Workers Compensation independent review office

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Bulletin of the Workers Compensation Independent Review Office (WIRO)

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***Bhusal v Catholic Health Care Ltd* [2018] NSWCA 56**
(NSWCA: Meagher JA, Simpson JA, Sackville AJA – Date of Decision: 26 March 2018)

HEADNOTE
[This headnote is not to be read as part of the judgment]

Between 2009 and 2014 the applicant was employed as an assistant nurse by the respondent, Catholic Health Care Ltd ("CHC"). On 2 February 2014 she suffered injury to her back in the course of that employment. She made a claim under the *Workers Compensation Act 1987* (NSW) ("the Act"). Initially CHC, through its licensed insurer, Catholic Church Insurance Ltd ("CCI") accepted liability to make weekly and other payments under the Act. However, on 25 February 2016, CCI advised the applicant that, following review of her claim, it had been decided that she had a current capacity to work that disentitled her to further weekly payments.

The decision was a "work capacity decision" within the meaning of s 43 of the Act and subject to review under s 44BB of the Act and to judicial review by the Supreme Court under s 69 of the *Supreme Court Act 1970* (NSW), but not otherwise. By s 44B(1) a work capacity decision is subject to "internal review" by the insurer; to "merit review" by the State Insurance Regulatory Authority ("SIRA"); and to procedural review by an Independent Review Officer. By s 44BB(3)(a) of the Act an application for review "must be made within 30 days after the worker receives notice" of the decision sought to be reviewed.

The applicant sought internal review of the work capacity decision of 25 February 2016. On review, CCI decided that the original decision would remain in place and notified the applicant by letter addressed to her, care of a firm of solicitors who had assisted, but not acted, for her, and forwarded to her by them. The applicant was out of Australia, and did not receive notice of the internal review decision until 2 June 2016 when she returned to Australia. She filed an application for merit review by SIRA on 9 June 2016. In the

application it was stated that she had received CCI's internal review decision on 2 May 2016. On the same day SIRA, by email, notified CCI of the application, noting that it did not confirm that it had jurisdiction to review the merit review decision. There was no evidence that a similar reservation was communicated to the applicant. On 14 June 2016 CCI provided its response to the application, but did not raise any jurisdictional issue. On 30 June 2016 the Delegate of SIRA advised the applicant that it did not have jurisdiction to proceed with the merit review as the application was not made within 30 days of the applicant being notified of CCI's internal review decision.

The applicant lodged an application for procedural review by the Independent Review Officer. The Independent Review Officer dismissed the application. By summons filed in the Supreme Court, the applicant sought judicial review of the decisions made by SIRA and the Independent Review Officer. The primary judge accepted that the word "must" in s 44BB(3)(a) was "mandatory in the true sense". He therefore rejected the submission that SIRA ought to have given the applicant an opportunity to explain why she did not lodge her application within 30 days from 2 May 2016, and dismissed the summons.

On appeal, the applicant contended that there had been a denial of procedural fairness in the SIRA decision; in particular by the failure of the Delegate to call for submissions on the issue of non-compliance with the 30-day period as being decisive of jurisdiction. The applicant also contended that the construction and operation of s 44BB(3)(a) of the Act permitted an application to be filed after the 30 day period had expired; and, further, that the factual matter of compliance with the 30-day period was a jurisdictional fact and that the primary judge erred in failing to make factual findings as to compliance.

Held

The Court, allowing the appeal:

(1) Procedural fairness is concerned with a fair hearing, not a fair outcome. In determining whether a person has been denied procedural fairness the key issue is whether the procedures adopted by the decision-maker have caused "practical injustice" to that person.

SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152; [2006] HCA 63, cited; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40, cited; *Kioa v West* (1985) 159 CLR 550; [1985] HCA 81, followed.

(2) The procedure adopted by the Delegate (of SIRA) caused the applicant to suffer practical injustice. This is not because SIRA's decision on the jurisdictional question was wrong but because the applicant was denied the opportunity to make submissions to SIRA on the issue that proved critical to the outcome of her merit review application.

(3) This conclusion does not imply that SIRA, when conducting a merit review, is obliged to check the accuracy of information provided by an applicant that appears adverse to his or her case. There was a denial of procedural fairness here because neither the Delegate nor CCI directed the applicant's attention to the critical issue on which SIRA's decision turned. The applicant was thus denied the opportunity to be heard on that issue.

