WIRO BULLETIN

CURRENT UPDATES, INFORMATION AND TRENDS

ISSUE NO 5, NOVEMBER 2016

MONTHLY BULLETIN OF THE
Workers Compensation Independent Review Office (WIRO)

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CASE UPDATES

Recent cases

The summaries are not intended to substitute the actual headnotes or ratios set out in the cases.
You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Draca v Formtec Group (NSW) Pty Limited [2016] NSWWCCPD 53

(WCC, Snell DP, Date of Decision: 7 November 2016)

Facts and Issues: The injured worker suffered an injury in the course of his employment with the Respondent on 28 November 2001. The worker made successful claims for lump sum compensation in 2006, 2007 and 2011. In October 2012 the worker made a lump sum compensation claim for the digestive system referrable to the November 2001 event. That claim was referred to the Workers Compensation Commission ("the Commission") on 13 December 2012 and was finalised on 26 May 2014 by way of a Certificate of Determination (COD) issued in respect of 0% permanent loss of bowel function in accordance with a Medical Assessment Certificate (MAC). On 10 November 2014 the worker wrote to the employer's insurer regarding the threshold for work injury damages based on an additional impairment of the digestive system.

Read more

Wagg v Woolworths Limited [2016] NSWWCC 236

(WCC, Arbitrator Dalley, Date of Decision: 12 October 2016)

Facts and Issues: The worker's claim was resolved in the Commission by consent of the parties for lump sum compensation for permanent impairment, following various amendments to the Application to Resolve a Dispute (ARD). The settlement of the permanent impairment lump sum compensation settlement meant that the worker would be entitled to lump sum compensation for pain and suffering under section 67 of the 1987 Act (which has since been repealed by the *Workers Compensation Legislation Amendment Act 2012* ("the 2012 amending Act"). The claim for section 67 compensation was part of the amendments made to the ARD. The only issue that remained was whether the worker was entitled to an award pursuant to the former section 67 of the 1987 Act.

Read more

Workpac Pty Ltd v Thearle [2016] NSWCA 303

(NSW Court of Appeal: McColl JA, Ward JA, Adamson J, Date of Decision: 4 November 2016)

Facts and Issues: A coal miner suffered a workplace injury while employed by Workpac. After becoming aware of the coal

miner's injuries, his mother, Mrs Thearle, brought proceedings in the District Court, claiming damages for nervous shock. Workpac sought to dismiss the action on the basis that section 151AD of the *Workers Compensation Act 1987* ("1987 Act") precluded Mrs Thearle from making such a claim. Section 151AD was inserted by the *Workers Compensation Amendment Act 2012* ("the 2012 reforms"), which now prevents non-workers from claiming damages for pure mental harm. Prior to the 2012 amendments, section 151P of the 1987 Act allowed a certain class of persons to make a claim for damages for psychological or psychiatric injury as a consequence of an injury sustained by a worker. This class of persons included a parent and relatives of an injured worker. When the 2012 reforms came into effect, section 151P was repealed and a transitional provision was inserted in clause 26 of Part 19H of Schedule 6 of the 1987 Act, specifically for coal miners. Mrs Thearle argued that clause 26 of Part 19H did not repeal section 151P and that section 151AD did not preclude her from making a claim.

Read more

Cook v Council of the City of Sydney [2016] NSWWCCPD 51

(WCC, Keating P, Date of Decision: 25 October 2016)

Facts and Issues: In this matter, a previous medical assessment certificate had previously been subject to a medical appeal and had even gone to the Supreme Court for judicial review. Following the Court's decision on review, the matter was remitted back to the Registrar to re-convene a different Medical Appeal Panel (MAP). The new MAP came to similar findings but without a fresh re-examination of the worker. The Registrar then issued a medical Certificate of Determination (COD) to reflect the Panel's findings of permanent impairment. The worker lodged an appeal against the Registrar's decision to issue a medical COD where the Panel did not conduct a fresh medical examination, despite previous submissions and requests made by the worker. The worker alleged that the Registrar and the Panel denied him procedural fairness by not being afforded the opportunity to provide submissions on the need for a fresh medical examination before the COD was issued and that the Registrar acting as Arbitrator failed to provide sufficient reasons in issuing the medical COD.

