WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 34

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.

WCC – Arbitrator Decisions

Application for assessment by an AMS dismissed because there was no medical dispute under s 321 WIMA

Lympike Pty Ltd v Wehbe [2019] NSWWCC 158 – Arbitrator Michael Wright – 3 May 2019

Background

On 25 January 2008, the worker aggravated a pre-existing injury to his lumbar spine at work. Radiological investigations indicated a chronic disc injury at the L4/5 level and evidence of an old laminectomy at the L5 level in 1985 and there was a disc protrusion on the left L5 nerve root. On 10 July 2009, he underwent an L4/5 decompression, laminectomy, discectomy and rhizolysis, but his left leg pain did not resolve.

From 2010 onwards, the 2008 aggravation was the subject of several WCC proceedings, which included claims for lump sum compensation under s 66 WCA. On 18 November 2011, Dr McGroder issued a MAC, which assessed 15% WPI in respect of the lumbar spine injury (after a 1/10 deduction for pre-existing impairment). However, the employer appealed against that MAC and on 13 March 2012, a MAP revoked the MAC. It applied a deductible of 1/3 for pre-existing impairment and issued a new MAC that assessed 12% WPI due to the 2008 aggravation. On 5 August 2016, the worker underwent fusion surgery at the L4/5 level, after which his lumbar pain improved but did not completely resolve.

In 2017, the worker applied for a referral to an AMS to determine whether the degree of permanent impairment was fully ascertainable under s 319 (g) *WIMA*. On 15 June 2017, Dr Beer issued a MAC, which determined that the degree of permanent impairment would not become fully ascertainable until “three to four months”. On 20 October 2017, the insurer qualified Dr Darveniza, who found that maximum medical improvement had been reached and he assessed 27% WPI (DRE Lumbar Category 4 = 22%, which he combined with 3% for residual radiculopathy + 2% for a second operation + 1% for a third operation).

On 12 February 2018, the insurer qualified Dr Machart to comment on the potential permanent impairment. He opined that there would be a minimum of 23% WPI, but that persisting radiculopathy would attract a further 3% WPI and impairment of activities of daily living could not be assessed until maximum medical improvement had been reached and scarring could not be assessed without viewing the scar.

On 15 May 2019, Dr Darveniza further reported to the employer's solicitor that he elected not to apply a deductible for the 1985 injury, but that a standard 1/10 deduction would be reasonable and he therefore assessed 24% WPI.

On 3 January 2019, the employer's solicitors wrote to the worker's solicitors, stating that they intended to apply to the WCC for an assessment by an AMS to determine whether the degree of permanent impairment was fully ascertainable and whether it is more than 20% for the purposes of satisfying the threshold under s 39 *WCA.* While they noted that Dr Darveniza opined that the degree of permanent impairment was fully ascertainable and was 27%, they also stated that the insurer had decided that the 1/10 deductible was inappropriate and that a 1/3 deductible should be applied and that the degree of impairment resulting from the injury is not greater than 20% WPI.

On 14 January 2019, the worker's solicitors replied that there was no threshold dispute regarding permanent impairment as the only post-operative assessment was that of Dr Darveniza, who assessed 27% WPI.

On 25 March 2019, after the employer's solicitors lodged the current application, the worker's solicitors wrote to them accepting Dr Darveniza's WPI assessment and stating that the worker opposed the matter being referred to an AMS as there was no dispute and the proceedings should be discontinued.

On 3 April 2019, the Registrar directed the employer to file and serve submissions addressing: (a) whether there was a medical dispute; and (b) whether in the absence of a medical dispute, the proceedings should be dismissed under s 354 (7A) *WIMA.*

On 11 April 2019, the employer's solicitors advised the Registrar that for the reasons set out in their letter to the worker's solicitors dated 3 January 2019, the employer does not accept Dr Darveniza's assessment, and that they were simply trying to ascertain whether the worker should continue to be exempt from the operation of s 39 *WCA* either because he has still not reached maximum medical improvement or he has a degree of permanent impairment of at least 21% WPI.