(4) It was unnecessary to determine the remaining grounds of appeal.

CASE REVIEWS (Recent cases)

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

[Entitlement to s 38A benefits, on appeal]

***Hee v State Transit Authority of NSW* [2018] NSWWCCPD 6**
(WCC: Keating P – Date of Decision: 26 February 2018)

The appeal against the decision of an arbitrator in ***Hee v State Transit Authority of NSW* [2017] NSWWCC 252** (reported in *WIRO Bulletin* Issue No. 14 October/November 2017), dealt with the issues of the application of special provisions for workers with highest needs and whether the benefits are payable under s 38A in circumstances where there is no other entitlement to weekly payments compensation.

The President dismissed the appeal and confirmed the arbitrator's decision, concluding at [188], that:

> A worker with highest needs and an established incapacity is not entitled to the additional benefits payable pursuant to s 38A merely by reason of the satisfaction of those criteria alone. More is required. The benefits provided for in s 38A are only payable where a worker has established that there is an amount of weekly compensation payable applying the provisions of ss 34-38 that is less than $788.32. A worker, such as Mr Hee, who is unable to establish any amount of weekly compensation payable arising from a compensable injury, is not eligible for the additional benefits under s 38A.

In arriving at this conclusion, the President held that:

> [144] It seems plain that the general purpose of inserting s 38A into the legislation is to ensure that workers with highest needs receive additional weekly compensation payments compared to those workers with an impairment of 30% or less. That is not to say that all workers with highest needs receive the additional compensation. Such compensation is only available to those workers who meet the conditions set out above.
>
> [145] … as the Arbitrator found, s 33 merely confirms that an employer is liable to pay weekly compensation to an injured worker during a period of incapacity, whether it be total or partial. However, the manner of calculating the quantum of entitlements is based on the clear and unambiguous terms of ss 34 to 38 of the 1987 Act.

and

> [151] … Unless the calculation of any entitlement under Div 2 results in an amount "of compensation payable" to the worker s 38A does not apply. This ensures that only those workers who have a demonstrated entitlement to

weekly compensation are able to access the additional benefits available under s 38A. An assessment of nil under s 37 cannot result in "compensation payable" to the worker.

[152] This construction produces the most harmonious result. That is because it must be understood, as I have said, that the purpose of s 38A is to provide workers with highest needs who, without the benefits of that provision, would receive more modest weekly compensation payments. It would be an absurd outcome if the additional benefits under s 38A were available to workers such as Mr Hee who, notwithstanding his considerable impairment, is unable to demonstrate that he is suffering any loss of earnings as a consequence of his injury. That is not to say that Mr Hee would be permanently precluded from recovering s 38A benefits. He is eligible to renew his application for such benefits should his circumstances warrant it.

. . . . . .

[Appeal out of time; role of arbitrator and AMS; liability dispute vs medical dispute]

***Vaughan v Secretary, Department of Education* [2018] NSWWCCPD 1**
(WCC: Snell A/P – Date of Decision: 10 January 2018)

The worker made a claim for lump sum compensation following an injury to the left and right shoulders. The insurer accepted that the worker injured his right biceps, but denied liability for injuries to either shoulder. In the Commission, the arbitrator determined that the worker's statement and histories he related to the various medico-legal experts included "sweeping generalities" and were not consistent with contemporaneous evidence. The arbitrator held that the worker failed to discharge the onus of proof and made an award in favour of the employer.

The worker appealed outside the prescribed timeframe, on the basis that:

1. the arbitrator erred in making an award for the employer;

2. the arbitrator erred in not finding a mechanism of injury;

3. the arbitrator's decision was outside his jurisdiction and ultra vires in that the dispute should have been resolved by way of a referral to an Approved Medical Specialist (AMS);

4. the arbitrator misdirected himself with regards to the medical conflict between the doctors; and

5. the arbitrator erred in finding there was no contemporaneous evidence as to injury.

Snell A/P did not find exceptional circumstances upon which the appeal could be allowed outside the prescribed timeframes, finding that the appeal was initially rejected by the Commission because it did not comply with the procedural requirements contained in the *Workers Compensation Commission Rules 2011* and *Practice Direction No. 6*. The Acting President held that the failure to lodge the appeal within the prescribed timeframe stemmed from an error in procedural non-compliance and did not constitute exceptional circumstances (at [25]-[27]).