Read more

Roads and Maritime Services v Rodger Wilson [2016] NSWSC 1499

(Supreme Court, Fagan J, Date of Decision: 14 October 2016)

Facts and Issues: The issue in this matter is whether or not the Medical Appeal Panel erred in not taking into account the worker's pre-existing condition/injury, which was the very basis of the ground of appeal for demonstrable error and further on other grounds for incorrect criteria. Despite clear evidence before him, the Approved Medical Specialist (AMS) initially determined that there had not been a significant pre-existing condition that justified a deduction under section 323 of the 1998 Act from the assessed 4% WPI, and applied various criteria in the medical assessment guidelines. On appeal, the Panel found that the AMS erred and revoked the AMS's medical assessment certificate (MAC) and issued a new MAC for 15% WPI without re-examination of the worker. In their MAC, the Panel stated that they were "unable to deal with the other aspects of the appeal which would have required a re-

Gray v Qantas Airways Limited [2016] NSWWCC 232

(WCC, Arbitrator Robert Perrignon, Date of Decision: 7 October 2016)

Facts and Issues: The worker was employed by the Respondent between 1965 and 1994 as a flight steward and later a flight services director. He was exposed to noise on a regular basis. On 22 September 2015, the worker made a claim for hearing aids and lump sum compensation in respect of 11.8% binaural hearing loss. The respondent denied the worker's claim on the basis that it was time-barred by operation of section 261 of the *Workplace Injury Management and Workers Compensation Act 1998* ("the 1998 Act"). The matter came before Arbitrator Perrignon in the Commission. The only issue in dispute was when the worker became aware of the causal link between his hearing

examination to properly determine those issues".

Read more

Jones v Qantas Airways Limited [2016] NSWWCC 241

(WCC, Senior Arbitrator Catherine McDonald, Date of Decision: 17 October 2016)

(On appeal application to the Workers Compensation Commission)

Facts and Issues: The worker was employed by Qantas until he took voluntary redundancy in May 1991. There was not dispute that Qantas was the last noisy employer and that the date of injury as deemed to be 18 May 1991. However, the worker was only medically assessed and only obtained medical opinion that he required hearing aids in March 2016. The worker asked Qantas to pay for the hearing aids in April 2016. Qantas denied liability on the basis of, among others, that the claim was not made within the prescribed period of 6 months under section 261 of the 1998 Act, subject to any provisions otherwise set out in the Act. In evidence made available to the Commission, the worker stated that although he was aware that he may have suffered some hearing loss as a result of his employment, he was not aware of the medical extent until later in 2015 when he sought recent advice (at [13]). He also stated that "he did not make a claim because he did not want to, being 'pro-Qantas' because the experience of working there 'made me the man that I am today'. He said he had determined that hearing aids were not a good idea at the time of his voluntary redundancy at about age 50 because he understood that they merely amplified sound" (at [17]). The worker argued that under section 241(4) his failure to make the claim within the prescribed 6 months of the injury was not a bar to recovery of compensation because the failure was occasioned by ignorance, mistake, absence from the State of other reasonable cause.

Read more

loss and his employment.

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Tsangaris v British American Tobacco Australasia Ltd [2016] NSWWCC 249

(WCC, Arbitrator Glenn Capel, Date of Decision: 26 October 2016)

Facts and Issues: The worker was employed by the Respondent from 2013 as a finance director from October 2013. He was made redundant on 1 July 2015. A claim was made for psychological injury as a result of harassment from colleagues who were colluding to try and get rid of the worker from the employer. The respondent denied the worker's claim disputing the worker had sustained injury. In the alternative, the insurer denied liability relying on section 11A of the 1987 Act stating that the applicant's alleged psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken in relation to performance appraisal, termination or retrenchment. The matter came before Arbitrator Capel ("the Arbitrator) in the Workers Compensation Commission ("the Commission").

