Independent
Review Office

# IRO Regional Seminars

# Orange

March 2024

# IRO acknowledges traditional owners

*We acknowledge the Wiradjuri People as the Traditional Custodians of the land we are meeting on today, and part of the oldest surviving continuous culture in the world. We recognise their continuing connection to Country and thank them for protecting this land and its ecosystems since time immemorial.*

*We pay our respects to Elders past and present, and extend that respect to all First Nations people present today*

# Agenda

- **Welcome** – Jeffrey Gabriel, A/Independent Review Officer
- **Hearing Loss** – Jeffrey Gabriel, A/Independent Review Officer
- **ILARS Update** – Philip Jedlin, Director, IRO
- **IRO Solutions Update** – Jeffrey Gabriel, Jeffrey Gabriel, A/Independent Review Officer
- **Estoppel in the Personal Injury Commission** – Michelle Riordan, Manager Legal Education, IRO
- **IRO Priorities 2024 and Closing Remarks** - Jeffrey Gabriel, A/Independent Review Officer

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# Hearing Loss

**Jeffrey Gabriel**
A/Independent Review Officer

# Industrial Deafness/Hearing Loss Seminar

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# Industrial Deafness: Overview.

- Industrial deafness is one of the most common forms of hearing loss.
- Industrial deafness is often referred to as ‘Boilermakers Deafness’ due to its long history of occurrence in that particular industry.
- Industrial deafness generally affects hearing in the high frequencies (2000Hz to 4000Hz). It is a sensorineural hearing loss.
- It has been found that people who are exposed to over 85dB (as an 8 hour weighted average) of sound on a regular basis are at risk of suffering industrial deafness.
- If a worker has to raise their voice to speak to a colleague standing one metre away, this is an indication that the noise they are exposed to is over 85dB.

# Industrial Deafness: Overview.

- Unfortunately, hearing protection is not always effective against high noise exposure.
- Hearing protection is also impractical to use at certain times.
- Hearing loss is prevalent in the following industries:
  - Construction;
  - Transport;
  - Mining; and
  - Manufacturing.

# Last noisy employer and date of injury (s 17 of *Workers Compensation Act 1987*)

- s 17 contains special provisions for hearing loss injuries.

*(1) If an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process, the following provisions have effect—*

*(a) for the purposes of this Act, the injury shall be deemed to have happened-*

*(i) where the worker was, at the time when he or she gave notice of the injury, employed in an employment to the nature of which the injury was due--at the time when the notice was given, or*

*(ii) where the worker was not so employed at the time when he or she gave notice of the injury--on the last day on which the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice,*

*(b) the provisions of section 61 of the 1998 Act shall apply to or in respect of the injury as if the words "as soon as practicable after the injury happened and before the worker has voluntarily left the employment in which the worker was at the time of the injury" were omitted therefrom,*

*(c) compensation is payable by—*

*(i) where the worker was employed by an employer in an employment to the nature of which the injury was due at the time he or she gave notice of the injury--that employer, or*

*(ii) where the worker was not so employed--the last employer by whom the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice …*

# Last noisy employer and date of injury (s 17 of *Workers Compensation Act 1987*)

- In practice therefore an industrial deafness claim must be brought against the worker's most recent noisy employer.
- Who is the last noisy employer? The last noisy employer is to be confirmed by a SIRA accredited ENT specialist. In formulating their opinion, the ENT specialist must consider whether the worker's employment with each employer possessed the necessary '*tendencies, incidents and characteristics to give rise to a real risk of boiler makers deafness or deafness of a similar origin*'.
- Section 17 confirms the date of injury to be used where the worker is still employed in noisy employment, is the date the claim is served. If the worker is not employed in noisy employment as at the date of service, the date of injury will be the last date the worker was '*employed in an employment to the nature of which the injury was due*'.

# Case study: *Lobley*

*Blayney Shire Council v Lobley & Another* (1995) 12 NSWCCR 52

- The Court of Appeal explained that s 17 was not concerned with true causation but deemed the loss to have happened at one time. It required the last noisy employer to pay compensation whether or not that employment actually caused all (or even most) of the loss.
- Kirby A-CJ at [55] stated:

> *"It would have been easy for Parliament to have assigned responsibility for hearing loss to the last employer whose employment had actually caused some hearing loss. Instead, Parliament chose a different criterion, namely by assigning liability to the employer, at the time of the notice of injury, to the nature of whose employment the injury was due.*
>
> *There is an element of artificiality in section 17(1) of the Act. The injury, which is the result of a gradual process, is deemed to have happened at an arbitrary time, vis when the notice of injury is given. It is assigned to the employer at that time. But it is only assigned if that employer employed the worker in employment 'to the nature of which' the injury was due."*

*"……. in determining whether, at the time when notice of injury was given, Mr Lobley was 'employed in an employment to the nature of which the injury was due', attention must be directed not to whether the employment then engaged in actually caused the injury but whether the 'tendencies, incidents or characteristics' of that employment were of a type which could give rise to the injury in fact suffered."*

# Case study: *Dawson*

*Dawson and others t/as The Real Cane Syndicate v Dawson* [2008] NSWWCCPD 35

- Mr Dawson worked for the Appellant Employer, RCS, as a cane harvester/operator from 1980 until 1985. Mr Dawson also alleged that in the first half of 1986 he worked for J H Williams & Son Pty Ltd ("Williams") operating a grass seed cutter.
- Mr Dawson claimed compensation in respect of his hearing loss alleged to be due to his employment with either RCS or Williams. The matter proceeded to arbitration where the Arbitrator made an award for Mr Dawson in respect of his claim against RCS. RCS subsequently appealed.
- At appeal, RCS argued that:
  - The Arbitrator had incorrectly relied on *Lobley* for the proposition that it was only necessary for a worker to establish that the relevant employment had a tendency, incident or characteristic to cause industrial deafness;
  - It was not appropriate for the Arbitrator to merely rely on a series of assumptions or to carry out *ex post facto* reasoning to come to the conclusion that the relevant employment was noisy.
- DP Bill Roche held that the Arbitrator reliance on *Lobley* was not misplaced.

# Case study: *Dawson*

*Dawson and others t/as The Real Cane Syndicate v Dawson* [2008] NSWWCCPD 35

- *"Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say 'my employment was noisy and I have boilermaker's deafness'. It is always essential that he or she present detailed evidence (if no acoustics expert is to be relied on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the "tendency, incidents or characteristics" of that employment are such as to give rise to a real risk of boilermaker's deafness. That is exactly what Mr Dawson did in the present matter. His evidence as to the noise to which he was exposed was unchallenged and that evidence, combined with the evidence from Drs Fernandes and Macarthur, clearly discharged the onus of proof he carried. The Arbitrator's acceptance of that evidence discloses no error."* [44] (emphasis added)

# Entitlement to hearing aids (s 60 of the 1987 Act)

- The provision of hearing aids for all industrial deafness claims is not subject to a % hearing loss threshold.
- For a worker to be entitled to bring a claim for hearing aids, they need to be assessed by a SIRA accredited ENT specialist as having an occupational hearing loss which warrants the need for hearing aids.
- The ENT specialist must support that the provision of the hearing aids is “reasonably necessary” (the test in Diab v NRMA) and “required as a result of the injury”.
- The definition of reasonably necessary in the legislation requires an analysis of the following:
  1. Appropriateness
  2. Availability of alternatives
  3. Cost
  4. Effectiveness
  5. Acceptance
- This test applies to all claims, regardless of the date of injury.

# Entitlements to lump sum compensation for injuries sustained after 1 January 2002 (s 66 of the 1987 Act)

- For a worker to be entitled to lump sum compensation in respect of an industrial deafness injury, the worker needs to suffer from at least 20.5% binaural hearing impairment (BHI) resulting from exposure to noise in their employment. This equates to 11% whole person impairment (WPI).
- Where the worker's date of injury is after 2002, BHI is determined using the tables located in the 1988 NAL publication.
- The ENT specialist is likely to limit the worker's noise induced hearing loss to hearing loss diagnosed in the higher frequencies (2000-4000Hz). Hearing loss diagnosed in the lower frequencies (below 2000Hz) can be included in the assessment of industrial deafness where the worker has been exposed to industrial noise for a prolonged period. (see below Shone v Country Energy).
- If the worker suffers from severe tinnitus, the ENT specialist may apply an addition of up to 5% on BHI, in accordance with Part 9.11 of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment* (the 'Guidelines').
- The ENT specialist must make an allowance for presbycusis (age related deduction) in circumstances where the worker is 55 years or older.

# Converting BHI to WPI

- An assessment of WPI, in respect of hearing loss, is provided according to AMA5 Chapter 11 (p 245), subject to modifications set out in Part 9 of the *Guidelines*.
- While some sections of the AMA5 Chapter 11 are still considered relevant to assessing WPI, the *Guidelines* take precedent in assessments of hearing impairment.
- Table 9.1 in the guidelines demonstrates the conversion of BHI to WPI.
- As per the *Guidelines*, presbycusis allowance and tinnitus related additions, if any, must be made before determining WPI.