Upon consideration of the merits of the grounds of appeal, Snell A/P also found that the appeal would not succeed, even if time were extended (at [32]), for the following reasons:

Ground 1

- The worker's submissions offer little elucidation (at [72]), and do not adequately identify a ground of appeal or seek to identify any specific error in the arbitrator's task of fact finding (at [75]); and

- The ground of appeal "simply complains about the result" and does not identify an appealable error (at [76])

Ground 2

- The ground of appeal cannot be sustained, because it was within the jurisdiction of the Commission to determine the issue of 'injury' which required resolution before the matter could be referred to an AMS under s 321 of the 1998 Act (at [88]); and

- The submissions on this ground do not address whether the arbitrator's approach involved error. The Arbitrator gave reasons for why he did not accept Mr Vaughan's case on 'injury', and why he preferred the competing medical opinion of [the insurer's doctor] at ([98]).

Ground 3

- The task of determining whether or not the worker suffered an injury is within the jurisdiction of the Commission, and required determination before a referral to the AMS could be made (at [107]);

- The worker's submission that the arbitrator was required to resolve a 'medical dispute' arising from a disagreement between expert witnesses or a difference of medical opinion is misleading. "The term 'medical dispute' is defined in s 319 of the 1998 Act. An issue between expert witnesses about the reliability of MRIs does not constitute a 'medical dispute' within the meaning of s 319. Furthermore, it is not a matter on which the assessment in a MAC is 'conclusively presumed to be correct' pursuant to s 326(1) of the 1998 Act. The submission that it was 'not the Arbitrator's decision' to resolve a 'medical dispute about imaging, is misconceived and wrong." (at [108]); and

- The arbitrator's consideration of the evidence available to him does not involve error (at [110]-[113]).

Ground 4

- The arbitrator had the power to determine 'liability' for the injury to the shoulders; it was open to him to accept the opinion of the insurer's medical expert over the other and gave reasons for doing so (at [122]); and

- It was a matter for the arbitrator to assess the weight of evidence ascribed to the insurer's medical expert's report, which was supported by other contemporaneous evidence before him; there is no error in accepting the insurer's medical expert's views over those of the medical expert for the worker (at [127]).

Ground 5

- The worker's submission is baseless in that the arbitrator did not proceed on the basis that there was no contemporaneous evidence as to injury. The arbitrator referred to the notification injury form, the incident form, the available material from the treating doctors, the radiologist's report, and to the absence of material in the medical evidence before him (at [133]);

- The arbitrator correctly applied the line of authority in dealing with the clinical material before him (at [134]); and

- The way the arbitrator dealt with the contemporaneous evidence that was reasonably open to him does not demonstrate error (at [146]).

Snell A/P held that the appeal would not succeed on its merits, even if leave were granted under the relevant rules of the Commission.

. . . . . .

[Jurisdictional error]

***State of New South Wales v Butler* [2017] NSWWCCPD 47**
(WCC: Snell DP – Date of Decision: 3 November 2017)

The worker sustained an injury to the right knee on 6 January 2006 while employed by JCS Big Country Services Pty Ltd (JCS). He received lump sum compensation for 2% WPI from JCS on 26 September 2008. He then suffered an injury to the left knee on 20 June 2011 while employed by the State of New South Wales (the State). He underwent total left knee replacement surgery on 13 February 2012 and total right knee replacement on 6 October 2015.

A claim was made for weekly payments, s 60 medical treatment expenses and lump sum compensation for both the right and left lower extremities.

JCS denied liability, arguing that the injury in 2006 was minor and that the worker had since made a full recovery. It also submitted that the lump sum claim related to the 2011 injury sustained with the State and for which they were therefore not liable. JCS argued the lump sum claim was excessive. The State similarly denied liability.

The arbitrator referred to the injury with JCS on 6 January 2006 as "not seriously in dispute". Consequently, the arbitrator made an award for weekly payments and medical treatment expenses all against the State, but also made an award in favour of JCS.