Held: The admission of certain documents relied upon by the Respondent was raised by the applicant. These documents included medical reports mentioned in the section 74 notice and other material (statements) produced in Applications to Admit Late Documents. The former were admitted into proceedings with the Arbitrator satisfied the Respondent complied with sections 73 and 74 of the 1998 Act and clause 46 of the *Workers Compensation Regulation 2010* ("the 2010 Regulation"). The statements were not admitted into proceedings. The Arbitrator was not satisfied any prejudice suffered by the Respondent if the documents were not admitted would "be substantial or outweigh the significant prejudice that the applicant may suffer if they are admitted into evidence."

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Mitu v Woolworths Limited [2016] NSWWCC 229

(WCC, Arbitrator Graeme Edwards, Date of Decision: 5 October 2016)

Facts and Issues: This was a claim for weekly payments for the first two entitlement periods under sections 36 and 37, and for s 60 medical treatment expenses. The dispute focused mainly on whether or not the worker suffered an injury as defined

in section 4 and/or whether the employment was the main contributing factor.

Held: The arbitrator found that the worker suffered an injury under section 4 and that the employer had failed to discharge its onus to establish the matters raised under s 9. The arbitrator then considered whether the worker had no work capacity or had a current work capacity as a result of injury. The Commission found that the worker had periods of total and partial incapacity for work as particularised in the wage schedule and proceeded to make awards for weekly payments in relation to those periods under sections 36 and 37. A general order for s 60 medical treatment expenses also made.

Warn v Flight Centre Limited [2016] NSWWCC 253

(WCC, Arbitrator Elizabeth Beilby, Date of Decision: 3 November 2016)

Facts and Issues: The worker sustained extensive injuries when she was assaulted by an unknown offender who swung a cricket bat, which struck her head and face. She sustained significant head trauma and lost consciousness. She resolved her claim for lump sum compensation, which settled at 50% WPI. She then made a claim for medical treatment expenses in the nature of proposed stem cell therapy, supported by medical opinion of her consulting doctor that "umbilical cord blood provides the best type of stem cell to use in stem cell therapy" to assist with her chronic pain and reduce the various medication she was taking. The only issue before the Commission was whether or not the proposed stem cell therapy was an effective mode of treatment such that it was reasonably necessary.

Held: The arbitrator applied the relevant authorities that provided the test for reasonably necessary treatment (*Diab v NRMA Limited* [2014] NSWWCCPD 72 and *Bartolo v Western Sydney Area Health Services* [1997] 14 NSWCCR 233) and determined that: "the effectiveness of the treatment is not proven, but, having regard to the medical evidence provided, "there is a real chance that the [worker] may obtain some relief from the proposed therapy", and that there it was a real chance the therapy would reduce the worker's extreme and pervasive pain. In dealing with the respondent's concern about the treatment being somewhat experimental, the arbitrator stated that the concern was not sufficient reason for believing that the worker ought not to have the treatment. The arbitrator ultimately found that: "After considering the medical evidence and the [worker's] reported symptomatology it appears … that this is a case where after 'exercising prudence, sound judgment and good sense, then the treatment is reasonably necessary" (after *Rose v Health Commission NSW* [1986] NSWWCC 2).

WIRO POLICY UPDATES

Recent WIRO policies

The WIRO has recently issued a WIRO WIRE that deals with an injured worker's continuing entitlement to weekly payments following the expiry of 260 weeks of payments, pursuant to section 39 of the 1987 Act.

The WIRO Wire, "***260-week limit on weekly payments***", may be accessed here: WIRO WIRE - 3 NOVEMBER 2016

Section 39 of the 1987 Act provides:

> "39 Cessation of weekly payments after 5 years
>
> 1. Despite any other provision of this Division, a worker has no entitlement to weekly payments of compensation under this Division in respect of an injury after an aggregate period of 260 weeks (whether or not consecutive) in respect of which a weekly payment has been paid or is payable to the worker in respect of the injury.
>
> 2. This section does not apply to an injured worker whose injury results in permanent impairment if the degree of permanent impairment resulting from the injury is more than 20%.

