whether the respondent was entitled to bring a second claim for lump sum compensation in the circumstances.

[77] Even if the claim dated 26 July 2016 had generated a 'medical dispute', such a dispute could not be the subject of being "referred again", within the meaning of s 329(1), as it would not previously have been "referred for assessment under this Part". Such a 'medical dispute' would require a referral for assessment pursuant to s 321 of the 1998 Act. The only further claim which was made, on the evidence, since the earlier proceedings, was that dated 26 July 2016, for further lump sum compensation. That claim could not have been referred pursuant to s 321, until the liability' issue was "determined by the Commission".

The Deputy President opined that the arbitrator applied incorrectly cl 28D Pt 2A of Sch 8 of the 2016 Regulation, stating, at [88]-[90], that:

[88] The scheme of the Workers Compensation Acts, dealing with the jurisdiction of the Commission, is discussed in (*South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16; 4 DDCR 421) at [55]–[69]. The legislative framework relevant to assessment of lump sum compensation is discussed in *Edmonds* at [75]–[80]. The jurisdiction of the Commission, and the scheme of the Workers Compensation Acts, going to the assessment of permanent impairment, is discussed in (*Favetti Bricklaying Pty Limited v Benedek* [2017] NSWSC 417) at [22]–[48] and [75]–[80]. The application of the 2016 Regulation falls within the jurisdiction of the Commission: s 105(1) of the 1998 Act. If there is a relevant dispute about a claim, it may be referred to the Commission: s 288(1) of the 1998 Act, *Divertie v Startrack Express* [2008] NSWCCPD 45; 6 DDCR 26 at [26]. A dispute about whether a worker's permanent impairment is "more than 20%", for the purposes of s 39(2) of the 1987 Act, falls within the definition of a 'medical dispute' in s 319 of the 1998 Act. It is a dispute about "the degree of permanent impairment of the worker as a result of an injury". The 'medical dispute' may then be referred for assessment in the normal way, pursuant to s 321 of the 1998 Act. It constitutes "a medical dispute concerning permanent impairment" within the meaning of s 321(4)(a) of the 1998 Act, even if it is not a claim for lump sum compensation: *Favetti Bricklaying* at [76]–[80]. Such a dispute cannot be referred "where liability is in issue and has not been determined by the Commission".

[89] Section 329(1) provides for "a matter referred for assessment" to be "referred again", that is, the same matter that was previously referred. It is conceivable that, on a referral for a "further assessment" within the meaning of cl 28D, a worker may seek to refer body parts or systems that were not the subject of an earlier referral, for example consequential conditions. This could potentially give rise to a 'liability' dispute which would require determination by the Commission, before assessment by an Approved Medical Specialist: *State of New South Wales v Bishop* [2014] NSWCA 354, 14 DDCR 1. The 'medical dispute' referred for the purposes of Sch 8, Pt 2A of the Regulations may not be identical to that

referred previously. The scheme of the Acts provides for 'liability' issues to be determined, prior to referral to an Approved Medical Specialist: ss 293(2) and (3), and 321(4)(a) of the 1998 Act. There is nothing in Sch 8, Pt 2A of the Regulations which suggests that it is necessary, in giving effect to that Part, that the "further assessment" should involve referral pursuant to s 329, rather than referral of the relevant 'medical dispute' pursuant to s 321.

[90] It is incorrect that there is no vehicle available for assessment within the meaning of cl 28D, other than s 329(1)(b) of the 1998 Act. Typically, the need for assessment within the meaning of cl 28D will arise in the context of a 'medical dispute', which (subject to the determination of any necessary 'liability' issues) will be referred for assessment pursuant to s 321 of the 1998 Act. This process falls within "the terms of the Workers Compensation Acts". It is consistent with the scheme of the Acts (see *Commissioner of Stamp Duties v Permanent Trustee Co Ltd* (1987) 9 NSWLR 719 per Kirby P at 723G, *Studorp Ltd v Robinson* [2012] NSWCA 382 per Hoeben JA (Allsop P and Meagher JA agreeing) at [46]. It avoids the use of s 329 "in an unrestrained or unlimited way" (see the passages of (*Miloslavjevic v Medina Property Services Pty Ltd* [2008] NSWCCPD 56) quoted at [73] above). Difficulties associated with the use of the referral power in s 329 are apparent from the circumstances of the current matter. The matter was referred in circumstances where the real nature of the claim was not apparent from the pleadings, given the respondent's ultimate lack of reliance on them. To the extent to which the claim and pleadings assisted, the referral involved a further claim for lump sum compensation which had been denied, consistent with s 66(1A) of the 1987 Act, (*ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; 254 CLR 1) and (*Cram Fluid Power Pty Ltd v Green* [2015] NSWCA 250; 13 DDCR 281), and where that 'liability' issue remained unresolved.