By way of an amended Certificate of Determination (COD), the arbitrator noted that "… whether permanent impairment resulted from the injury on 6 January 2006 was 'wholly within the province of the AMS'" and said that "whether there is a causal connection between any injury and impairment are matters for an arbitrator, not an AMS, to decide".

He then remitted the matter to the Registrar for referral to an AMS for assessment of the left knee injury on 20 June 2011 only, and any consequential condition in the right knee.

On appeal, the State argued jurisdictional error (with concurrence of the worker) on the basis that:

- the arbitrator failed to consider and determine the rights and obligations of the parties arising from the injury on 6 January 2006. This included whether incapacity and the need for medical treatment resulted from that injury as well as the injury on 21 June 2011, and the need to refer WPI resulting from injury on 6 January 2006 to an AMS for assessment. It was necessary to determine the relief to which the worker was entitled as against JCS, resulting from the injury on 6 January 2008; and

- the weekly payments award was erroneous in that during the periods awarded from 6 to 20 October 2015, the worker did not suffer 'economic capacity'.

Applying the authorities on the issue of 'medical dispute' and the roles of the Commission and an AMS (including ***Haroun v Rail Corporation (NSW)* [2008] NSWCA 192; 7 DDCR 139**, ***Trustees of the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA 213**, and ***Jaffarie v Quality Castings Pty Ltd* [2014] NSWWCCPD 79**), Snell DP determined that the issues raised by JCS "did not involve issues of 'liability' for

the purposes of s 321(4)(a) of the 1998 Act. They involved issues which went to 'the degree of permanent impairment of the worker as a result of an injury' (that of 6 January 2006)" (at [26]).

Snell DP held, at [31], that:

> *The dispute regarding the permanent impairment that resulted from the conceded injury on 6 January 2006 was a 'medical dispute'. Consistent with authority, in the absence of assessment pursuant to Pt 7 of Ch 7 of the 1998 Act, the Commission could not determine that medical dispute. This limitation on the Commission's jurisdiction extended to the entry of an award in favour of the relevant employer. The submissions of the parties at the arbitration hearing were correct, it was necessary that the medical dispute relating to the injury of 6 January 2006 be referred to an AMS. The entry of an award in favour of JCS, including on the permanent impairment claim against it, involved jurisdictional error.*

Following consideration of the decisions in ***Baira v RHG Mortgage Corporation Limited* [2012] NSWCA 387**, ***Waterways Authority v Fitzgibbon* [2005] HCA 57; 221 ALR 402; 79 ALJR 1816** and ***Mifsud v Campbell* (1991) 21 NSWLR 725**, Snell DP held that:

- the arbitrator's reasons do not deal with whether the effects of the injury on 6 January 2006 continued, and if so, the consequences of that injury (at [42]-[44]); and

- the arbitrator's reasons do not deal with whether that injury caused or materially contributed to the periods of incapacity for which weekly compensation was ordered, or the need for medical treatment, including surgery (at [42]-[44]); and

- the arbitrator's reasons did not decide the issue of whether the effects of the injury on 6 January 2006 continued, and the significance of that to the relief claimed. There were no other reasons provided for making an award in favour of JCS and the failure of all heads of the worker's claim against JCS (at [46]).

The Deputy President revoked the arbitrator's amended COD and remitted the matter for re-determination by a different arbitrator.

In disposing of the appeal, Snell DP also noted that:

- the parties should ventilate their positions on each employer's right of contribution, particularly in relation to the right knee injury on 6 January 2006 (which was not placed in issue by JCS) (at [49]-[50]); and

- the parties should turn their minds to whether orders would be sought for s 60 medical treatment expenses where the worker sought to withdraw the aspect of the claim in the first instance (at [51]-[52]).

[Injury; bird attack; "journey", "in the course of employment", "arising out of the course of employment", "real and substantial connection"]

***Smith v Woolworths Ltd* [2017] NSWWCC 290**
(WCC: Arbitrator Harris – Date of Decision: 5 December 2017)

The worker is an employee of Woolworths located with other shops (the mall) within the Kiama Village Shopping Centre (the Centre). She drove on the day of the injury to the Centre, parked her car at the designated staff car park and started walking along an open walkway outside the mall. Just prior to entering the mall to report to her job at Woolworths, the worker was attacked by a native pee wee bird and sustained an injury to her right eye.