On 29 April 2019, the worker's solicitors submitted that the only dispute is apparently between the employer and/or the insurer and Dr Darveniza and that there is no medical dispute.

Arbitrator Michael Wright decided to determine the matter on the papers. He referred to the definition of "medical dispute" in s 319 *WIMA* and rejected the employer's submission that there was a medical dispute on foot.

He held that there was no medical dispute between the parties that could be capable of referral for assessment by an AMS under *WIMA.* He held that the evidence of Dr Darveniza and Dr Machart clearly indicates that the worker has suffered a minimum of 23% WPI and that he would therefore be exempt from the application of s 39 *WCA.* He held, relevantly:

> 34. Section 321 of the 1998 Act provides for referral of a medical dispute to an AMS. A medical dispute is defined in s 319 of the 1998 Act as, among other things, a dispute "between a claimant and a person on whom a claim is made …about…the degree of permanent impairment of a worker as a result of an injury." There is no medical dispute, pursuant to s 319 of the 1998 Act. Indeed, the worker accepts the

only medical evidence attached to the Application in respect of his degree of permanent impairment. That is, the worker accepts Dr Darveniza's assessment of whole person impairment in respect of the lumbar spine which exceeds 20%. While the employer may seek to cavil with Dr Darveniza's assessment, it has not explained how its disagreement with the doctor's assessment constitutes a "medical dispute" for the purposes of s 319 of the 1998 Act.

35. Even if it could be argued that there is a "medical dispute", the employer does not have any medical evidence to support its position that Dr Darveniza's assessment should not be accepted. The assertion that Dr Darveniza should have assessed the worker and applied a deductible amount of one third without medical evidence in support is not accepted. The employer or insurer is not qualified to step in the shoes of an independent medical expert and make an assessment of a worker's degree of permanent impairment.

Accordingly, he dismissed the proceedings under s 354 (7A) (b) *WIMA.*

Cl 28C of Pt 2A of Sch 8 of the 2016 Regulation does not entitle a worker to weekly compensation before the date on which an AMS certified that he had not reached maximum medical improvement – Hochbaum applied

Strooisma v Coastwide Fabrications and Erections Pty Ltd [2019] NSWWCC 173 – Arbitrator Paul Sweeney – 16 May 2019

Background

On 23 September 2003, the worker suffered injury to his lumbar spine at work. The insurer accepted liability and paid weekly compensation for all periods of incapacity. In 2008, he was paid compensation under s 66 *WCA.* He was an existing recipient of weekly payments for the purposes of the 2012 amending *Act*.

On 12 September 2017, the insurer issued a notice under s 39 *WCA* and advised the worker that his weekly payments would cease on 25 December 2017.

In November 2017, 2 neurosurgeons recommended that the worker should undergo further surgery at the L5/S1 level and on 18 July 2018, he underwent an interbody fusion at that level.

On 12 October 2018, an AMS certified that the worker had not reached maximum medical improvement and that the degree of permanent impairment was not fully ascertainable. The insurer resumed weekly payments from the date of that MAC.

On 21 February 2018, ***Arbitrator Paul Sweeney*** conducted a conciliation and arbitration. The issue for determination was whether the worker was entitled to weekly payments from 26 December 2017 to 11 October 2018.

Referral of questions of law to the President under s 351 WIMA

During conciliation, counsel for the insurer applied to refer the following questions of law to the President:

> *(1) does the Commission lack jurisdiction to determine whether a worker is entitled to weekly compensation on the basis of s 38 of the Workers Compensation Act 1987?*
>
> *(2) Does cl 28C of Pt 2A, Sch 8 to the 2016 Regulation operate to exclude the application of s 39 of the 1987 Act only from the date one of the conditions in clause 28C (a) or (b) is satisfied or from some other date?*

However, before he determined this matter, the President delivered a decision in *RSM Building Services Pty Limited v Hochbaum* [2019] NSWWCCPD15 (*Hochbaum*), which concerned the application of s 39 *WCA*, which rejected Arbitrator Sweeney's reasoning in *Kennewell*.

