Bulletin

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ISSUE NUMBER 18

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These 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.

Submissions of appellant in person failed to establish he was aggrieved in point of law by Presidential decision

Jaffarie v Quality Castings Pty Ltd **[2018]NSWCA 88**

Decision maker: NSWCA Macfarlan JA, Leeming JA, White JA
Date of decision: 27 April 2018

The appeal by the unrepresented worker was the latest stage of lengthy contested litigation. The worker claimed to have suffered an injury to his lumbar and thoracic spine in 2009. The Arbitrator had determined that there was liability with respect to the lumbar spine but not the thoracic spine. One of the worker's complaints was that the referral to an AMS did not extend to this thoracic injury.

The Court found that the written submissions did not advance a legally tenable submission as to why the appellant was aggrieved "in point of law" with the decision of the Acting President. The submissions were very difficult to understand and the appellant was unable to assist the Court with the arguments put forward as he was not legally qualified and had not written them. The appeal was dismissed.

Inferences must only be drawn from facts established by evidence

Knezevic v Laticrete Pty Ltd **[2018] NSWWCCPD 11**

Decision maker: Wood DP
Date of decision: 19 March 2018

The applicant brought proceedings in the WCC with respect to the death of her husband who died on 13 June 2012 after being struck by a truck when he alighted from his vehicle on the M7.

The issue before the Arbitrator had been whether the worker's death arose in the course of his employment. The Arbitrator found against the worker. The appeal rested on a consideration of whether the Arbitrator fell into error by either drawing inferences that were not available on the facts or failing to draw inferences that were.

The worker had been made aware the day before the accident that his employment was to be terminated and email correspondence had taken place between his lawyer and employer with his lawyer advising the termination was unlawful. There was competing evidence about whether the worker was on his way to work or to visit clients or to go shopping at the time of the accident.

The Deputy President found that the Arbitrator's decision was affected by error as he had taken into account speculative conclusions that the time of day was an odd time for the worker to be travelling at that point on the M7 and that had he been travelling to work he would likely have contacted his employer first. These inferences were not available on the evidence.

The matter was remitted for re-determination by another Arbitrator as the three dependent children were not party to the proceedings (Rule 10.5 WCC Rules 2011).

WCC no jurisdiction to make an award to activate s53

Paterson v Paterson Panel Workz Pty Ltd **[2018] NSWWCC 83**

Decision maker: Senior Arbitrator McDonald
Date of decision: 26 March 2018

The worker suffered a serious injury to his left ankle and foot in October 2013. He left Australia to live in the Philippines on 13 December 2017. The insurer thereafter issued a s74 notice denying liability under s53 of the 1987 Act solely because the worker no longer lived in Australia. The ARD sought a determination by the WCC that the worker's incapacity was likely to be of a permanent nature so that he could 'comply' with s53 and continue to receive payments.

The Senior Arbitrator found that s53 only applies to a worker receiving or entitled to receive payments under *an award* and on its face therefore did not apply. The worker had been in receipt of compensation for more than 130 weeks and was outside the second entitlement period. The WCC did not have jurisdiction to hear a dispute about entitlement to weekly compensation or to make an award in his favour so that s53 would apply.

There was no jurisdiction to refer the question of the permanence of his injury to an AMS, and entitlements to payments depended on the insurer's claims management.

The Senior Arbitrator declined to make a declaration with respect to permanence of the worker's incapacity but stated if she did have jurisdiction she would find in favour of the worker.

The decision is on appeal.

Combining permanent impairment from primary physical injury and primary psychological injury

Hulme v Secretary, Department of Education and Communities **[2018] NSWWCC 35**

Decision maker: Arbitrator Wardell
Date of decision: 8 February 2018

The worker was a teacher who suffered various physical injuries in September 2007 as the result of being embroiled in a fight between two groups of students. She subsequently developed psychological problems and made a claim for a primary psychological injury. A Medical Appeal Panel assessed a 19% WPI in August 2014.

The worker was advised in 2017 that the operation of s39 of the 1987 Act meant weekly payments would cease at the end of the year. A report was obtained from a physician who assessed a 13%WPI with respect to temporomandibular joint dysfunction. The worker sought to have this physical injury assessed by an AMS.

The issue was whether it was permissible for the purpose of determining the s39 threshold to combine impairments resulting from physical and primary psychological injuries arising from the same incident. This involved the question of whether s 65A(4) was applicable.