The attack of pee wee birds on patrons of the mall and other shops within the Centre had previously been documented by the local council and the Centre Management, and reported in the local newspaper, the *Illawarra Mercury*. The previous attacks had caused injury to a number of people who all sought ophthalmic treatment.

The worker claimed weekly payments for the period of absence due to conservative treatment of and surgery to the right eye and for s 60 medical treatment expenses.

The respondent declined liability on the following basis:

1. that she did not sustain an injury (s 4 or s 10 of the 1987 Act);

2. that if she sustained the injury, whether she was injured in the course of employment, or the injury arose out of the course of employment (s 9A of the 1987 Act); and

3. that if the injury occurred while she was on a journey, whether there is a real and substantial connection between her employment and the incident (s 10(3A) of the 1987 Act).

The arbitrator conducted a fact-finding exercise and mainly rejected the respondent's arguments.

The car park

The arbitrator determined that:

- the worker parked her car at the side car park, which was the "staff car park"; [at [23]);

- the worker was injured after she parked her car in the designated "staff car park" on the same [property] in which the respondent's premises were situated (at [28]);

- the worker was outside but was entering the mall when she was attacked by the bird and suffered the eye injury (at [28]);

- the worker's journey to the place of employment had concluded prior to the injury (at [31]);

- the worker's passage from at least the designated staff parking area to the Woolworth's store was necessarily incidental to the employment (at [33]); and

- the injury occurred when the worker was in the course of her employment (at [34]).

Arising out of the course of employment

Applying the facts and principles in the decision of the Court of Appeal in ***Badawi v Nexon Asia Pacific Ltd* [2009] NSWCA 324** (*Badawi*), the arbitrator rejected the employer's argument and held that:

- the worker was attacked by the pee wee bird in circumstances where her employment brought her to the very spot where the injury occurred, and that it was extremely unlikely that she would have been attacked by the bird at that time, had she not been in the course of her employment (at [39]);

- the injury arose out of the worker's employment because she was in the course of her employment at the time of her attack, having been brought to that very spot by reason of her employment (at [40]).

Substantial contributing factor and real substantial connection

Further considering *Badawi*, the arbitrator held that:

- the worker's injury occurred in circumstances incidental to the performance of work, that is, entering the premises (with the rejection of the respondent's submission that the incident had nothing to do with the worker's employment) (at [49]);

- the respondent's argument that the worker was "not performing work at the time of injury" was rejected because it was inconsistent with *Badawi* and the finding that the nature of the work being performed was incidental to the performance of her duties (at [52]-[53]);

- the length of time within which the worker had been employed by Woolworths was irrelevant to the nature of the injury she sustained (at [55]);

- it is extremely likely that the injury or similar injury would NOT have happened if the worker had not been at work (at [57]);

- the worker was attacked and suffered the injury while undertaking an activity incidental to her employment (entering the premises), and no other conclusion is

reasonably open that the employment was a substantial contributing factor (at [59]-[63]); and

- given the finding of injury under s 4, it is unnecessary to express a view that the worker had otherwise established that there was a real and substantial connection between her work and the bird attack (at [67]).

The arbitrator made an award in favour of the worker for weekly payments and medical treatment expenses.

[Medical appeal; scarring; error on the face of the MAC]

***Whitaker v McDonalds Australia Ltd* [2017] NSWWCCMA 83**
(WCCMAP: Arbitrator Harris, Dr Curtin, Dr Mastroianni – Date of Decision: 4 December 2017)

The worker injured herself when, while working at McDonalds, she slipped on oil, and, in placing her right arm out to stop her fall, fell into a vat of heated oil up to her right elbow. She suffered extensive injuries that required at least four surgeries, including debridement surgeries to excise the necrotic skin, as well as undergoing skin grafts, applying sorbolene cream, wearing compression gloves, and dealing with persistent pain in the right upper limb.

Following the assessment of an AMS, she was certified to be suffering 9% WPI of the right upper extremity and 4% WPI due to scarring. The AMS opined that the scarring assessment was placed in the class 1, 3-4% category in Table 14.1 of the *NSW workers compensation guidelines for the evaluation of permanent impairment, Fourth edition*, on the following basis:

- there was a minor limitation of performance of few ADLs, despite noting that the worker could not fully close her fist,
- could not clean her teeth (grooming and dressing),
- could not play tennis because her grip has been affected,
- could not use a kettle or jug with coffee because of problems with grip to the right hand, and
- had difficulty writing and handling cash.