# Converting BHI to WPI

Table 9.1: Relationship of binaural hearing impairment to whole person impairment

| % Binaural hearing impairment | % Whole person impairment | % Binaural hearing impairment | % Whole person impairment |
|---|---|---|---|
| 0.0–5.9 | 0 | 51.1–53.0 | 26 |
| | | 53.1–55.0 | 27 |
| 6.0–6.7 | 3 | 55.1–57.0 | 28 |
| 6.8–8.7 | 4 | 57.1–59.0 | 29 |
| 8.8–10.6 | 5 | 59.1–61.0 | 30 |
| 10.7–12.5 | 6 | 61.1–63.0 | 31 |
| 12.6–14.4 | 7 | 63.1–65.0 | 32 |
| 14.5–16.3 | 8 | 65.1–67.0 | 33 |
| 16.4–18.3 | 9 | 67.1–69.0 | 34 |
| 18.4–20.4 | 10 | 69.1–71.0 | 35 |
| 20.5–22.7 | 11 | 71.1–73.0 | 36 |
| 22.8–25.0 | 12 | 73.1–75.0 | 37 |
| 25.1–27.0 | 13 | 75.1–77.0 | 38 |
| 27.1–29.0 | 14 | 77.1–79.0 | 39 |
| 29.1–31.0 | 15 | 79.1–81.0 | 40 |
| 31.1–33.0 | 16 | 81.1–83.0 | 41 |
| 33.1–35.0 | 17 | 83.1–85.0 | 42 |
| 35.1–37.0 | 18 | 85.1–87.0 | 43 |
| 37.1–39.0 | 19 | 87.1–89.0 | 44 |
| 39.1–41.0 | 20 | 89.1–91.0 | 45 |
| 41.1–43.0 | 21 | 91.1–93.0 | 46 |
| 43.1–45.0 | 22 | 93.1–95.0 | 47 |
| 45.1–47.0 | 23 | 95.1–97.0 | 48 |
| 47.1–49.0 | 24 | 97.1–99.0 | 49 |
| 49.1–51.0 | 25 | 99.1–100 | 50 |

# Entitlements to lump sum compensation for injuries sustained before 1 January 2002

- For an injury sustained before 1 January 2002, the worker is only required to be assessed as suffering from a 6% binaural hearing loss to receive monetary compensation. Again, the level of hearing loss must be supported by a SIRA accredited ENT specialist.
- Where the worker's date of injury is before 1 January 2002, BHI is determined using the tables located in the 1976 NAL publication, with an allowance made to account for presbycusis in accordance with the same.
- There is no allowance for severe tinnitus where the date of injury is prior to 1 January 2002.

# Case study: *Shone*

## *Shone v Country Energy WCC* [2007] NSWWCCMA 18

- On 22 March 2007, Donald James Shone made an application to appeal against a medical assessment to the Registrar of then WCC. The AMS found Mr Shone to be suffering from a total 17% BHI due to industrial deafness.
- In forming his opinion, the AMS had considered Mr Shone's losses only at 2000, 3000 and 4000 Hz.
- Mr Shone had been exposed to prolonged occupational noise, notably for 49 years.
- The Panel's view was that the AMS had erred in failing to take into account Mr Shone's losses at the lower frequencies below 2000 Hz in this particular matter given Mr Shone's particular and undisputed history of prolonged noise exposure. The Panel noted Mr Shone had been employed by Country Energy for 37 years and it was accepted that this employment was noisy. Prior to being employed by the Country Energy, Mr Shone's workplace was also noisy.
- *Shone* is authority for the proposition that an AMS should not automatically disregard hearing loss at the lower frequencies and consideration needs to be given to the individual facts of the matter *"including the nature and duration of occupational hearing exposure and the extent of all the hearing losses including those at the lower frequencies..."*

# Case study: *Shone*

## *Shone v Country Energy WCC* [2007] NSWWCCMA 18

- Outcome was that the MAC was revoked and a new Certificate issued.
- It was determined that Mr Shone was suffering from a 41.8% BHI due to industrial deafness, following a small correction for presbycusis, and therefore a 21% WPI in respect of his hearing loss injury.

**Table 1**

| Notional date of injury | Frequency Hz | Left dB HL Air | Left dB HL Bone | Right dB HL Air | Right dB HL Bone | Total % BHI | Occupational % BHI |
|---|---|---|---|---|---|---|---|
| **18 May 2006** | **500** | **40** | **35** | 35 | 35 | 5.1 | 5.1 |
| | **1000** | **45** | **40** | 40 | 40 | 8.5 | 8.5 |
| | **1500** | **55** | **55** | 55 | 44 | 11.2 | 11.2 |
| | **2000** | **55** | **55** | 50 | 50 | 7.4 | 7.4 |
| | **3000** | **60** | **60** | 60 | 60 | 6.3 | 6.3 |
| | **4000** | **60** | **60** | 55 | 55 | 5.3 | 5.3 |
| **TOTAL % BHI: 43.8** | | | | | | | |
| **Less Pre-existing non-related loss: 0** | | | | | | | |
| **Less Presbyacusis correction: 2%** | | | | | | | |
| **Add % of severe tinnitus: 0** | | | | | | | |

| **Adjusted total % BHI: 41.8** |
|---|
| Resultant total BHI of 41.8 % = 21% WPI less prior WPI of 6% means that there is a **further 15 % whole person impairment** (Table 9.1) |

*(Extract of the final calculation of WPI from the Statement of Reasons of Shone)*

# Case study: *Xuereb*

*Xuereb v G.A.M.E.S Pty Ltd (Deregistered)* [2013] NSWWCCMA 50

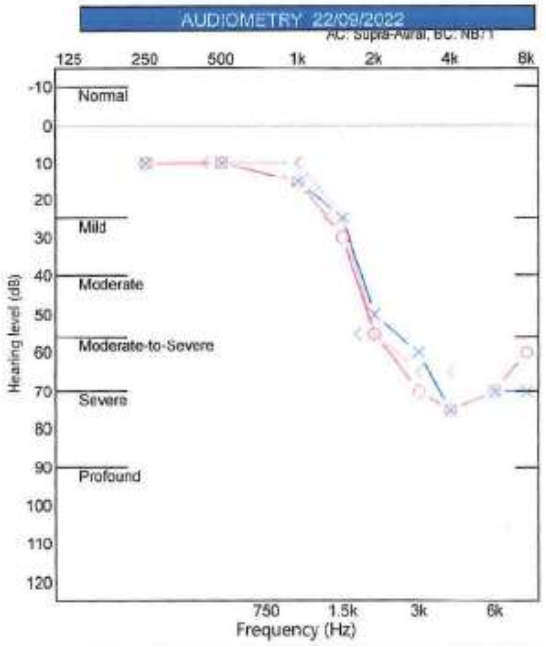
- On 15 April 2013, Mr Xuereb appealed a MAC which found Mr Xuereb to be suffering from 57.2% BHI, but deducted 36.2% BHI for non-occupational hearing impairment plus 2.9% for presbyacusis correction, giving an adjusted total of 18.1% BHI which equalled 9% WPI.
- Regarding the 36.2% BHI deduction, the AMS did this because he regarded the losses below 2000Hz as a pre-existing non-related loss.
- Mr Xuereb argued that the AMS erred in failing to properly consider his employment history. He had a 34 year history of loud noise exposure whilst in employment in NSW, where he was exposed to loud grass mowers for up to 8 hours a day and when he was employed as an air conditioning installer he was exposed to the noise of metal presses, jackhammers and building sites. *Shone* was relied upon to argue that losses at the lower frequencies ought to have been included.

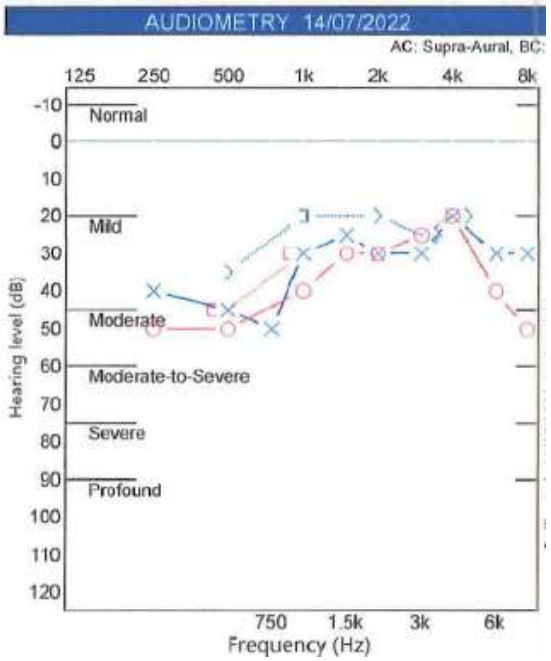
# Case study: *Xuereb*

*Xuereb v G.A.M.E.S Pty Ltd (Deregistered)* [2013] NSWWCCMA 50

- The Panel was satisfied that the AMS carried out a comprehensive and careful examination of the worker. They accepted that the AMS obtained a valid audiogram, took a history of employment, as well as a history of the injury and onset of symptoms and subsequent related events and treatment.
- The Panel accepted that it could not be assumed that losses at 500, 1000 and 1500 Hz were to be disallowed on the basis that these frequencies were not generally involved in noise induced hearing loss. However, whether these frequencies were to be taken into account when assessing occupational noise-induced hearing loss depended on the facts in each individual matter including the nature and duration of occupational noise exposure and the nature and extent of all the hearing losses including those below 2000 Hz.
- The Panel was not satisfied in this case that all frequencies ought to be used to calculate noise induced loss.
- Although they accepted that Mr Xuereb was exposed to approximately 34 years of loud noise in his employment, the audiogram did not show a typical sensorineural hearing loss. In the case of noise-induced loss, the typical profile of the audiogram would concave upwards and in this case the profile was flat. Furthermore, the facts in this case, being the nature and extent of hearing loss, were clearly distinguishable from those in *Shone*.
- The MAC was thus confirmed.