Snell DP determined that a referral pursuant to either s 321 or s 329 of the 1998 Act was not available (at 96]).

[Medical assessment of 'medical dispute' where liability is in issue; jurisdiction of the Commission in threshold disputes only]

***Favetti Bricklaying Pty Limited v Benedek* [2017] NSWSC 417**

(Supreme Court of NSW: Bellew J, Date of Decision: 24 April 2017)

The worker suffered an injury to the lumbar spine in October 2005. Following a claim for lump sum compensation for the injury, the worker entered into a complying agreement with the insurer for 14% WPI. In 2015, the worker brought a claim for further lump sum compensation for 16% WPI arising from the lumbar spine, and a fresh 5% WPI for a thoracic spine injury and 1% WPI for scarring. At the same time, the worker commenced a claim for work injury damages. The insurer denied liability for the thoracic spine injury and argued that there was no increase in the worker's degree of permanent impairment of the lumbar spine.

In the Commission, the matter was pursued as a 'threshold dispute' for the purpose of the potential work injury damages claim at common law, with the worker seeking a

referral from the Registrar to an AMS for medical assessment. The insurer submitted that the Registrar had no power to refer the matter to an AMS until the issue of liability for the thoracic spine injury had been determined by the Commission. The Registrar's delegate formed the view that it was outside the Commission's jurisdiction to determine the liability issue in a work injury damages claim and proceeded to issue a referral of the medical assessment to an AMS.

The employer issued a summons at the Supreme Court, seeking to set aside the Registrar's decision to refer the matter to an AMS without the Commission first determining the issue of liability for the thoracic spine injury.

Bellew J acknowledged the presence in the matter of a 'medical dispute' within the meaning of s 319(c) of the 1998 Act, such that the effect of s 321 limited the power of the Registrar to refer such a dispute to an AMS for medical assessment "concerning permanent impairment" because liability was in issue and had not been determined by the Commission (at [75]-[76]). His Honour opined that the term "concerning" in s 321 connoted a "broad class of dispute" (at [77]), and stated that:

[79] In the present case, QBE gave notice under s. 74 of the WIMA denying liability. In doing so, QBE took the position that the plaintiff was not entitled to any compensation over and above that which he had already received. The effect of that notice was to put in issue QBE's liability to pay compensation to the [worker]. There was no subsequent determination of liability by the Commission.

[80] In these circumstances, the relevant criteria having been met, the plain text of s. 321(4)(a) did not allow the [Registrar] to determine that the matter should be referred to an AMS.

In holding that the Registrar had no power in the circumstances to refer the matter to an AMS for medical assessment pursuant to s 321(4)(a), his Honour remarked that it "presupposes that the Commission has jurisdiction to resolve the issue of liability prior to the matter being referred to an AMS" (at [89]). His Honour further stated that:

[90] In exercising that jurisdiction the Commission is, pursuant to s. 105(2) of the WIMA, exercising its jurisdiction to "examine, hear and determine" matters for the purposes of, and in connection with, the operation of Part 6 of Chapter 7 of the WIMA ...

His Honour found that the Registrar's referral was beyond power and that the term "injury" in s 151H(4) of the 1987 Act "can only mean injury for which liability has been determined. To conclude to the contrary would lead to the unintended consequence of allowing an assessment of permanent impairment of an injury to be undertaken, in circumstances where no liability for that injury may ever attach to an employer" (at [92]).

The decision is a clear departure from the Commission's long-standing policy that, for the purposes of a work injury damages claim, the issue of liability for the injury was a matter for a court of proper/competent jurisdiction. It is not clear at this stage if there are to be procedural changes to the Commission and/or amendments to the rules of the Commission in this respect.



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 – 4817 (26 July 2017)

[Work capacity decision (WCD) set aside for erroneous and misleading information]

Facts: The worker returned to suitable employment until he was medically terminated in November 2016. The insurer issued a WCD on 23 March 2017, which terminated the worker's weekly payments, on the basis that his ability to earn in suitable employment exceeded the amount of the calculated PIAWE. On internal review, the insurer (for reasons unknown) affirmed the WCD but inserted information related to circumstances of a different worker on a different claim. The internal review decision also identified the worker as an existing recipient when he clearly did not fall under that category. The worker applied to the Merit Review Service (MRS), which made findings that the worker was able to return to work in suitable employment and provided an amount for his ability to earn per week without making recommendations.