The worker appealed on the basis of the use of incorrect criteria and that there was demonstrable error on the face of the MAC.

The appeal panel reviewed the AMS's observations and determined that the worker's limitations and restriction noted in the MAC were significant and not "minor" at all. These limitations, the appeal panel said, would limit some of the other ADLs (at [26]-[27]).

The appeal panel also determined that the error on the face of the MAC is one of fact, being that the conclusion reached by the AMS — that there was no requirement for ongoing treatment of the scarring — was inconsistent with the history largely accepted by the AMS and contrary to the accepted evidence of the severity of the worker's skin condition (at [32]-[34]).

On re-examination, the appeal panel consequently found that:

- adopting the re-examination findings, the worker's skin condition must be analysed under Table 8-2 of the AMA 5 (at [38]-[40]);

- the severity of the scarring would affect a number of activities previously identified (at [46]);

- the effect of the worker's skin disorder is such that it should be appropriately classified as "limited performance of some ADLs" and that the limitations are greater than what would be classified as "minor" (at [48]); and

- the worker's scarring should be classified as class 2 (10%-24%WPI) of the relevant scale in the AMA 5, being towards the lower range in class 2 (at [60]-[61]).

The AMS's MAC was revoked and a new assessment rating of the skin was issued at 13% WPI. Combined with the 9%WPI for the right upper limb, the worker was assessed for a total of 21%WPI on appeal.

PROCEDURAL REVIEW UPDATES (WCD reviews)

All the procedural reviews of WCDs are published by the WIRO and can be accessed at http://wiro.nsw.gov.au/injured-workers/procedural-review-decisions.

Decision WIRO – 318 (Date of Decision: 1 February 2018)

[Misleading WCD]

The worker suffered injury and did not return to her pre-injury employment. She was then made redundant by the employer. The insurer accepted liability and made weekly payments.

On 29 June 2017, the insurer made a WCD, informing the worker that, among other notations: she was currently not working, was certified fit to work in suitable duties, her weekly payments would cease on 4 October 2017, and that her calculated PIAWE was $1,099.05 (on page 2 of the WCD) and $1,373.81 (on page 6 of the WCD).

On internal review, the insurer advised the worker that her new weekly payments at a reduced rate would commence on 1 December 2017.

While not making a recommendation, the MRS on merit review found that the worker was not able to return to her pre-injury employment but was capable of returning to work in suitable duties, that she had current work capacity, and that she did not satisfy the special requirements such that her weekly payments could continue.

On further review, the WIRO determined that the insurer breached the *Guidelines* in its original WCD, in that they provided two conflicting figures for the worker's PIAWE ($1,099.05 on page 2 and $1,378.81 on page 6 of the same WCD). Further, the WIRO's delegate stated:

> [15] The internal review proceeded on the basis that [the worker] was currently employed and working for 24 hours per week. Both the original decision and the merit review proceeded on the basis that [the worker] was not working as at the date of those decisions.
>
> [16] The failure of the Authority to make a recommendation in light of its findings means that the only decision currently in force must be the internal review decision.

The WIRO's delegate recommended that the worker's weekly payment should continue in accordance with the internal review decision, and that the insurer should issue a further WCD which complies with the *Guidelines*, if they wish to terminate the worker's weekly payments.

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.

Increase in PIAWE due to three employers

The worker advised WIRO she was not receiving her correct weekly benefits. She had three employers prior to her injury but was only being reimbursed for loss of wages with one of her employers. WIRO requested the insurer to complete an internal review of the PIAWE in the WCD. WIRO noted that the worker was a causal employee with all three employers and so there were no applicable fixed hours. At first, the insurer claimed they had not been provided with any information regarding the other employers. However, the worker provided WIRO with a copy of her claim form, attached to which were her Group Certificates and payslips from all three employers. WIRO provided the insurer with this information and noted its inclusion in the initial claim form. The insurer conducted the internal review and increased her PIAWE pursuant to Sch 3, item 8 of the 1987 Act, which included all her earnings from each employer.