The worker submitted the dispute fell within the exclusive jurisdiction of an AMS and there was no "liability" dispute. The Arbitrator rejected this argument and found there was a dispute in relation to liability to make weekly payments having regard to s39 and he did have jurisdiction.

He agreed with the reasoning of Snell DP in *Abu – Ali v Martin – Bower Australia Pty Ltd* in which the Deputy President rejected an argument that the limitations in s 65A applied only to assessments of permanent impairment lump sum compensation.

Proceedings were dismissed on the basis that they were misconceived.

Psychological injury: s 11A(1) defence

Locke v Australian Unity Home Care Service Pty Ltd **[2017] NSWWCC 255**

Decision maker: Arbitrator Wardell
Date of decision: 31 October 2017

The worker alleged a psychological injury resulting from events that had occurred at work. In dispute was whether the worker suffered a recognisable psychological condition constituting an "injury" and if so whether the respondent had established a defence under s 11A(1) of the 1987 Act.

The Arbitrator found the worker had suffered an injury and was not persuaded on the balance of probabilities that it was wholly or predominately caused by action characterised as performance appraisal or discipline.

Rather it was caused by the cumulative effect of a number of issues and events, not all of which could be so characterised. As there was no medical evidence addressing the issue of what wholly or predominately caused her injury the defence failed.

The Arbitrator then went on to find that the worker had no current work capacity based on the medical evidence and also made findings with respect to the dispute relating to the worker's PIAWE.

Does Rule 15.3 of the WCC Rules provide power to order attendance at a respondent's medical examination?

De Vries v Bega Valley Shire Council **[2018] NSWWCC 22**

Decision maker: Arbitrator Harris
Date of decision: 30 January 2018

An interlocutory application was brought by the respondent seeking an order that the worker be further medically examined prior to the conciliation/arbitration hearing. The respondent submitted the WCC had the power and discretion to make the order sought relying solely on Rule 15.3(3) of the Workers Compensation Rules.

The worker's claim form dated 16 March 2017 alleged psychiatric injury as the result of various matters which occurred in the course of her employment (which had commenced in November 2016).

The insurer denied liability and then arranged for the applicant to be examined by a psychiatrist. A further s 74 notice was then issued additionally raising a s11A defence. The worker made a claim for weekly payments in November 2017 attaching a medical report which concluded the worker suffered from a work-related exacerbation of a constitutional mood disorder. The respondent then made an appointment for the worker to attend a further psychiatric examination (with a different psychiatrist as the first was unavailable). The worker refused to attend.

The Arbitrator did not accept that an entitlement to have a person medically examined was subsumed with the notion of the "*practice and procedure*" of the WCC when various sections of legislation provide specific circumstances when the right exists. In addition, he did not accept it fell within the notion of the "*fullest opportunity practicable*" to have their case considered as stated in the Rule. He found that the power to order a medical examination cannot be exercised otherwise than in accordance with a clear statutory entitlement.

Did the deceased's injury arise in the course of employment?

Applicant 1 v Employer **(unreported)**

Decision maker: Senior Arbitrator McDonald
Date of decision: 16 January 2018)

The deceased and her partner ran a financial advice company from their home. The deceased died in June 2010 as the result of injuries inflicted by her partner who was found not guilty of murder by reason of mental illness.

Proceedings were commenced seeking a death benefit to be apportioned between the deceased's two sons. The deceased was killed on her bed and was wearing pyjamas and the issues in dispute included whether her injuries were suffered in the course of her employment or arose out of her employment.

Time of death could not be determined so the Arbitrator was unable to determine that she was in the course of her employment. The Arbitrator decided that the delusions suffered by her partner were the cause of the injury which led to her death rather than the fact of her employment. There was an award for the respondent.

The decision is subject to an appeal.

The one claim limitation in s66(1A) can't be avoided by "amending" claim

***Youssef v Ikea Pty Ltd* [2018] NSWWCC 37**

Decision maker: Arbitrator Egan
Date of decision: 8 February 2018

The worker sustained an injury to his right shoulder on 2 June 2008 and a consequential left shoulder condition. He claimed and received lump sum compensation pursuant to s66 with respect to impairment of his shoulders following the issue of a MAC in 2014. His WPI was assessed at 14%.