# Typical audiogram showing Industrial Deafness



# Deductions made under s *323 Workplace Injury Management and Workers Compensation Act 1998*

- In an assessment of industrial deafness, the ENT specialist can make a deduction under section 323 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 'WIM Act') for '*previous injury or pre existing condition or abnormality*.'
- In accordance with section 323 of the *WIM Act a* 10% deduction will usually (at the discretion of the ENT specialist) be applied to account for the following:
  - Noisy employment outside of NSW
  - A period spent working as a sole trader, or sub-contractor
  - Hearing loss unrelated to noise exposure

# Case Study: Pereira v Siemens Ltd

[2015] NSWSC 1133

On 5 March 2013, the plaintiff lodged a Notice of Claim with the employer, claiming compensation for loss of hearing. The claim was in respect of a 38.6% binaural loss of hearing (19% WPI).

Mr Pereira had worked overseas for 17 years before coming to Australia in largely the same type of employment he continued to work in NSW. He was a Production Engineer and was exposed to loud noise from a workshop which included hammering, grinding, air tools, milling machines, forklifts. His employment with Siemans was for a further 32 years.

Allianz denied the claim based on an assessment of Dr Niall, who assessed the binaural hearing impairment at 13.5% and the whole person impairment at 7%. This percentage fell below the compensable threshold.

The assessment stated: "*Noting the history of 17 years of similar noise exposure (until the age of approximately 35 years) outside the jurisdiction of NSW and that (in percentage terms) the decline of hearing in these circumstances is an approximately linear function of exposure time, a fraction of 17/ (17 + 32) has been excluded from the hearing assessment on a before presbyacusis basis."*

The matter was referred to an AMS who assessed the worker in this same method.

- Mr Periera lodged an Application to Appeal against the decision of the AMS.
- The appeal was referred to a Medical Appeal Panel ("the Appeal Panel") and on 15 July 2014 the MAP dismissed the appeal, following the same reasoning process as the AMS (and Dr Niall) again using this linear assessment to deduct impairment under s323 of the WIMA.

- The MAP stated in its reasons:

*Mr Pereira was employed continuously in Pakistan for some 17 years in employment of the same nature and intensity he was employed in when he came to NSW. As the respondent to the appeal submits, each case must be considered on its own circumstances.*
*The evidence here is of greater loss than 10 per cent, and that it can be satisfactorily calculated as has been demonstrated by the AMS and also by Dr Niall. The AMS has very carefully taken account of the history, including the exposure in Pakistan and in NSW. The method used by the AMS in the circumstances of this particular case is entirely appropriate. It will not always be that the direct proportion of time in employment outside the jurisdiction is the proper basis for calculating the s 323 deduction …, but in this matter it is highly apt."*

- In overturning the MAP decision the Supreme Court, found 5 errors:

- Firstly that you cannot apply s17 to deem a hearing loss injury to employment outside NSW, which employment is not subject to the provisions of the 1987 Act.
- Secondly, *the facts upon which a pre-existing injury are to be found must be clearly identified, and the injury itself identified including the time at which the injury was sustained.* This must be based on facts and not assumptions.
- Thirdly, *the Appeal Panel and the AMS wholly failed to consider whether, if there was a pre-existing injury, it caused or contributed to the present whole person impairment.*
- *Fourthly, in seeking to assess the deductible proportion by the fixed line methodology of taking the number of years of exposure and applying it equally across the period, the Appeal Panel and the AMS have used a methodology which was unsupported by any direct evidence before them. If it was the application of expert medical knowledge or an accepted medical fact, then their reasons needed to reflect that. Nowhere in the Appeal Panel's reasons is there any discussion at all as to why it ought be assumed that deafness occurs in equal proportions over time.*
- *Finally, if deafness does not occur, other than by assumption, equally across time, then the Appeal Panel failed to give any consideration to whether an assessment of the deductible proportion was either costly or difficult warranting thereby the application of s 323(2) of the 1998 Act at a deduction of 10%.*

The final 2 reasons highlight the impossibility of the linear assessment method. No ENT can say with any certainty that the hearing loss was suffered precisely the same each day, week or year of exposure to be able to rely on a linear method of assessment of pre-existing injury.

# Notice provisions

- The workers' compensation scheme in New South Wales imposes time limits for workers to make a claim for compensation against an employer.
- Ordinarily, that time limit is six months to make a claim from the date of injury.
- In hearing loss claims, the deemed date of injury could be many years earlier.
- *Petrevska* provides an important precedent Industrial Deafness claims. Essentally, the time limit does not begin running until the awareness of both the fact of an injury and its cause is attained.

# Case study: *Petrevska*

*Unilever Australia Ltd v Petrevska* [2013] NSWCA 373

- Mrs Petrevska was employed as a process worker at Unilever's Streets ice cream factory between 1983 and 1995. As a result of that employment she suffered hearing loss. However, it was not until 2009 that she received medical advice that she had suffered hearing loss as a result of her noisy employment. On 20 August 2009, she lodged a notice of injury with Unilever and lodged a claim for compensation.
- Unilever argued that the claim was lodged outside the statutory time limit. This argument was based on the requirement set by Section 261(1) of the WIM Act 1998, which requires that a claim be lodged within the six month period "after the injury or accident happened."
- Petrevska argued that the time limit did not start running until the time that she received medical advice concerning her hearing loss and its cause. This argument was based on Section 261(6) of the Act, which provides:

> *(6) If an injured worker first becomes aware that he or she has received an injury after the injury was received, the injury is for the purposes of this section taken to have been received when the worker first became so aware.*

# Case study: *Petrevska*

*Unilever Australia Ltd v Petrevska* [2013] NSWCA 373

- The key question, therefore, was when Petrevska first became aware of the hearing loss as an actual compensable injury under the Act.
- Macfarlan JA held that Petrevska's "awareness", for the purposes of Section 261(6), referred to her awareness of both the fact of the hearing loss and its cause. This "awareness" comprised more than an opinion or belief and instead required "a high level of assurance". Such a state of awareness, so it was held, was attained only upon the receipt of the medical advice rendered in 2009.
- It was not enough for the worker to know they had a hearing loss or even that their hearing loss may have been caused by loud noise at work. The awareness of injury requires expert advise by a medical practitioner that in fact they had X% loss and that it could have been caused by employment with Y.

# Subsequent noisy employment and further claims

- Where a client has previously been compensated for an industrial deafness injury, but has continued to work in noisy employment, they may entitle a further claim only if they have suffered additional occupational hearing loss.
- If the additional loss suffered is a further 20.5% BHI (equivalent to 11% WPI) or greater, the worker will have a further claim for lump sum compensation.
- If the additional loss suffered is less than 20.5% BHI, the further claim will be for hearing aids only. There is no strict threshold to be met for a further claim for hearing aids against a subsequent noisy employer. The worker need only have engaged in further noisy employment and suffered a further loss because of it.
- As per section 17 of the 1987 Act, any further industrial deafness claim must be brought against the last noisy employer, as at the date of service of the claim.