Back payments not made despite favourable merit review decision

The worker's lawyer complained that the insurer refused to make the back payments for weekly benefits, despite the worker's favourable merit review decisions. The insurer advised that the back payments would not be made until the expiration of the timeframes for a procedural review. WIRO suggested to the insurer that it was highly unlikely that the worker would proceed to a procedural review of a favourable merit review decision. The insurer then stated that it was their policy to wait for the expiration of the review process. WIRO advised that the recommendations made in the merit review decision were binding and that there appeared to be no reference or provision in the Guidelines or the legislation that allows such a policy or practice by the insurer. The insurer conceded and made arrangements to make and process the back payments.

Reasonable excuse

The worker told WIRO she provided a certificate of capacity to the insurer as notification of injury on 15 December 2017. The insurer provided a reasonable excuse notice to the worker dated 22 December 2017. However, this notice was not sent to the worker until 28 December 2017. The worker said she was advised via telephone on 22 December 2017 that the claim had been reasonably excused. WIRO reminded the insurer that s 268 of the 1998 Act provides that the reasonable excuse notice must be issued in writing within seven days of notification of the injury. WIRO also noted that the notice stated there was insufficient medical information. However, as at the date of the notice, the worker had already provided two certificates of capacity. The SIRA Guidelines state that reasonable excuse can only be used where a certificate of capacity has not been provided. Further, the insurer's notice stated that there is evidence that the injury may not be work related. However, the insurer failed to provide any such evidence or supporting documents as required by the Guidelines. WIRO requested that the insurer make provisional payments to the worker. The insurer agreed that the reasonable excuse had not been appropriately applied, and agreed to make provisional payments from the date of injury on 14 December 2017 to the date of the dispute notice on 19 January 2018.

WIRO & OTHER ACTIVITIES

WIRO Seminars

WIRO's annual Sydney seminar was held on 8 March 2018 at the ICC Sydney in Darling Harbour. Over 900 participants from across the scheme registered for the event. Preparations are now underway for the regional seminars to be held in Wollongong, Newcastle, Ballina and Bathurst in May. If you have queries about the seminars, please send them in the first instance to editor@wiro.nsw.gov.au.

WIRO Annual Report

WIRO has released its Annual Report 2016-2017. The report has been tabled in Parliament and is now published in the WIRO website: http://wiro.nsw.gov.au/annual-report-2016-2017.

Paralegal Courses 2018

WIRO has successfully conducted two Paralegal Courses in Newcastle and Wollongong in February 2018, in addition to two in-house workshops held in law practices in Sydney. If you would like WIRO to conduct in-house workshops for paralegal and secretarial staff you may send an EOI to editor@wiro.nsw.gov.au.

Workers Compensation Commission e-Bulletin on amended rules

The Commission has issued *e-Bulletin No. 75 January 2018*, which sets out the amendments to the *Workers Compensation Commission Rules 2011*. The amended rules apply from 29 January 2018. You may view the e-Bulletin on the Commission's website at: http://wcc.nsw.gov.au/Policies-and-Publications/Pages/e-Bulletins.aspx.

WIRO Solutions Brief

Issue 16 of the *WIRO Solutions Brief* is now available on the WIRO website. 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 meets with insurers

WIRO invites insurers to meet with us to discuss issues in 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 annual WIRO Sydney Seminar held on 8 March 2018 at the ICC Sydney in Darling Harbour was a resounding success. Over 900 participants from across the scheme registered for the event and I was very pleased that so many excellent speakers were able to participate. Thank you to everyone who attended.

The success of the Sydney Seminar 2018 is due to the tireless efforts of my staff who have made valuable contributions in numerous ways and I extend my thanks to everyone involved. Video recordings of the seminar will be posted on the website and on the WIRO YouTube page shortly. In the meantime, you can review the presentations, view the photographs and watch the interviews we conducted.

The WIRO Annual Report 2016-2017 has been published. I hope that the report demonstrates the extent of my office's commitment to and active participation in addressing the issues with the scheme that impact various stakeholders, particularly injured workers. Of particular note is the continuing success of the Solutions Group in resolving and managing complaints and issues involving insurers.

During May 2018, a series of WIRO Regional Seminars will be held, delivering an abridged version of the Sydney programme.

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 or to send me a direct email at kim.garling@wiro.nsw.gov.au.

Kim Garling

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