Held: Despite not making any errors in the original WCD, the insurer was found to have provided incorrect information in its internal review decision, which was both erroneous and misleading. As per the *Guidelines*, this erroneous information had misled, disadvantaged and caused the worker to suffer procedural unfairness. "The applicant would have no way of knowing that the contents of ... the internal review were based on a different worker or based on a misunderstanding of the law by the insurer, or perhaps both. That content clearly contradicts what he was told in the original decision" (at [16]). The WCD was set aside, with recommendations for the insurer to make a new WCD.

Decision WIRO – 5017 (18 August 2017)

[Application dismissed, jurisdiction for procedural review]

Facts: The worker sought internal review of a WCD issued on 24 March 2017. On 18 April 2017, the insurer maintained the WCD. On 10 June 2017, the worker sought a merit review from MRS. The MRS declined to undertake a merit review because the application was lodged outside the 30-day timeframe for such a process. On 3 August 2017, the worker sought a procedural review, arguing that the merit review was lodged out of time because she was awaiting further medical advice and that there were extenuating circumstances that would allow the review to proceed.

Held: The WIRO held that the insurer had complied with its obligations under the *Guidelines* in making the WCD. In examining the application of s 44BB(3)(a) of the 1987 Act in **Bhusal v Catholic Health Care [2017] NSWSC 838**, the WIRO applied the Court's decision therein that the phrase "must be made within 30 days" was mandatory in the true sense. Further to this, the WIRO determined that there is no

provision for “extenuating circumstances” in s 44BB(3)(a) that would allow the review to proceed. In the circumstances, the WIRO has no jurisdiction to conduct a procedural review where no merit review has taken place. The application was dismissed.

Bhusal v Catholic Health Care [2017] NSWSC 838 was highlighted in **Issue 10** of the *WIRO Bulletin*.

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.

Hearing loss injuries prior to 2002 and sustained after that date

The worker claimed lump sum compensation for a hearing loss injury with a deemed date of injury of 24 July 1997. The claim was made on the basis of a medical report which assessed 13.98% binaural hearing loss. The insurer disputed the claim pursuant to s 66(1) of the *Workers Compensation Act 1987*. The insurer confirmed the basis of the dispute was that the assessment was less than the equivalent of 11% whole person impairment (WPI). WIRO proposed to the insurer that *BP Australia Limited v Greene* [2013] NSWCCPD 60 may apply, where hearing loss injuries with deemed dates of injury prior to 1 January 2002 are not subject to the operation of the WPI threshold under s 66(1). The insurer then agreed that s 66(1) did not apply but that they would need to arrange a further examination so that the worker could be assessed under the 1976 NAL Tables.

(Note: The WIRO does not agree with the decision of *BP Australia v Greene*.)

Who pays for interpreter services under s 64A(1) of the 1987 Act?

A worker’s lawyer made a complaint to WIRO after the insurer refused to pay interpreters’ fees for their client pursuant to s 64A(1) of the 1987 Act. The insurer asserted that interpreter fees were a disbursement claimable against ILARS. Section 64A(1) sets out that the insurer is responsible for the expenses. On this point, the insurer agreed to pay the claimed interpreter services fees.

WIRO ACTIVITIES

Changes in interim invoicing

A WIRO Wire has been issued on changes to the protocol on interim invoicing. The new Wire can be accessed here:

[WIRO WIRE: Interim invoicing: Immediate change of protocol](#)

Selected merit review findings published

A selection of redacted Merit Review Service findings and recommendations can now be found on the WIRO website. The WIRO believes these published decisions would be of interest to system participants.

You can find the selection on the WIRO's website here:
[Merit Review Findings and Recommendations](#)

WIRO Solutions Brief Issues 8 and 9

Issues 8 and 9 of the *WIRO Solutions Brief* have 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 8](#) and [WIRO Solutions Brief – Issue 9](#) are now up 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

We are approaching the last quarter of 2017 and the issue of s 39 of the *Workers Compensation Act 1987* continues to present challenges. My office is maintaining its rigorous participation in stakeholder initiatives designed to address the concerns of workers whose weekly payment entitlements are severely impacted by this provision. A particular concern that has arisen is the importance of ensuring that clear policy and efficient procedures are in place to deal with workers whose degrees of permanent impairment not be readily ascertained as their conditions may not have stabilised (not reached maximum medical improvement) before their weekly payments are likely to cease due to s 39. We have found there is often profound confusion in these instances and my office is tackling the issue head on, with the full cooperation of other stakeholders.

I encourage each and everyone in the scheme to let me know of any other issues or concerns regarding s 39 that have arisen. Send an email to

complaints@wiro.nsw.gov.au or contact my office directly with your queries on 13 9476.

Finally, I extend my appreciation and thanks to everyone who attended the successful series of seminars that my office has conducted this year. It's always a great opportunity to be in touch with you outside the office in a less formal setting.

Kim Garling

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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 www.wiro.nsw.gov.au

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