Independent
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# ILARS Update

**Philip Jedlin**
Director, ILARS

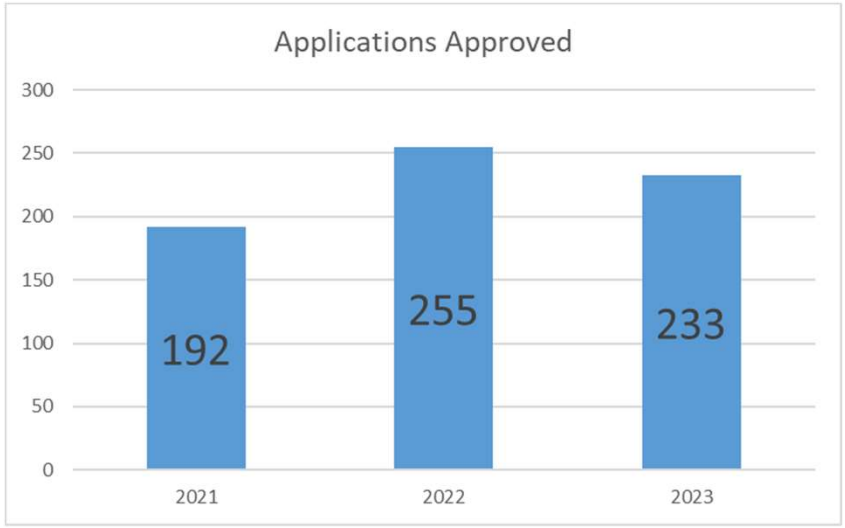
# ILARS Update

- ILARS – key statistics
- Applications and invoices – how to improve efficiency
- Right to reviews under the ILARS Funding Guidelines
- Changes to ILARS Processes
  - Automated Updates
  - Centralised email management

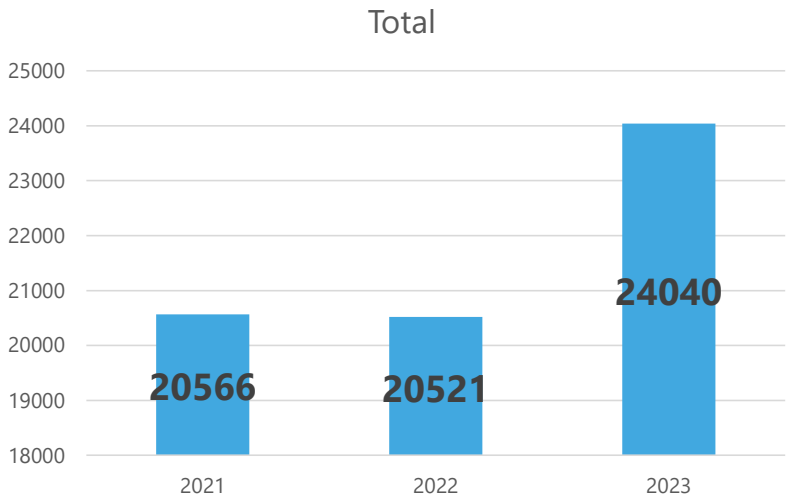
# Applications Approved

Your region includes **Central Tablelands And North West**

## Your Region



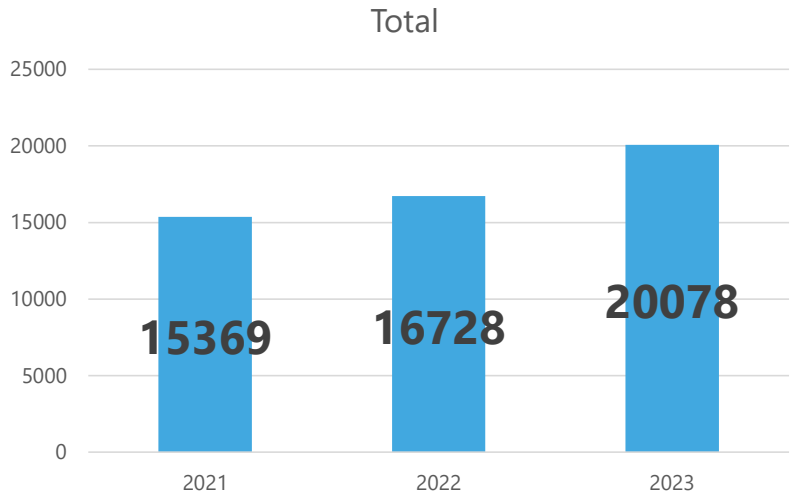

## All Firms



# Closed Cases

## Your Region


## All Firms



# Cases Closed continued – delete slide

| Year | Total of All Closed Matters in Region |
|---|---|
| 2021 | 3.6% |
| 2022 | 2.5% |
| 2023 | 2.2% |
| | |

# Stages of Cases

| Stages | Number of cases | Percentage | % all Firms |
|---|---|---|---|
| Stage 1 | 146 | 36% | 30% |
| Stage 2 | 194 | 48% | 50% |
| Stage 3 | 58 | 14% | 19% |
| Stage 4 Conditional | 8 | 2% | 1% |
| **Grand Total** | **406** | **100%** | **100%** |

# Injured persons in your Region

| | Hearing | Lower extremity | Psychiatric and psychological disorders | The spine | Upper extremity | Grand Total |
|---|---|---|---|---|---|---|
| Your Regions | 14 | 81 | 141 | 85 | 164 | 485 |
| All other Regions | 518 | 291 | 492 | 371 | 471 | 2143 |
| Total | 532 | 372 | 633 | 456 | 635 | 2628 |
| Percent of matters managed by AL's in your region | 3% | 22% | 22% | 19% | 26% | 18% |
| -Excluding Hearing loss | | | | | | 22% |

# Where do your injured workers come from

| Injured Person Region | Hearing | Lower extremity | Psychiatric and psychological disorders | The spine | Upper extremity | Grand Total |
|---|---|---|---|---|---|---|
| Central Tablelands | 10 | 59 | 120 | 69 | 130 | 388 |
| North West | 4 | 22 | 21 | 16 | 34 | 97 |
| Hunter | 1 | 3 | 5 | 3 | 5 | 17 |
| North Coast | 0 | 2 | 4 | 1 | 6 | 13 |
| Blue Mountains | 1 | 2 | 4 | 2 | 2 | 11 |
| Other Region | 1 | 12 | 16 | 16 | 10 | 55 |
| **Total** | 17 | 100 | 170 | 107 | 187 | 581 |

# Application for Grants issues - 2021-23

| Issue | All Regions | | Your Region | |
|---|---|---|---|---|
| | Number | % | Number | % |
| Request for further information | 4977 | 8% | 69 | 10% |
| Remind Request for further information | 900 | 18% | 11 | 16% |
| Average time to approve application - All accepted applications (Days) | 4.5 | | 4.3 | |
| Where NO request made for further information (Days) | 3.0 | | 3.0 | |
| Where a request is made for further information (Days) | 24.9 | | 20.6 | |

# Applications

- Supporting material
- Explanation of the merit/arguable case of a request for funding
- Details of insurer's response to claims.  Be Mindful of the timeframes for responses to claims by Insurers.
- Requests for Updates
- Correct ILARS reference in the subject line in correspondence
- Accurate details in application for funding
- Attaching PDF's, not links

# Invoices - 2021-23

| Issue | All Regions | | Your Region | |
|---|---|---|---|---|
| | Number | % | Number | % |
| Invoices processed from law firms | 53237 | | 626 | 1% |
| Number of cases with invoice errors | 12797 | 24% | 193 | 31% |
| An invoice may have more than one issue and may be returned more than once | | | | |
| Grant related issues | 11453 | 22% | 182 | 29% |
| Invoice related issues | 5395 | 10% | 96 | 15% |
| Issues with MRP invoices | 2674 | 3% | 53 | 6% |

# Recurring Themes

- Unique tax invoice number
- Only one event number for costs per Tax invoice can be used (except for appeals)
- Date Missing or incorrect
- ILARS reference incorrect or missing
- GST added to disbursements

# Recurring Themes continued

- Incorrect amounts
- Copies of medico-legal reports
- Specify the Doctor, date of examination and category of report
- EFT details
- Format –PDF is required
- Invoices do not tally

# Invoices in Your Region - Requests for amendment

| Grant related errors | |
|---|---|
| Disbursements exceed approved funding | 23% |
| Legal cost exceed approved funding - | 29% |
| Supporting documents not supplied | 43% |

| Invoice related errors | |
|---|---|
| No unique invoice number- | 5% |
| Wrong amount - | 48% |
| Wrong GST - | 11% |
| Incorrect bank details - | 15% |

# Impact of Invoice errors

Causes a failure in the payment system

Multiple interactions

Causes delay in the  payment of the invoice

# Reviews of Funding Decisions under the ILARS Guidelines

Clause 2.12 of the Funding Guidelines sets out the review process

- 2.12.1 When the IRO will review a funding decision
- 2.12.2 What a review will consider
- 2.12.3 How a review will be conducted
- 2.12.4 Possible outcomes of a review of a funding decision
- 2.12.5 Final Review

# Example of review - Request for Stage 2 Funding

- AL submits the following to the PL
  - Certificate of Capacity
- Funding Request is refused by IRO and further information is sought
- AL seeks review and provides additional information with submissions
  - That the IP is MMI and that in their opinion the WPI>10%

# Examples of reviews - Request for Stage 2 Funding (cont)

- Learnings
  - Had the information provided to the reviewer been available to the PL stage 2 would have been provided
  - There would have been a far more timely funding of this matter
  - Far fewer interactions and emails