Note: For workers with more than 20% permanent impairment, entitlement to compensation may continue after 260 weeks but entitlement after 260 weeks is still subject to section 38.

3. For the purposes of this section, the degree of permanent impairment that results from an injury is to be assessed as provided by section 65 (for an assessment for the purposes of Division 4)."

For this purpose, section 65 of the 1987 Act provides:

"65 Determination of degree of permanent impairment

1. For the purposes of this Division, the degree of permanent impairment that results from an injury is to be assessed as provided by this section and Part 7 (Medical assessment) of Chapter 7 of the 1998 Act."

Read more

LEGISLATION UPDATE

Recent legislation changes

On 1 October 2016, the new indexation amounts of various benefits and entitlements came into effect in accordance with the *Workers Compensation Benefits Guide October 2016*, published by SIRA. The full guide can be accessed on SIRA at: http://www.sira.nsw.gov.au/__data/assets/pdf_file/0005/101579/WC-Benefits-Guide-final.pdf

PROCEDURAL REVIEW UPDATES

Work capacity decision reviews

All the procedural reviews of the WDC's are published by the WIRO and can be accessed at:
http://wiro.nsw.gov.au/information-lawyers/work-capacity-decisions

Decision WCD12216 (27 October 2016)

Facts: The worker had partial incapacity and was working between 15 and 25 hours per week for a different employer. She was both an "existing recipient" and an "existing claimant" as at 1 October 2012. The insurer made a work capacity decision on 6 May 2016, advising that here weekly payments would cease on 12 August 2016. The decision also stated that the insurer did not regard her as a "worker with high needs".

The worker sought an internal review with the insurer, which on 24 June 2016 issued an internal review decision that confirmed the termination of the weekly payments. The worker then lodged a merit review with SIRA's Merit Review Service (MRS), which delivered findings consistent with the previous decisions. On a subsequent procedural review application, the worker submitted that the insurer failed to identify when the assessment of work capacity commenced and ended, that it was not clear on what basis the insurer had calculated the payments, and that the insurer did not make clear whether the assessment related to the second entitlement period or the period following that.

Read more

CASE STUDIES

Cases from WIRO's Solutions Group

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

Medical Treatment Expenses – In early 2016, the worker received a Certificate of Determination (COD) from the Workers Compensation Commission, awarding section 60 medical treatment expenses in his favour for a fixed period. Following this determination, the worker advised WIRO that he had provided the insurer with all the relevant invoices and receipts as required for reimbursement. The worker asserted that he had not received payments from the insurer, despite his numerous requests. The worker then contacted WIRO to assist.

As a response to WIRO's inquiry, the insurer stated that the section 60 award was for a closed period only and that all invoices and receipts as per the award had been paid. However, on reviewing the terms of the COD, it became clear that an award was separately made in favour of the worker for section 60 expenses after the relevant closed period. The worker provided a schedule of out-of-pocket medical treatment expenses. Following deliberations between the lawyers for the parties, the insurer made an offer to pay the worker's outstanding medical treatment expenses in accordance with the award.

Injury Management Plan – An injured worker contacted WIRO after receiving a "Work Health Plan" (an Injury Management Plan or IMP) from the insurer. The worker was concerned about certain details and information contained in the IMP, and stated that the plan cited her employer as the "current employer" rather than the "pre-injury employer" and indicate a new rehabilitation provider which she had not agreed to. She also complained about the requirement in the document for the provision of Certificates of Capacity every three months, where she was only previously required to provide them every six months. For these reasons, the worker declined to sign the new IMP until all the changes had been clarified.

WIRO liaised with the insurer to clarify the requirements and the changes to the IMP, including its implementation without the agreement of the worker. Following a review of the new plan, the insurer responded to WIRO by advising that the Work Health Plan would now be amended to identify the correct classification of the employer, by removing the nominated rehabilitation provider and changing the requirement to submit a Certificate of Capacity from every three months back to the previous six-month arrangement.