The Arbitrator declined to refer the proposed questions of law to the President. He held that the decision in *Hochbaum* authoritatively answered question (2) and the issue of the Commission's jurisdiction to make awards of weekly payments during the third entitlement period under s 38 *WCA* is irrelevant to the outcome in this matter. In relation to question (1), he noted that this issue is currently before the Presidential Unit in the matter of *Whitton* and if necessary, a Presidential member will make an authoritative ruling of it in that case. In any event, that question is not novel and numerous decisions of arbitrators and presidential decisions address it, including *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd* [2016] NSWWCCOD 54. While there is some debate about whether the issue has been addressed by the Court of Appeal, it is not necessary to consider those cases in this matter.

Operation of cl 28C

In *Hochbaum*, the President held that there was no entitlement to weekly compensation between the expiry of 260 weeks and the certification of more than 20% permanent impairment. He found that the language of s 39 (2) strongly indicates the present tense application and, if it is speaking in the present tense, it could not apply until the statutory precondition of more than 20% permanent impairment was satisfied. The Arbitrator stated:

> 26. The language of Cl 28C is similar to that utilised in s 39(2). Significantly, it also says that s 39(1) "does not apply" if an assessment of permanent impairment "is pending". Ms Tronson argued in her written submissions that the language of the clause was "constantly speaking in the present". That submission conforms with the President's reasoning in *Hochbaum*. It must be accepted. It follows that my reasoning in *Kennewell* was wrong and that decision cannot be followed.
>
> 27. Certainly, there are contextual differences between the two provisions. It is much easier, for example, to characterise Cl 28C as a beneficial provision for the reasons which I gave in *Kennewell*. Ultimately, however, both provisions address different aspects of the same statutory purpose: to establish the circumstances in which compensation is payable beyond the period limited by s39(1).
>
> 28. To hold that they operate differently would give rise to anomalous outcomes… The legislature cannot have intended such a capricious result.
>
> 29. Accordingly, I hold that Cl 28C on its true construction does not entitle the applicant to weekly compensation before the date on which the AMS certified that his impairment was not fully ascertainable and that he had not reached maximum medical improvement.

Accordingly, he entered an award for the respondent.

Application for reconsideration of a MAC refused

Cooper v Coca Cola Amatil (Aust) Pty Ltd [2019] NSWWCC 176 – Arbitrator Carolyn Rimmer – 20 May 2019

Background

The worker injured his left knee at work on 31 October 2018 and suffered a deep vein thrombosis. He claimed lump sum compensation for 29% WPI (comprising assessments from Dr Berry (9% WPI) and Dr Niesche (22%)).

The dispute was referred to Dr Ho and Dr Crane for assessment. Dr Ho assessed 8% WPI and Dr Crane assessed 3% WPI in a MAC dated 20 December 2018.

On 17 January 2019, the worker lodged an application to appeal against the decisions of the AMS, but the appeal was rejected because no submissions were attached.

On 23 January 2019, Arbitrator Annette Farrell issued consent orders, which awarded the worker compensation under s 66 *WCA* for 13% WPI, based upon the MAC's.

On 18 March 2019, the worker wrote to the Registrar seeking reconsideration and rescission of the COD dated 23 January 2019, under s 350 (3) *WIMA*. He argued that he could not complete submissions in support of the rejected appeal without the further medical evidence that he intended to obtain and that he prepared these and lodged a further appeal application as expeditiously as possible after he received further evidence. However, the respondent opposed the application for reconsideration of the COD.

On 10 April 2019, the worker lodged a further application to appeal against the decision of the AMS, which alleged that Dr Crane's MAC contains a demonstrable error and was based on incorrect criteria because: (1) he did not explain in detail how he came to the conclusion that there was no oedema and real discolouration of the left lower extremity; (2) he did not mention to worker's reported history relating to the injury; (3) he made no mention of enquiring whether the worker wore elastic stockings in an attempt to control oedema; and (4) he is a general surgeon and not a vascular surgeon and is therefore not the most suitable expert to assess vascular injuries.