In May 2016 the worker advised of an intention to claim work injury damages and a claim for further lump sum compensation resulting from a consequential condition in his left wrist in the form of de Quervain's syndrome. In November 2017 the worker issued an application to "*amend his claim for lump sum compensation*".

The application was dismissed. The Arbitrator found that the worker could not avoid the consequences of s 66(1A) by framing his application to "amend" a previously finalised claim. There had been a claim that was finalised and the worker had had his one claim pursuant to s 66(1A) of the 1987 Act.

MAC did not contain adequate reasons and not supported by medical evidence

***Applicant v Employer* (unreported)**

Decision Maker: MAP Arbitrator Edwards, Dr Noll, Dr McGroder
Date of decision: 12 December 2017

The worker had suffered an injury to his right shoulder in a motor vehicle accident in the course of employment and had undergone four arthroscopic procedures. It was not disputed that he had suffered a consequential condition of his left shoulder.

Pursuant to s323 of the 1998 the AMS had found a deductible proportion of one- tenth related to a pre-existing condition in respect of the right upper extremity and one-half in respect of the left upper extremity which resulted in an assessment under the Combined Values Table of 14% WPI.

The Appeal Panel found the MAC contained a demonstrable error in that the AMS failed to give adequate reasons for the conclusion that the deductible proportion for the left shoulder was one-half or 50%. It also found there was an absence of medical evidence to support the AMS' conclusion.

The Panel found the extent of the deduction for a pre-existing condition as required by s323 would be difficult or costly to determine because of the absence of medical evidence. They substituted a Certificate finding that the contribution to the permanent

impairment of the left shoulder to be 10% which was not at odds with the available evidence. The new MAC issued for 18%WPI.

AMS had not addressed basis for determining MMI nor made clear whether proposed surgery had been considered: s319(g) 1998 Act

Miller v NR & DL Davies, MJ & AM Stewart t/as Central Australia Hotel **[2018] NSWWCCMA 12**

Decision maker: MAP Arbitrator Edwards, Dr Dixon, Dr Harvey-Sutton
Date of decision: 19 February 2018

The worker suffered injuries on three separate occasions in January 2001 while working as a hotel manager in Bourke. The injuries were to her lumbar spine, cervical spine and left and right shoulders. A MAC was issued in December 2017 where the AMS found that the degree of permanent impairment was fully ascertainable.

The worker lodged an appeal submitting that the AMS had failed to address her current clinical status, including a proposed decompressive laminectomy as recommended by the treating specialist, or mention it in the MAC.

The Panel found that the AMS had not addressed the issue of current clinical status including the basis for determining maximum medical improvement (para 1.46 of the Guidelines). They found the AMS had not disclosed in his reasoning process if he had considered the proposed surgery or whether the condition was unlikely to change substantially in the next year with or without treatment.

The MAC was revoked.

AMS in error by considering need for spinal surgery

Proctor v Paragon Risk Management Pty Ltd **[2018] NSWWCCMA 7**

Decision maker: MAP Arbitrator Wynyard, Dr Dixon, Dr Croker
Date of decision: 15 February 2018

The worker was assessed by an AMS to determine whether the degree of permanent impairment was fully ascertainable pursuant to s319(g) of the 1998 Act for the purpose of continued weekly payments (in the context of s39 of the 1987 Act and Schedule 8, Part 2A, Clause 28C of the *Workers Compensation Regulation 2016*).

The treating specialist had recommended surgery and the insurer disputed surgery was reasonably necessary. The MAC certified that maximum medical improvement had been reached and the degree of permanent impairment was fully ascertainable.

The worker appealed on the basis that the AMS had fallen into error by determining whether spinal surgery was reasonably necessary.

The Panel revoked the MAC and issued a new one certifying that the degree of permanent impairment was not fully ascertainable. This was because the question of whether the surgery proposed was reasonable and necessary had not yet been determined and if it was determined in the worker's favour and surgery proceeded the degree of permanent impairment may well change. It was for the WCC to determine whether the proposed surgery was reasonable and necessary.

Permanent impairment fully ascertainable: s319(g) 1998 Act

Applicant v Employer **(unreported)**

Decision maker: Registrar WCC
Date of decision: 28 February 2018

The worker was injured in 2009 when he fell on uneven ground, developing chronic neck and back pain such that he was unable to return to work. A MAC issued in January 2018 determined that the degree of permanent impairment was fully ascertainable in accordance with s 319(g) of the 1998 Act.