# What have we learned from reviews?

- There is great benefit when the Approved Lawyer provides all relevant and up to date information to the Principal Lawyer when the request for funding is first made
  - You can always provide the additional information to the Principal Lawyer after they decline your request rather than asking for a Director Review

- If there is a difficulty with a request from a Principal Lawyer please call them to discuss the circumstances of the matter
  - Ask the Principal Lawyer what further information they need to approve your request

# Changes to update requests

## What has changed

- Requests are consistent – about 250-300 per day

## What is expected of you

- Timely response to update requests

## Where contact is unsuccessful

- After 12 months your grant maybe closed

# Where contact is unsuccessful

Your attention is drawn to clause 2.14 of the ILARS Funding Guidelines

- Where a grant matter remains open for a period of twelve (12) months without any progress, the grant matter may be closed without payment of legal costs
- A fresh application maybe required to continue funding
- Submissions will be required to support the payment of any costs on the closed matter
- Please respond to our update requests to avoid closure of your grant

# Key Messages

- Completion of all the fields in the Update form assists IRO
- Where information is received by you please advise IRO by forwarding the information to the ILARSALmail@iro.nsw.gov.au
- Please use the ILARS grant number for the live grant in the subject line
- Where extension requests are made please address the merit test and the arguable case test
- If there is a doubt please call the Grant Manager or an ILARS Manager
- When you call 13 94 76 the call is answered by our Solutions team who deal with Injured Persons and not ILARS cases. They often cannot assist you and will pass your message onto the Principal Lawyer or paralegal managing your matter
- Updates
  - Please respond to the update requests.
  - Please reply using the email option on the email rather than creating a new email.
  - Please use the templates provided in your response

# Reminder on how we send and process emails

- The Centralised Email Management System will send all emails to you from a new mail box - ILARSALmail@iro.nsw.gov.au
- Please send New Funding applications to ILARSCONTACT@iro.nsw.gov.au
- Please ensure that you use only the current live grant number in the subject line of the email.
- If you have issued a tax invoice the matter is closed – please do not use that ILARS grant reference number – you need a fresh funding application.

# What impact does the email changes have on you?

| | |
|---|---|
| There is no change to how you send new applications to ILARS | • Please continue to use ILARScontact@iro.nsw.gov.au |
| For current ILARS matters, when sending emails to ILARS or responding to ILARS emails | • Please use ILARSALmail@iro.nsw.gov.au in the "To" field and include the ILARS case number – C/NN/YYYYY or G/NN/YYYYY in the subject line |

Independent
Review Office

# IRO Solutions and the IRO Direction

**Jeffrey Gabriel**
A/Independent Review Officer

# IRO Solutions Jurisdiction

- Complaints

Schedule 5, Clause 8 of the *Personal Injury Commission Act 2020*

- Workers Compensation Enquiries
- Early Solutions

Schedule 5, Clause 9 (2)

*"The purpose of ILARS is to…provide assistance in finding solutions for disputes between workers and insurers."*

Independent Review Office

# INDEPENDENT REVIEW OFFICE DIRECTION 2023-25

## MISSION OF THE INDEPENDENT REVIEW OFFICE

The Independent Review Office (IRO) helps persons who are injured at work or in motor accidents and insurers find fair solutions to complaints and claims. IRO also recommends improvements to the statutory compensation schemes for workers compensation and motor accident injuries. IRO is established under the *Personal Injury Commission Act 2020*.

## IRO SERVICES – WHAT WE DO

- help persons who are injured and insurers find fair and fast solutions
- fund experienced lawyers to assist workers who are injured access their workers compensation entitlements
- identify, report on and recommend solutions to emerging and systemic issues in the statutory compensation schemes.

## IRO VALUES – HOW WE WORK

IRO has six core Values that inform how we do our work:

- integrity, trust, service, and accountability, which we share with the NSW government sector
- independence and expertise, which are unique to IRO.

## IRO PRIORITIES AND STRATEGIES – WHERE WE WILL FOCUS

<table>
<tr>
<td rowspan="2">An effective and valued agency</td>
<td>Achieving fair and quick solutions for injured persons' complaints and claims<ul><li>increasing IRO's capacity and capability to deal with motor accident injury complaints</li><li>identifying more opportunities to implement early solutions in Independent Legal Assistance and Review (ILARS) matters</li></ul></td>
<td>Enabling injured workers' access to appropriate legal assistance<ul><li>acting on the recommendations of the 2022 ILARS Review</li><li>completing the review of medical report provider arrangements and appeal costings, and acting on the outcomes</li><li>reviewing matters where workers' outcomes not improved to identify any opportunities to refine Funding Guidelines</li></ul></td>
<td>Offering insights that improve the operation of the injury compensation schemes<ul><li>making suggestions to improve the complaint and claim handling of insurers</li><li>contributing to external reviews of the injury compensation schemes</li><li>improving the experience of injured persons who are dissatisfied with the compensation schemes</li></ul></td>
</tr>
<tr>
<td rowspan="2">A great place to work</td>
<td colspan="3">Fostering the wellbeing and expertise of IRO's team<ul><li>enhancing the connection and effectiveness of IRO teams and team members in a hybrid work environment</li><li>responding to the results of IRO's People Matter Employee Surveys</li><li>making ongoing development of IRO's team a hallmark of our culture, and supporting the training and development of every IRO team member</li></ul></td>
</tr>
<tr>
<td colspan="3">Improving how we work<ul><li>embedding continuous improvement as a way of working at IRO</li><li>improving how we engage with those who rely on us</li><li>increasing the quality and value of our data, and improving the use of data in all our functions</li><li>embedding good practice in our financial, governance, ICT, and risk management arrangements</li></ul></td>
</tr>
</table>

## IRO SUCCESS MEASURES – HOW WILL WE KNOW IF OUR STRATEGIES ARE SUCCESSFUL

- improving satisfaction by injured persons as measured by user experience surveys
- achieving timeliness and quality measures in how we perform our work
- identifying more ILARS matters for early solutions
- increasing IRO team member engagement as measured by People Matter surveys.

# Operationalising our function

- **The IRO Complaint Handling Protocol**
  - Defines how and which matters we deal with
  - Consultation with industry participants
  - A complaint outcome that is “fair and reasonable”
  - What complaints we may not deal with?
    - Matters the subject of the PIC
    - Where no attempt to resolve with insurer

# CTP Focus

- Uplift in CTP work
  - CTP Care
  - Adapt to changes in legislation
  - Emerging case law from PIC
- Deal with increasing volumes
- More engagement with insurers

# IRO Early Solutions

- Specifically called out in PIC Act
- No Response to Claim (NRTC)

  TIP:  If NRTC – carefully check timelines and check with insurer before seeking Stage 3 funding

- Medical disputes pilot
- Other early solutions

# IRO Early Solutions – Medical Dispute Pilot

- A limited pilot
- To assist parties to find early solutions for disputes about medical treatment
- Run through Solutions Group in parallel with No Response To Claim (NRTC) and other early solution matters
- Applies to disputes meeting eligibility criteria

# IRO Early Solutions – Medical Dispute Pilot

- Eligibility criteria:
  - Eligible for funding
  - Approved Lawyer (AL) asks for stage 3 funding
  - Liability for injury not disputed
  - Only medical/treatment disputes
  - Only disputed on basis of insufficient evidence
  - Not affected by s.59A
  - Medical support
  - AL has already requested s.287A review
  - Currently excludes ifnsw/TMF (except Department of Education)

# IRO Complaints – the numbers

- 1 July – 31 December 2023
  **4091** WC complaints (compared to 3766 in the same period H1 2022-2023)
  **359** CTP complaints (compared to 408 in the same period H1 2022-2023)

# Common Workers Compensation Matters

Percentage of all workers compensation complaints for H1 2023-24

- Delay in determining liability 29.1%
- Delay in payment 23.3%
- Denial of liability 9.7%
- Request for documents 9.2%
- General Case Management 9.2%

# Common CTP Complaint Matters

Percentage of all motor accident complaints for H1 2023-24

Subjects

- Treatment and care 29.5%
- Income support/weekly payments 23.6%
- Case Manager 10.0%

Issues

- Decisions 39.0%
- Timeliness 30.1%
- Service/Communication 17.8%

# CTP Focus

## Treatment and Care

- Complaints related to medical expenses and domestic assistance
- Most prominent issue for this complaint subject is timeliness
- Timeliness is critical in claims where compensation period is limited (e.g., minor injury / threshold injury or at fault claims). Claimants often miss out due to untimely decisions.
- Changes to minor / threshold injuries
- Case studies

# CTP Focus

## Income Support/Weekly Payments

- Biggest driver of IRO CTP complaints in 2022-23 but not the biggest driver in H1 2023-2024
- Time taken to commence weekly payments
- Time taken to confirm PAWE, meaning extended periods on interim rate
- Case studies

# CTP Focus

## Case Manager

- Complaints of this kind often relate to customer service issues
- Often tied to processing of benefits
- Case studies

# After the IRO Intervention

## IRO Impact

- At a local level with insurer – changes to payment cycles
- Referral of matters to SIRA
- Aggregated data and significant matters
- Contributes to SIRA's regulatory work
  - Licence conditions on insurers
  - Penalties
- Legislative change

# Key Lessons from our Experience in Complaints

## Service

- Unreturned phone calls + emails are behind a lot of complaints
- Communication – keep claimants updated
- Timeliness
- Start weekly payments ASAP – MAIA claims
- Try to find out the issue behind the question

## Detail

- Notices that lack detail attract complaints. e.g., dispute notices in MAIA claims

# How to help IRO help you deliver early Solutions to Injured Workers - Approved Lawyers

ILARS Grant Number (if applicable)

A clear summary the issues and proposed solution – remember IRO does not adjudicate disputes

All necessary information (copy of claim, communication serving the claim, details of how, when and to what address the claim was made)

Details of any follow up with insurer (when/how/who)

If there has been any acknowledgement by the insurer or their representative about the claim/issue (including date and nature of communication)

# How to help IRO help you deliver Early Solutions - Insurers

If you are relying on a document/decision, please provide it.

