Bulletin

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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.

Decisions of the Registrar's Delegates

Cl 28C of Sch 8 of the Regulation - Employer entitled to seek reconsideration of MAC as to whether the degree of permanent impairment is fully ascertainable

Martin v Insurance Australia Group Services [2019] NSWWCCR 3 – Delegate McAdam – 1 July 2019

On 28 May 2009, the worker injured her left ankle. Towards the end of 2017, she commenced WCC proceedings seeking a determination under s 319 (g) *WIMA* that she had not reached maximum medical improvement. On 15 December 2017, Dr Mastroianni issued a MAC, which certified that she had not reached maximum medical improvement and that he expected that this would occur within the next 6 to 9 months. She was therefore subject to the exemption to the operation of s 39 *WCA* contained in cl 28C of Sch 8 of the Regulation.

On 11 April 2019, the insurer sought a reconsideration of the MAC based on evidence that the worker had reached maximum medical improvement. However, the worker opposed reconsideration of the MAC and on 24 April 2019, she sought to discontinue the proceedings by filing an Election to Discontinue. However, the Registrar rejected that document.

Mr McAdam, as Delegate of the Registrar, decided that it was appropriate to refer the matter to the AMS for reconsideration. His reasons are summarised below:

- While the worker commenced the original proceedings, they were finalised by a MAC dated 15 December 2017, but no Certificate (of Determination) was issued as the only issue before the Commission was a medical dispute;
- While the worker relied upon *Milosavljevic* and argued that s 329 cannot be relied upon to maintain a medical dispute that has been concluded, he held that this decision is distinguishable. In that matter, a MAP revoked a MAC and the worker sought reconsideration of the MAC under s 329 *WIMA.* In doing so, he was

attempting to circumvent the binding nature of that determination to re-agitate rights he had already pursued. He was also attempting to maintain a medical dispute through repeated assertions of error. However, in this matter, the insurer is not seeking to circumvent a binding certificate, but rather a reconsideration of the decision that finalised the proceedings in the Commission.

- The matter currently before him is the insurer's application and only the insurer can discontinue these proceedings.
- There is nothing in the case law relied upon by the worker, or a construction of s 329 *WIMA*, that limits or defines what can be subject of a reconsideration. It was inherent in the question asked to the AMS and the reasons he provided in the MAC that at some point circumstances may change and the degree of permanent impairment would be fully ascertainable and the insurer asserts that those circumstances exist now.
- Whether maximum medical improvement has been reached is a matter for the AMS to determine, but it was always envisioned when the MAC was issued in December 2017 that at some point the MAC may need to be reviewed.
- While the worker referred to s 322A *WIMA* and the decision of *Singh v B & E Poultry Holding Pty Ltd,* those submissions are not relevant as the matter was not referred for an assessment of the degree of permanent impairment. Section 322A *WIMA* does not apply to this MAC and any reconsideration of it will not be caught by s 322A, as the AMS can only answer the question asked in s 319 (g) *WIMA* and cl 28C of Sc 8 of the Regulation – whether the degree of permanent impairment is fully ascertainable.
- While s 288 *WIMA* provides that only a claimant can refer a dispute about lump sum compensation to the Commission, nothing in s 329 *WIMA* suggests that only a worker can apply for reconsideration under s 329.
- While the worker also argued that the consequence of the MAC is that she is a worker with highest needs, that argument is misconceived as the application was not brought for a determination that she was a worker with highest needs under s 32A *WCA*. He stated:

> 30.However, I will consider Ms Martin's submissions as if they were a reference to Cl 28C of Sch 8 to the 2016 Regulation.
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> 31.The submission is, in essence, that once a worker is assessed as not having reached maximum medical improvement and the degree of permanent impairment is not fully ascertainable, that will always be the case, regardless of what a future assessment may indicate. Ms Martin submits: "There is not provision in the Act which makes any part of the definition no longer applicable".
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> 32.Although not expressed explicitly in these terms, this appears to be an estoppel argument. There can be no estoppel in circumstances capable of change: *Railcorp NSW v Registrar of the WCC of NSW* [2013] NSWSC 231 at [83]. Not only is the determination of the AMS of itself capable of change implicitly, the AMS explicitly pointed out the point at which those circumstances would likely change. The Workers compensation guidelines for the evaluation of permanent impairment, 4th edition, also envision the potential for change when discussing maximum medical improvement:

1.15 Assessments are only to be conducted when the medical assessor considers that the degree of permanent impairment of the claimant is unlikely to improve further and has attained maximum medical improvement. This is considered to occur when the worker's condition is well stabilised and is unlikely to change substantially in the next year with or without medical treatment.

1.16 If the medical assessor considers that the claimant's treatment has been inadequate and maximum medical improvement has not been achieved, the assessment should be deferred and comment made on the value of additional or different treatment and/or rehabilitation – subject to paragraph 1.34 in the Guidelines.

33.Further, by the operation of section 329(2) were the AMS to reconsider his opinion in relation to whether the worker has reached maximum medical improvement, that would be inconsistent with his earlier decision, and the reconsidered certificate would prevail.

- He has been guided by ss 354 and 367 *WIMA* and did not see the utility in requiring the insurer to file a new set of proceedings, seeking a further assessment under s 319 (g) *WIMA* that the worker has reached maximum medical improvement. The matter would be sent to the same AMS and the resolution of the application would be delayed. Therefore, the interests of justice dictate that the reconsideration application should proceed.
- He was satisfied that the application has merit as the insurer has provided medical evidence that shows, on a prima facie basis, that maximum medical improvement has been reached.

Accordingly, the Delegate referred the matter for reconsideration under s 329 (1A) *WIMA.*

Work Capacity Decision – worker has current work capacity of 40 hours per week in suitable employment – worker's wishes to work at a location closer to her family foes not alter the application of s 32A – Worker's capacity to earn is most likely to be at or near PIAWE – worker not entitled to weekly payments under s 37 WCA

Stefanac v Secretary, Department of Family and Community Services [2019] NSWWCCR 4 – Arbitrator Egan (as Delegate of the Registrar) – 11 July 2019

The worker suffered a psychological injury (deemed date: 2 June 2016). On 18 March 2019, the respondent made a work capacity decision, based upon a work capacity assessment dated 24 August 2018, which calculated PIAWE as $1,640 per week and determined that the worker had current work capacity for employment as an administrative officer for 40 hours per week and that this was suitable employment. It also determined her ability to earn in that suitable employment as $1,307.58 per week.

During the expedited assessment teleconference, the worker's solicitor conceded that the worker was fit to perform the duties of her substantive position in any location other than Mr Druitt and Blacktown (her usual places of employment).

Arbitrator Egan held that the worker has capacity to undertake suitable employment and that he is not to have regard to the worker's place of residence or whether the suitable employment is generally available in the employment market. He stated that the fact that the worker wishes to be closer to her family does not alter the application of s 32A *WCA.* There was no suggestion that the respondent had provided any undertakings that the

worker would be provided with alternative roles more suitable to her personal circumstances and no issues were raised under ss 48 or 48A *WCA.* He determined that the worker's capacity to earn in suitable employment was $1,640 per week and that she has no entitlement to weekly payments under s 37 *WCA.*

The Delegate declined to make an interim payment direction as the claim had minimal prospects of success: s 297 (3) (a) *WIMA*.

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Stop Press: Broadspectrum (Australia)Pty Ltd has lodged a Summons seeking judicial review of the decision made by the second Medical Appeal Panel appointed in relation to this dispute. The summons is listed for hearing on 2 December 2019. WIRO will report on the outcome in due course: *Broadspectrum (Australia) Pty Ltd v Fiona Willis*

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