However, on 11 April 2019, a delegate of the Registrar rejected it and determined that the appeal could not proceed because the Certificate of Determination dated 23 January 2019 had not been rescinded or revoked. The delegate stated that until such time as a decision is made in respect of an application for reconsideration the application to appeal against the decision of the AMS should not be filed.

Arbitrator Carolyn Rimmer determined the matter on the papers. She referred to the decision in *Sebel v Sebel Furniture Ltd* [2006] NSWWCCPD 141, regarding the operation of s 350 (3) *WIMA,* in which of Roche AP extracted the following principles (at [58]):

> (1) The section gives the Commission a wide discretion to reconsider its previous decisions;
>
> (2) Whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> (3) Whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration;

(4) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;

(5) Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result;

(6) Given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350 (3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;

(7) Depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 (*Anshun*) may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;

(8) A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration; and

(9) The Commission has a duty to do justice between the parties according to the substantial merits of the case.

The Arbitrator noted that the presumptive onus lies on the party seeking reconsideration of the previous orders. She stated that it is important keep in mind the distinction between the existence of the power of reconsideration and the occasion of its exercise, and the Commission should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably (*Hilliger v Hilliger* (1952) 52 SR (NSW) 105).

The Arbitrator noted that the worker sought to rely upon fresh evidence in the appeal and that this issue was considered by Fleming DP in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCCPD 7, as follows:

> A number of authorities have considered the tests at common law for the introduction of fresh evidence in appellate proceedings before the Courts. The relevant tests are firstly, that the evidence which is sought to be admitted on appeal was not available to the Appellant at the time of the original proceedings or could not have been discovered at that time with reasonable diligence, and secondly that the evidence is of such probative value that it is reasonably clear that it would change the outcome of the case (Wollongong Corporation v Cowan (1955) 93 CLR 435; McCann v Parsons (1954) 93 CLR 418; Orr v Holmes (1948) 76 CLR 632). These tests are addressed to the underlying principle of the need for finality in litigation and the importance of the ability of the successful party to rely on the outcome of the litigation. They are also addressed the fundamental demands of fairness and justice in the instant case.

The Arbitrator considered the obtaining a medico legal report for the practice of criticising the basis on which an AMS formed his opinion as not being a permissible practice and stated that such evidence is not generally admitted. She felt that the fresh evidence did not support a submission that the AMS had incorrectly assessed the vascular injury and as it would not have a significant influence on the outcome, it should not be admitted. It is not relevant to the application to reconsider the COD, except from providing some background for the delay in bring an appeal and the necessity to apply for a reconsideration, and it is not fresh evidence that would be admitted in any appeal proceedings. There has also not

been any adequate explanation as to why the further report was required before appeal submissions could be prepared and an appeal lodged within time and before the COD was issued. A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration, but the delay had not caused the respondent any identifiable prejudice.

The Arbitrator discussed the medical evidence and noted that Dr Niesche was the only doctor who found oedema on examination in the last 2 years and a difference in calf measurement. She noted that the worker made no objection to an examination by Dr Crane before that examination occurred and that Dr Niesche conceded that Dr Crane was an experienced general surgeon who would be familiar with the chronic venous insufficiency and his speciality would have no bearing on his assessment of vascular impairment.

Accordingly, she held that the worker's proposed appeal against Dr Crane's MAC has no arguable prospects of success and she declined the application for reconsideration.

Work Capacity Decision made before 1 January 2019 - WCC lacks jurisdiction to review an insurer's internal review decision

Grima v Bursons Automotive Pty Limited [2019] NSWWCC 184 – Arbitrator John Harris – 24 May 2019

This recent decision clarified the issue concerning "existing" work capacity decisions and their susceptibility to review under either the former s 44BB *WCA* or through the WCC pursuant to Sch 6, Pt 19L, cl 6 *WCA* (as enacted by the *Workers Compensation Legislation Amendment Act* 2018).