If a claim has been overlooked in error, please provide a date for when the claim will be determined, and, when it is determined please provide a copy of the decision once issued.

If you consider you are inside timeframes for a decision, please provide a brief timeline establishing that.

Independent
Review Office

# Estoppel in the Personal Injury Commission


## Michelle Riordan

Manager Legal Education, IRO

# What is meant by:

| Res Judicata | Issue Estoppel | Anshun Estoppel |
|---|---|---|
| A thing, matter, or determination that is adjudged or final.<br>i.e. a claim, issue, or cause of action that is settled by a judgment conclusive as to the rights, questions, and facts involved in the dispute. | A long-established principle that prevents a party to a proceeding denying to the contrary an issue of fact or law that was established in previous proceedings. | An estoppel that prevents a party from making a claim which should have been pursued by that party in earlier proceedings:<br><br>*See: Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 |

# Relevant cases

| **Res Judicata & Issue Estoppel** | |
|---|---|
| Etherton v ISS Property Services Pty Ltd | [2019] NSWWCCPD 53 |
| **Anshun Estoppel** | |
| Miller v Secretary, Department of Communities & Justice (No. 9) | [2021] NSWPICPD 29 |
| Geary v UPS Pty Ltd | [2021] NSWPICPD 47 |
| OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang | [2022] NSWPICPD 32 |
| Racing NSW v Goode | [2023] NSWPICPD 43 |
| Inner West Council v BFZ | [2023] NSWPICPD 62 |
| | |

# Res Judicata & Issue Estoppel

# Etherton v ISS Property Services Pty Ltd

- In 2015, the worker injured his right leg. The Insurer disputed the claim under ss 4, 9A, 33 & 60 WCA.
- On 9/02/2016, he filed an ARD and claimed weekly payments & s 60 expenses for right TKR surgery.
- On 5/05/2016 an Amended COD – Consent Orders issued, which:
  - Added an allegation of injury due to the nature & conditions of employment until 15/04/2015.
  - Entered an award for the respondent for that alleged injury.
  - Awarded the appellant a closed period of weekly payments, with an award for the respondent thereafter.
  - Awarded the appellant s 60 expenses up to $3,871.25.
  - Entered an award for the respondent with respect to a claim for right total knee replacement surgery.

# Etherton

- The appellant later claim compensation under s 66 WCA for 18% WPI, based on an opinion from Dr Giblin, which was based on the right total knee replacement.
- The insurer disputed the claim and relied upon the Consent Orders.
- ***Arbitrator Wynyard*** entered an award for the respondent. He held that:

  1. Dr Giblin either ignored or was unaware of the Consent Orders; and
  2. The effect of the Consent Orders was that the appellant could not claim that the right TKR resulted from the injury on 15/04/2015.

# Etherton

- **On appeal**, the appellant alleged that the Arbitrator erred:

  1. In finding that he was estopped from proceeding with the s 66 claim;

  2. In acting ultra vires to determine a medical dispute; and

  3. By construing the 2018 amending Act as having retrospective effect.

- ***President Phillips*** upheld the appeal. His reasons included:

  - In *Bouchmouni v Bakhos Matta t/as Western Red Services,* Roche DP held that Consent Orders can give rise to res judicata estoppel, but only to the extent of what was '*necessarily decided*': (*Habib* at [186] per McColl JA);

  - In deciding what was '*necessarily decided*', the Commission will closely examine the pleadings and particulars, the s 74 notice, and the legislation, because that forms part of the mutually known facts and assists in objectively determining the '*genesis*' and '*aim*' of the orders: (*Isaacs* at [75]; *Spencer Bo*wer at [39]; *DTR No*minees at [429]);

# Etherton

- Consent Orders should be construed by reference to what a reasonable person would understand by the language used in the orders, having regard to the context in which the words appear and the purpose and object of the transaction: (*Cordon Investments* at [52]);
- Where the words in the Consent Orders are ambiguous or susceptible of more than one meaning, extrinsic evidence is admissible to show the facts which the negotiating parties had in their minds: (*Codelfa* at 350).
- Prior negotiations that tend to establish objective background facts which were known to both parties and the subject matter of the consent orders will be admissible (*Codelfa* at 352).
- However, evidence of prior negotiations that are reflective of the parties' actual (subjective) intentions is not receivable: (*Codelfa* at 352).

# Etherton

- His Honour found that:
    - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
    - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.
    - Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
    - When the Consent Orders issued, the pleading and body of evidence alleged a frank injury to the right knee on 15/04/2015.
    - The award for the respondent for the s 60 claim for the TKR with respect to that frank injury causes problems, as Dr Giblin was not instructed about it.

# Etherton

- Based on *Habib*, the Consent Orders '*necessarily decided*' that there were awards for the respondent regarding the allegation of right knee injury due to the nature and conditions of employment until 15/04/2015 and s 60 expenses after 4/03/2016 (including that the right TKR surgery was not reasonably necessary as a result of the frank injury).
- The Consent Orders *did not necessarily decide* whether the appellant suffered a frank injury to his right knee on 15/04/2015, although orders 4 and 5 could only apply to that injury.
- Therefore, the Arbitrator erred in finding that the appellant *was estopped* from seeking compensation under s 66 WCA and no relevant estoppel arose from the Consent Orders.

- ***His Honour rejected grounds (2) and (3).***
  - This was not a not a claim in relation to compensation paid or payable in respect of any period before 1/01/2019 (the appellant sought a referral to an AMS under s 66 WCA). Therefore, Part 19L(2) does not apply.
  - The effect of Pt 19L(1) is that the 2018 amendments apply, and the Arbitrator acted within power in determining the claim under s 66 WCA.
  - As the Arbitrator assessed 10% WPI, the appellant was not entitled to recover compensation under s 66 WCA.

# Anshun Estoppel

# *Miller (No 9)*

- This was a claim for death benefits, the worker died after suffering an Asthma attack whilst working in remote NSW. This appeal was against a decision by ***Arbitrator Harris*** dated 8/01/2021, which found an *Anshun* estoppel.
- The respondent argued that:

  (1) These proceedings sought "*the same entitlement … arising out of the same fact circumstance and relating to the same compensation*" and that the appellants made a conscious decision not to allege injury under s 4(a) WCA at first instance;

  (2) This was unreasonable having regard to the benefits of finality of litigation and other matters identified by the President in *Miller No. 5; and*

  (3) The appellants bore the onus of proving that it was not unreasonable to pursue the s 4(a) claim in these proceedings and they failed to adduce any evidence about why it was not claimed initially.

# *Miller (No 9)*

- The appellants appealed on multiple grounds and alleged that the Arbitrator erred:

  (1) In finding that they failed to provide evidence about why they chose to argue a particular injury in *Miller No 1* and to raise a different injury in *Miller No 4*;

  (2) In finding that they failed to adduce evidence about why they chose not to allege a s 4(a) injury initially;

  (3) In finding that their explanation, that they were not aware of a s 4(a) injury, did not stand up to any proper analysis;

  (4) In finding that it was unreasonable for them to not file evidence about why they could not rely upon s 4(a) initially;

  (5) In rejecting their submissions that the "*rules of evidence are not strictly applied in the PIC*" as being relevant to the consideration of the *Anshun* principle;

# *Miller (No 9)*

6. In rejecting their argument that the "legislation is considered to be beneficial" when considering the Anshun principle;
7. In deciding that both proceedings relate to the same factual circumstances and involved similar causes of action;
8. In finding that at the time of Miller (No. 1), they knew that the deceased suffered both an asthma attack (a s 4(b)(ii) disease) and "*anoxia and cardiac arrest*" (a s 4(a) injury);
9. In finding that the factual matrix showed that the current subject matter was relevant to that in the previous proceedings; and
10. In failing to consider and refer to the obligation to conduct proceedings according to law, with due regard to equity, good conscience, and the substantial merits of the case.