WIRO MILESTONES

Recent WIRO outcomes and activities

WIRO Regional Seminar - Bathurst, 28 October 2016

The WIRO held its penultimate regional seminar for 2016 in front of keen attendees and against the backdrop of the world-famous race course at Mount Panorama.

Mount Parnorama race course

WIRO merchandise

Paul Gregory, Director ILARS

Emma Lethbridge-Gill, ILARS Principal Lawyer, talked about recent cases

WIRO Regional Seminar - Wollongong, 11 November 2016

The last of the WIRO Regional Seminars was held in Wollongong and attended by over 70 participants from various agencies and practices in the south coast. The seminar was graced by Ryan Park MP, Member for Keira / Shadow Treasurer and Shadow Minister for Illawarra.

It was also the perfect opportunity for the regional WIN media to interview Kim Garling on the impact of the 2012 reforms and the challenges faced by stakeholders as such impacts come to fruition in the years ahead.

Kim Garling, WIRO, launches the seminar

Ryan Park MP
Special guest presenter

Wollongong seminar participants

Ashley Russell, Director Solutions, WIRO

Paul Gregory, Director ILARS, WIRO

Ramon Loyola, Principal Lawyer ILARS

Con Ktenas, Principal Lawyer ILARS

WIN Television interview with Kim Garling, WIRO

WIRO staff and attendees

WIRO College of Law course

New WIRO Solutions Brief

On 19 October 2016, the WIRO conducted the last of the courses for legal clerks and paralegals at the College of Law on the many aspects of the workers compensation scheme and how to address the practical requirements of seeking ILARS funding, issuing tax invoices and proceeding to the Workers Compensation Commission.

The next course dates are earmarked for early 2017 and WIRO invites everyone to send their expressions of interest to attend. Final dates and venues will be posted soon.

The WIRO has now published the first issue of WIRO Solutions Brief, which is a regular insurer brief that highlights current news, updates, decisions and relevant statistical information and trends about 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

You can view the Solutions Brief Issue No. 1 here:
WIRO Solutions Brief - Issue 1

WIRO seminar videos

The videos of the WIRO Seminar at The Westin Sydney in September 2016 are now available for viewing on the WIRO's YouTube channel.
Check them out here: https://www.youtube.com/channel/UCoJ7FVwYkqj04jy1SVIVg9Q/videos?shelf_id=0&view=0&sort=dd

FROM THE WIRO

IMPORTANT EVENTS AND ANNOUNCEMENTS

Public hearing - Workers Compensation Scheme
The Standing Committee on Law and Justice

The Standing Committee on Law and Justice of the NSW Upper House had commenced its public hearings on the review of the workers compensation scheme, where the WIRO was invited to make submissions and make significant representations about the impact of the 2012 reforms and how the various agencies deal with the challenges arising from those reforms. Together with icare and SIRA, Kim Garling addressed the Parliament on the continuing operations of the WIRO in accordance with the powers and functions conferred by the legislation and proposed further inquiries on how the complex challenges brought on by the reforms can be dealt with.

The full Hansard transcripts of the public hearings can be located at:
https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2414tab-hearingsandtranscripts

New WIRO YouTube videos

WIRO are pleased to announce two new WIRO Videos have been released on our YouTube page. Our first video, which was released over three years ago gave an overall view of what we do and how we can help. To expand on that we wanted to give people a better understanding of what our ILARS teams does and also our Solutions team.

Please see below the two new videos:
https://www.youtube.com/channel/UCoJ7FVwYkqj04jy1SVIVg9Q/videos?shelf_id=0&view=0&sort=dd

Problem with a workers comp...

Independent Legal Assistanc...

FEEDBACK ON THE WIRO BULLETIN

If you have any feedback on the WIRO Bulletin please let us know, we would appreciate hearing any suggestions or ideas

email us at
editor@wiro.nsw.gov.au

How WIRO can help you

HOW WIRO CAN HELP YOU

Level 4, 1 Oxford Street