The worker sought to appeal on the basis that maximum medical improvement had not been achieved because his treating specialist had recommended a spinal fusion. No contemporaneous request for payment of surgery had been made of the insurer and no surgery was scheduled to occur.

The Registrar found that the Guidelines require more than an "*elusive possibility of surgery*". It was relevant that surgery had never been scheduled and the original recommendation for surgery had been made two years earlier. Further, although the respondent had denied liability, no application to resolve the dispute had been lodged in the WCC concerning the liability issue.

The Registrar was not satisfied that at least one of the grounds of appeal had been made out and did not allow the appeal to proceed.

CASE STUDIES

Cases from the WIRO Solutions Group and ILARS

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

Weekly payments – claim to be determined within 21 days

The worker ceased working for his employer due to a decrease in work capacity and the travel involved with getting to a new worksite. The worker lodged a certificate and made a claim, which was yet to be responded to. He had exhausted his annual leave entitlements and was without income.

The insurer advised a WCD was issued in July 2013 which was followed by Internal Review and then Merit Review that same year. The insurer noted that Merit Review concluded that the worker had no entitlement to weekly payments. WIRO again wrote to the insurer asking them to confirm whether they had provided an official response to the recent certificate of capacity submitted in December 2017 and any thereafter that certified a reduced capacity for work.

WIRO cited s 274 of the 1998 Act, which requires these claims to be determined within 21 days. The insurer then agreed to commence weekly payments at the transitional rate and processed a back payment to November 2017. The worker received back payments of **over $15,000** and over $800 per week from 1/4/18 and continuing.

Recovery action

The worker contacted WIRO for assistance after the insurer had recently commenced a recovery action against him. The insurer had apparently processed a WPI settlement to the injured worker in November 2017, without seeking Centrelink clearance.

The insurer repaid Centrelink payments of about $7,000 after a notice of demand was sent to the insurer in March 2018. The injured worker provided an email from his lawyer and other documents clearly showing the oversight had occurred due to the actions of the insurer.

The insurer was contacted and asked to clarify why the settlement payment was made without following the correct process. The insurer responded that they would not pursue the payment as it was their clerical error.

Delay in determining liability for weekly benefits

A worker was terminated from his employment in December 2017. In January 2018, his lawyer sent documents purporting to be a claim for weekly payments. There was no claim form, but the lawyer's letter attached a certificate and asserted that the worker was losing income since his termination and wanted the insurer to determine weekly payments payable.

The lawyer followed up on multiple occasions as to the status of the claim. Each time the insurer indicated that they were about to decide or they were calculating PIAWE. No decision was made and the worker's lawyer sought WIRO's assistance.

The insurer then said that the worker was not entitled to weeklies because he was terminated for misconduct. Later, when WIRO pressed for a written dispute notice, the insurer claimed they did not have to provide one since no formal claim was made.

The insurer had had weeks to refute that a claim had been made. Instead they acted as if the claim was about to be determined. Then, when they were weeks out of time, they were saying no claim was made.

Further, the suggestion no formal claim was made was a matter of semantics as the worker's lawyer had provided all information to indicate a claim was being made. WIRO requested a decision. In response, weekly payments were paid from the date of termination.

Delay in payment of medical expenses

The worker said she was advised by her case manager that she would receive payment of outstanding medical and travel reimbursement accounts by Friday the previous week. The worker said that the accounts had been outstanding for some time and she was owed thousands of dollars. In response to our enquiry, the insurer confirmed the same day that all s 60 expenses had been reimbursed in the sum of **nearly $4,000.**

Weekly payments during overseas travel

The worker alleged she notified the insurer that she was travelling overseas and a certificate of capacity was provided up until 20 April 2018. She claimed that weekly entitlements had ceased and she had been unable to find out why. The insurer acknowledged that the worker contacted them regarding overseas travel and agreed to continue paying weekly entitlements. They contacted the employer and requested that timely payments should continue unless they were advised otherwise.

Delay in determining liability for s 60 expenses

The worker's lawyer contacted WIRO as the new claims manager would not reimburse past medical expenses nor determine current treatment requests as the claim had been declined by the previous claims manager. The worker's weekly payments had ceased pursuant to the two-year limit under s 59A but he had been recently assessed at 12% WPI by an AMS. The insurer agreed to accept ongoing reasonable and necessary medical expenses. They would contact the worker to obtain receipts of outstanding medical expenses and would review any current and future requests for approval.

s39: If an injury is not compensable under s66 can it be assessed for threshold purposes under s39? Cessation of weekly payments on the basis of lesser primary physical injury where primary psychological injury assessed and over threshold.