# *Miller (No 9)*

***Deputy President Snell dismissed the appeal.***

- He rejected grounds (1), (4), (7) and (9) as being without merit.
- He considered grounds (2), (3) and (8) together and rejected them.
- He considered grounds (5) and (10) together and rejected them.
- He held that in *Miller No. 5*, the President specifically held that the principles in *Anshun* apply in an appropriate case. His Honour accepted that "*whether the principle of estoppel is engaged must be considered in the rubric of the practices and procedure applicable to proceedings in the Commission*".
- He rejected ground (6) and found that the appellants had not demonstrated, based on any authority or reasoned argument, that finding that the legislation is "*beneficial in a general sense*" would change the result.

# *Geary v UPS Pty Ltd*

- The appellant injured his neck and both shoulders at work and he claimed compensation under s 66 WCA for 37% WPI (cervical spine & both upper extremities) based on assessments from Dr Guirgis & s 60 expenses for proposed left shoulder surgery.
- On 29/11/2018, the WCC issued Consent Orders, which:
  - Amended the ARD to plead injuries to the cervical spine and right shoulder and consequential injuries to the left shoulder and neck;
  - Entered an award for the respondent for the alleged injury and the consequential injury to the neck;
  - Discontinued the claim under s 66 WCA; and
  - Noted that the respondent would pay s 60 expenses for left shoulder surgery.
- On 14/01/2021, he claimed compensation under s 66 WCA for 46% WPI (cervical spine + both upper extremities + scarring) for an injury deemed to have occurred on 1/02/2018.
- The respondent disputed the claim.

# *Geary*

- On 9/02/2021, the appellant filed an amended ARD, which alleged injury to the neck as a result of the nature and conditions of employment until 12/12/ 2018 and, alternatively, a consequential injury to the neck due to "*overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries.*"

- ***Member Perry*** found that there was an Anshun estoppel, based on the Presidential decisions in *Fourmeninapub Pty Ltd v Booth, Habib and Miller (No 9).*

  - The relevant question is "*whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings?*"

  - Disease was integral to the dispute (Dr Guirgis apportioned 90% of WPI to a disease, Dr Endrey-Walder provided a similiar opinion and all doctors diagnosed a disease in the shoulders).

  - Discontinuing the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: *Habib*;

  - The facts in both proceedings were essentially the same;

# *Geary*

- Consent orders may create an estoppel and the parties clearly intended for an injury to the cervical spine to be pleaded, and for there to be an award for the respondent with respect that alleged injury and/or consequential injury; and
- The consent orders made it clear enough that the applicant '*could not succeed in gaining compensation for a consequential benefit*'.

- On appeal, the appellant argued that:

1. The 2019 COD must be read in the light of the pleadings, which alleged a frank injury;
2. The only claim determined in 2019 was the s 60 claim (left shoulder surgery) and it was not unreasonable that disease injuries to the shoulders and cervical spine were not pleaded then;
3. The fact that the s 66 claim was discontinued meant that there was no *Anshun* estoppel, and it would not align with the PIC's practice to apply *Anshun* to "*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*"; and
4. "*A worker is entitled to pursue his rights independently*".

## Geary

- ***President Phillips DCJ*** dismissed the appeal and he held that.
  - *Anshun* estoppel is available in PIC proceedings;
  - In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out various authorities (at [114]–[119]) that dealt with the application of Anshun estoppel.
  - The mere fact that a party chooses to litigate a matter in other proceedings in and of itself is insufficient to ground an Anshun estoppel.
  - However, this does not mean that every decision to litigate separate claims will always be permissible from an Anshun point of view.
  - Rather, such a decision will only give rise to an Anshun estoppel if it was unreasonable not to have pleaded this cause in the earlier action.
  - The 2020 Act did not modify or derogate from the approach to Anshun estoppel by the WCC or Compensation Court.

# *Geary*

- In *Bruce v Grocon Ltd* [1995] NSWWCC 10, Neilson J summarised the relevant principles:
  - The principle in *Anshun* extends to claims and defences;
  - Estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceedings, or the granting of remedies inconsistent with the remedy originally granted, or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
  - the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
  - it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case.

# *Geary*

- His Honour dismissed ground (1). He held that:
    - The claim for disease injury to the neck was connected with the subject matter of the 2019 proceedings;
    - The Member exercised a discretion of the type in *House v The King* [1936] 55 CLR 499 at 504-505 (House) and the appellant must prove error in exercising that discretion:

        "*If a judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so.*"

- The appellant did not challenge the finding that the facts pleaded in both proceedings were essentially the same;
- The Member found there was no explanation about any difficulties that existed, or might reasonably have been perceived, in raising a disease injury earlier. This pointed towards it being unreasonable to have not relied on a disease injury in 2019; and

# *Geary*

- It is "*artificial in the extreme*" for the appellant to assert that the claim for the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before those proceedings were commenced.
- His Honour rejected ground (2).
    - He found that this was not argued before the Member and a Member cannot have erred in law in relation to an argument that was not put to him.
- His Honour also rejected ground (3).
    - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the authorities and applied them in find that there was an Anshun estoppel regarding the disease injury to the neck in the 2021 proceedings.

# *Geary*

- His Honour rejected ground (4).
  - The appellant effectively argued that different causes of action were pursued in the 2019 and 2021 proceedings, but in *Anshun*, the High Court stated:

    "*By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction*".

  - The Court's finding in *Anshun* is entirely relevant to consideration of this ground and the Member found that the two sets of proceedings were "*essentially the same*".
  - This is exactly what happened in *Anshun* and it was an approach that found no favour with the Court.

# *OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang*

- The worker claimed compensation for a back injury on 25/09/2016 (deemed).
- On 24/07/2019, Consent Orders were issued, which:
  - Amended the ARD to claim weekly benefits from 2/11/2016;
  - Awarded the worker weekly payments from 25/11/2016 to 2/05/2019 with an award for the respondent thereafter;
  - The respondent agreed to pay s 60 expenses up to $5,500, with an award for the respondent thereafter; and
  - Noted that the worker acknowledged that as and from 2/05/2019, he was able to earn "as much or more than he would have earned had he remained in the employ of the respondent uninjured" in suitable employment.

# ***Dang***

- On 1/12/2020, the worker sought approval from the insurer for an MRI scan of his lumbar spine.
- The appellant asserted that there was no further entitlement under s 60 WCA by reason of the Consent Orders.
- He then claimed compensation under s 66 WCA for 12% WPI.
- The appellant disputed that claim and asserted that the worker was prevented from making this claim "as it was based on medical evidence that existed at the time of the prior proceedings and was not disclosed". It alleged prejudice and that that "*the full extent of the claim brought in 2019*" had resolved.
- The worker then filed an ARD claiming s 60 expenses (including costs of the MRI scan) and compensation under s 66 for an injury on 25/09/2016.
- ***Senior Member Capel*** held that the worker was not estopped from bringing this claim and that the appellant was liable for the compensation claimed.

# *Dang*

- On appeal, the appellant alleged that the Senior Member erred as follows:
  - in law, as to the nature of an Anshun estoppel;
  - In law, by failing to exercise his discretion to apply the Anshun principles to the case;
  - in fact, by accepting that the worker only decided not to proceed with surgery in 2021; and
  - in law, by taking into account an irrelevant consideration.

# Dang

- ***Deputy President Wood*** dismissed the appeal.
- She rejected ground 1.
    - She noted that the appellant argued that the relevant medical report was available to the worker in the earlier proceedings.
    - It relied on the High Court's decision in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*) and argued that the earlier authorities that were relied upon by the worker and cited by the Senior Member, were inconsistent.
    - In *Tomlinson*, the Court considered the concept of abuse of process, and found that this is inherently broader and more flexible than estoppel. This can be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
    - It has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

# Dang

- In its submissions to the Senior Member, the appellant referred to an "*abuse of process*" but it did not actively argue that there was an abuse of process or that the worker's action was unjustly oppressive or had brought the administration of justice into disrepute. Instead, it argued that an *Anshun* estoppel applied.

- Abuse of process and an *Anshun* estoppel are two distinct concepts, although may have overlapping features.

- She rejected ground (2).

  - The critical reasons given for not pursuing the claim in the earlier proceedings were that the worker only had an entitlement to make one claim under s 66 WCA and the surgery, if undertaken, might likely alter the assessment of his WPI and he was yet to make a final decision about the surgery. The evidence supported these matters.

  - The Senior Member addressed the relevant factors that the appellant relied upon to show that the failure to bring the claim was unreasonable.

  - The appellant's case substantially rests on an assertion that because the worker could have brought his case in the earlier proceedings, he should have. That submission falls foul of the observations of Allsop P in *Manojlovski*.

  - The Senior Member did not fail to apply the *Anshun* principles.

# *Dang*

- She rejected ground (3).
    - The Senior Member's conclusion that the worker only decided against surgery in 2021 was consistent with the evidence.
- She rejected ground (4).
    - She noted that the grounds of appeal did not point to any error by the Senior Member in proceeding to determine the s 66 claim.