Background

The worker suffered an injury at work on 10 July 2017. On 10 April 2018, he claimed weekly payments from 16 July 2017 at the rate of $1,574.59 per week. The insurer made voluntary payments at a lesser rate and the dispute for determination was the correct rate of the worker's PIAWE.

In a letter dated 30 April 2018, the insurer wrote to the worker and advised him that it would pay up to $1,500 for treatment expenses and $960 per week for weekly payments. It also informed him, relevantly:

> I am writing to let you know that we can help you immediately with provisional weekly payments and treatment expenses for your injury. This provisional help might be enough to see you recover fully.

The letter set out the methodology for calculating the worker's PIAWE and states the following:

> How we have calculated the amount of weekly payments we can help you with is outlined in the attached weekly payments details sheet. Because the calculation involves a decision about your PIAWE it is a 'work capacity decision'. This means that you have the right to ask for a review of the decision if you don't agree

The insurer advised the worker that as it did not have sufficient information to calculate the PIAWE, it had used an interim rate, and that the process of reviewing the calculation of the PIAWE is set out including asking for an "internal review" and then a "merit review".

On 15 January 2019, the worker completed a "Review of Decision Request", in which he asserted that PIAWE was incorrectly calculated and that it should be $1,953 per week "in line with offer of employment".

On 14 February 2019, the insurer issued a document headed “A request for review has been completed”. It characterised the resulting decision as being “am internal review outcome” and advises that it has decided that PISWE is $981.15 per week. It set out the basis for calculation and informed the worker that he could request a review from SIRA by completing an attached “Merit Review Form”. It also referred to a procedural review by WIRO.

On 3 April 2019, the worker applied for a merit review by SIRA. However, that application was dismissed under s 44BB (3) *WCA* as it was made outside the strict 30-day time limit.

The worker then filed this application with WCC. However, during a teleconference, the respondent questioned the WCC’s jurisdiction to hear and determine the dispute. ***Arbitrator John Harris*** held that where an insurer made a work capacity decision before 1 January 2019, and it was subject to an internal review at the request of a worker, the date on which the internal review occurred (i.e. before or after I January 2019) was irrelevant in characterising that internal review as either a ‘review decision’ or a ‘new decision.’

The Arbitrator made the following observations:

> 31. In respect of the transitional arrangements for the implementation of the 2018 Amendment Act for existing work capacity decisions, Sch 6, Pt 19L, cl 6 of the 1987 Act provided:
>
> > (1) Subdivision 3A of Division 2 of Part 3 of the 1987 Act continues to apply to an existing work capacity decision (as if the work capacity decision amendments had not been enacted):
> >
> > > (a) during the transitional review period, and
> > >
> > > (b) if, immediately before the expiry of the transitional review period, the decision is subject to a review under that Subdivision--until the review is finally determined.
> >
> > (2) A dispute about an existing work capacity decision that is determined before the expiry of the period during which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision is not subject to referral for determination by the Commission after the expiry of that period.
> >
> > (3) The work capacity decision amendments do not apply in relation to an existing work capacity decision during the period in which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision.
> >
> > (4) The "transitional review period" is:
> >
> > > (a) the period of 6 months commencing on the day on which Schedule 1.1 [3] to the 2018 amending Act commences, or
> > >
> > > (b) any other period prescribed by the regulations.
>
> 32. Existing work capacity decision” is defined in cl 1 to mean “a work capacity decision of an insurer made before the commencement of Schedule 1 to the 2018 amending Act.

This means that if an insurer issues a Work Capacity Decision in 2018, or at any earlier time and subsequently a worker seeks an internal review, then the Work Capacity Decision will be found to be an *“existing work capacity decision.”*

As a result, any review of that decision will remain subject to the former regime under s 44BB *WCA* including both merit review and procedural review. If that review process is

underway when the transitional period expires, the transitional period itself will be extended in that individual case until the completion of that review. In accordance with cl 2, the outcome of that review will not be subject to referral for determination by the WCC.