The worker sustained a primary psychological condition and primary physical injury in the same work-related incident in 2001.

For the purposes of s39 the insurer arranged an examination by a psychiatrist and a maxilla-facial surgeon to assess WPI arising for each primary injury exclusively. The IMEs found 44% in respect of primary psychological injury and 18% for the physical injury.

The insurer insisted they could not 'deem' the worker to have exceeded the s39 threshold because the primary psychological injury was "not compensable under section 66".

WIRO ILARS has referred the case to icare for reconsideration by the scheme agent on the basis that the s39 threshold and the operation of the Regulation are not reliant on an injury being compensable under section 66. The matter is proceeding to the WCC.

Death arising from work-related injury and s66 lump sum compensation

Following the case of Mexon in the Supreme Court (Schmidt SCJ, 22 November 2017), WIRO ILARS has observed a rise in claims for permanent impairment compensation for deceased workers. WIRO notes that earlier decisions establish the right to claim s66 compensation for a deceased worker (see *Ansett Australia v Dale* [2001] NSWCA 314).

The decision is on appeal to the Court of Appeal.

WIRO & OTHER ACTIVITIES

WIRO Regional Seminars 2018

WIRO is hosting a series of Regional Seminars in May and June in Wollongong, Bathurst, Newcastle and Wagga Wagga. You can find out more about the upcoming WIRO Regional Seminars here.

WIRO Annual Sydney Seminar

A highlights video and complete videos of each presentation are now available here. Presentation slides and photographs are also available.

WIRO Paralegal Courses 2018

Successful sessions have been held recently in Sydney, Wollongong, Newcastle and Ballina. Further courses will be arranged later in the year or where there is sufficient demand. In addition, workshops can be conducted in-house for law practices within the Sydney metropolitan area.

If you would like WIRO to conduct a paralegal course in your region or an in-house workshop in your practice send an EOI to editor@wiro.nsw.gov.au.

WIRO Solutions Brief

WIRO Solutions Brief – issue 17 has been published and is now available on the WIRO website. The brief is a regular insurer newsletter 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 send an email to editor@wiro.nsw.gov.au.

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 the Director Solutions, Jeffrey Gabriel, at jeffrey.gabriel@wiro.nsw.gov.au or (02) 8281 6308.

WIRO meets with law firms

WIRO regularly meets with law firms to provide firm specific data and information and feedback from the WIRO ILARS Team with respect to interaction with ILARS.

If you would like to arrange a feedback session please contact the, Director ILARS, Roshana May, at roshana.may@wiro.nsw.gov.au or (02) 8281 6239.

FROM THE WIRO

I have just returned from attending the 2018 Forum of the International Association of Industrial Accident Boards and Commissions (IAIABC) in Atlanta Georgia. I gave a detailed presentation to members of the Dispute Resolution Committee meeting about WIRO, the NSW workers compensation scheme and its dispute resolution system, which was well received.

The audience which largely comprised heads of state workers compensation judiciaries together with state scheme directors were very interested in several aspects of WIRO's operations. Of particular interest was WIRO's ombudsman type role, our data collection and analysis and our pre-filing Solutions function.

The Forum is a wonderful opportunity to learn about workers compensation issues affecting other countries and the responses and solutions developed in response. For instance, the IAIABC's Medical Committee was concluding a project on opioid use in workers compensation and pain management strategies, now emerging as a major issue in NSW.

The Legislative Council's Standing Committee on Law and Justice has commenced its next review of the state's workers compensation scheme. The Committee has resolved to focus on the feasibility of a personal injury tribunal for CTP and workers compensation dispute resolution and recommendations for a preferred model. Submissions are due by 17 June 2018. Further information is available here.

On 4 May 2018 the Government announced proposed changes to the workers compensation dispute resolution system following a review undertaken in response to recommendations of the Standing Committee on Law and Justice. Under the proposed reforms the Workers Compensation Commission will undertake all dispute resolution once an internal review is completed and all enquiries and complaints from injured workers that are not resolved will go to WIRO. Learn more here.

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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For any other enquiries, please visit the WIRO website at www.wiro.nsw.gov.au