# *Racing NSW v Goode*

- The worker was a jockey.
- He suffered paraplegia at the T4 level, and multiple other injuries from a fall and was permanently wheelchair-bound. He required ongoing medical care and assistance with ADLs.
- On 21/10/2010, a Complying Agreement was signed, under which he received compensation under s 66 WCA for 85% WPI and $50,000 for pain and suffering.
- In June 2012, the worker and his wife returned to their native UK, after which he submitted numerous claims to the insurer for treatment, medication, rehabilitation, housing modifications and maintenance. Some claims were paid, but some were disputed.
- On 18/02/2020, he filed an ARD claiming s 60 expenses for house repairs and hotel expenses.
- On 22/04/2020, Consent Orders were issued, under which the appellant agreed to pay some claims, it received an award for the respondent for some claims, and the worker discontinued some claims.
- On 10/12/2021, the worker filed a further ARD, which claimed s 60 expenses, but the appellant disputed those claims.

# *Goode*

- ***Member Wynyard*** determined the dispute.
    - The appellant disputed that the claims were "*allowable*" based on definitions in s 59 WCA and/or that they were reasonably necessary under s 60 and sought argue *Anshun* estoppel.
    - As *Anshun* had not been raised, the appellant required leave under s 289A WIMA.
    - He refused to grant leave to rely upon *Anshun* estoppel under s 289A WIMA and awarded the worker compensation under s 60 WCA.
- **On appeal**, the appellant argued that:
    1. The parties were legally represented at all relevant times during the 2020 and 2021 proceedings.
    2. It accepted liability for the worker's injuries;
    3. The WCC and the PIC, are the tribunals of competent jurisdiction to hear and determine both applications; and
    4. The parties to the 2020 and 2021 proceedings are the same and both proceedings involved a dispute regarding s 60 expenses.

# Goode

- ***President Judge Phillips*** upheld the appeal.
    - He noted that the Member held that he needed to be satisfied that it was in the interests of justice to allow it to rely on *Anshun* estoppel and he quoted from his decision in *Geary*.
    - The correct authority – *Mateus* – was brought to the Member's attention, but he failed to engage with the parties' arguments and to grapple with the *Mateus* factors. This was a failure to exercise a discretion in accordance with the law.
- Accordingly, he redetermined the application under s 289A WIMA and he decided that:
    1. Anshun applies to statutory compensation schemes.
    2. Consideration of the s 289A application requires an assessment of the relative merits of the proposed Anshun defence in accordance with *Mateus*.
    3. The *Anshun* defence was only proposed to apply to claims that existed, but were not advanced, before the 2021 proceedings. There was no earlier decision on the merits of the matters in dispute that could possibly conflict with any decision in the current proceedings.

# *Goode*

4. *Mateus* set out a number of non-exhaustive factors to be considered when dealing with a leave application and whether it is in the interests of justice to grant leave. The starting point is to undertake a broad review of all the circumstances surrounding the matter.

5. The worker's needs will change from time to time depending upon his condition, the advice given by his treating doctors and possible developments in medical science that may assist in the management of his condition.

6. As Hutley JA said in *Thomas v Ferguson Transformers Pty Ltd*, "*the process of dealing with an incapacitated person may involve a continual war with disease, atrophy of muscles by lack of use, and even psychological decay by reason of lack of something to do*." In *Thomas*, the worker was a paraplegic, and the decision has "*considerable resonance*" with this matter.

# *Goode*

- In relation *Mateus* factors, his Honour held that:
  - The application to rely upon *Anshun* was made at the commencement of the hearing and the appellant did not act promptly in bringing it to the notice of the PIC or the worker;
  - While the appellant's counsel referred to a "*pleading oversight*", there was no explanation of how that occurred;
  - The worker had no opportunity to consider what evidence may be required to answer the defence and it was unreasonable for the appellant to expect him to meet it without notice;
  - The s 60 claim was based on "*poikilothermia*" and the appellant did not properly respond to it; and
  - The defence was not articulated in a compelling manner.
  - A fundamental precept in establishing an *Anshun* defence is that the later claim was so relevant to the subject matter of the earlier dispute that it was unreasonable not to have advanced it in the earlier proceedings.

# Goode

- In *Miller No 10*, Brereton JA held that *Anshun* "***is engaged only where the party has unreasonably failed to assert a right or defence in connection with or in the context of the earlier proceeding***." (emphasis in original)
- Other than the fact that both sets of proceedings concerned s 60 WCA, the claims were not such that they had to brought at once. The mere fact that a claim ***could have been brought in earlier proceedings does not automatically mean that it should have been so brought*** (emphasis added).
- What is required is the evaluative exercise spoken about by McColl JA in *Habib* (at [84]).
    - In *Champerslife Pty Ltd v Manojlovski*, the Court of Appeal said that deciding whether the matter in question was so relevant that it can be said to have been unreasonable not to rely upon it in the first proceedings involves a value judgment to be made referrable to the proper conduct of modern litigation.
    - "*Unreasonableness*" is a key feature of Anshun estoppel – namely, was it unreasonable not to have advanced the claims in the earlier proceedings?

# Goode

- *Anshun* is not an inflexible principle. As the High Court said, "*there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings*". He considered this in *Miller No 5* at [194].

- His Honour declined to infer that the worker had behaved unreasonably.

- He held that the appellant effectively asked him to elevate the *Anshun* principle from "***what could have been brought in the earlier proceedings to a principle which requires that it should have been brought***" (emphasis added).

- The *Anshun* defence had little merit and the discontinuance of claims in the 2020 proceedings did not mean that the appellant was entitled to treat them as abandoned.

# *Inner West Council v BFZ*

- The worker suffered a psychological injury.
- On 27/05/2020, Consent Orders were issued. The appellant agreed to pay:
  - A closed period of weekly benefits (18/03/2020 to 26/05/2020), with an award for the respondent thereafter; and
  - Section 60 expenses up to $2,000, with an award for the respondent thereafter.
- The worker resigned effective from 26/05/2020 and the appellant agreed not seek credit for paid sick leave.
- In 2022, the worker claimed compensation under s 66 WCA, but the appellant disputed the claim.
- The worker argued that the appellant was estopped from denying liability under ss 4(a), 4(b), 9A and 11A WCA because of the 2020 Consent Orders.
- ***Principal Member Bamber*** determined that the appellant was estopped from disputing liability because of the Consent Orders, and she remitted the dispute to the President for referral to a Medical Assessor.

## BFZ

- On appeal, the appellant alleged that the Principal Member erred:

  1. In determining that it was estopped from disputing liability; and

  2. In referring the s66 dispute to the President for referral to a MA.

- ***Acting Deputy President Nomchong SC*** granted leave to appeal and allowed it. She remitted the matter to another member for re-determination. Her reasons included:

  - Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.

  - Estoppel is to be applied strictly.

  - Issue estoppel will apply only to prevent the assertion in later proceedings of the precise matter of fact or law that has already been necessarily and directly decided in the earlier decision.

## BFZ

- The 3 conditions that must exist for issue estoppel to apply are:

  1. the first decision was final;

  2. the same question has been decided, and

  3. the same parties, or at least parties with the same legal interest, are the same.

- In this matter, (1) and (3) were established and the issue for the Principal Member to determine was whether the same question or questions were decided in 2020?

- The Principal Member needed to identify precisely what issues were determined in 2020, as the COD did not refer to the nature or extent of the injury.

- There had been no arbitration on liability issues and consent orders were to resolve the dispute.

- The authorities referred to by Roche DP in *Bouchmouni* (including *Habib*) provide that in these circumstances there must be an examination of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved in the actual decision assented to by the parties. The Principal Member recognised this and referred to these authorities.

**BFZ**

- However, the Principal Member concluded that the only relevant characteristic for determining the nature of the injury was whether it was work-related. This was an error of law.
- "*Injury*" refers to both the event that caused it and the pathology arising from it.
- In *Department of Juvenile Justice v Edmed*, Roche DP held that for the purposes of a determination of a s 66 entitlement, it is the pathology which must be determined.
- Specificity is required for the application of estoppel and the fact that the Principal Member found that there was "*an evolution over time into a different type of psychopathology*" necessarily means that there can be no issue estoppel.
- The injury that is the subject of the s 66 claim is different in kind to that which was the subject of the 2020 Consent Orders, and it is a matter for a merits consideration as to whether there had been other incidents or events (workplace or otherwise) in the worker's life since the 2020 Determination.

# ***Recommendation***

- When faced with issues of a possible *Anshun estoppel,* I recommend that the Principal Lawyer refers to ADP Nomchong's decision in ***BFZ***, as this provides an excellent summary of the principles that the PIC will apply in determining whether an *Anshun estoppel* arises from previous litigation between the parties.

# QUESTIONS

Independent
Review Office

# IRO Priorities 2024 and Closing Remarks


## Jeffrey Gabriel

A/Independent Review Officer