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RECENT DEVELOPMENTS

Discussion paper: Improving workers compensation dispute resolution in NSW

Link to Paper

In response to a review of the workers compensation scheme conducted by the NSW Legislative Council Standing Committee on Law and Justice in 2017, the Department of Finance, Services and Innovation has recently issued a discussion paper seeking feedback on options to improve the workers compensation dispute resolution system in NSW.

There are a number of participants within the scheme who are currently responsible for claimant support, legal support, dispute management and resolution and system oversight that include:

- State Insurance Regulatory Authority (SIRA)
- Workers Compensation Commission (WCC)
- Workers Compensation Independent Review Office (WIRO)

The concerns sought to be addressed include the confusing and complex nature of the current system with multiple dispute pathways which claimants and other stakeholders find hard to navigate and find information.

The object of the discussion paper is to obtain views on how to build a system that:

- prevents disputes and helps parties reach agreement and resolve issues earlier, and
- supports claimants throughout the process to help them to return to work and good health.

There are proposals to improve the current system by:

- Delivering a 'one stop shop' for resolving disputes – four possible options.
- Focusing more on dispute prevention – changing approach to medical assessments, enabling more lump sum exits from the scheme instead of receiving ongoing payments, simplifying notices to claimants and providing simpler and clearer public information about dispute resolution.
- Implementing other system improvements – providing information and services online to make the system more 'user friendly', internal review of disputed decisions by insurers before going to the WCC and removing the need for claimants to provide full documentation before conciliation can begin.

SHORT SHOTS

Appeal on Jurisdictional Error – Determination of medical dispute by arbitrator

State of NSW v Butler

LINK TO DECISION

The worker suffered injuries involving both knees with different employers – occurrence of injuries was not disputed. A claim was raised for weekly benefits and lump sum compensation against both employers. Earlier employer disputed liability on the basis that injury in 2006 was only 'minor' and worker had 'made a full recovery'.

The arbitrator made awards against the subsequent employer (State of NSW) for weekly benefits and medical expenses and remitted matter to the Registrar for referral to an AMS to assess WPI that resulted in injury to the left knee in June 2011 and a consequential injury to the right knee. Award made in favour of earlier employer. State of NSW submitted that the determination of permanent impairment resulting from earlier injury was 'wholly within the province of the AMS' – Arbitrator stated 'whether there is a causal connection between an injury and impairment are matters for an arbitrator, not an AMS to decide'.

On appeal, Snell DP found that the dispute regarding the permanent impairment that resulted from the injury in 2006 was a 'medical dispute' which in the absence of assessment by an AMS could not be determined by the Commission. The medical dispute relating to the injury in 2006 was required to be referred to an AMS – entry of award in favour of earlier employer involved – jurisdictional error.

The arbitrator's Certificate of Determination was revoked and the matter remitted for re-determination by a different arbitrator.

Decision Number: [2017] NSWWCCPD 47
Decision date: 3 November 2017
Matter No: A1-1508/17
Decision Maker: Snell DP, Workers Compensation Commission

Appeal on s38 Entitlement – Workers with highest needs

Hee v State Transit Authority of NSW [2018] NSWWCCPD 6 (26 February 2018)

LINK TO DECISION

Consideration of special provisions for workers with highest needs (greater than 30% WPI) and whether benefits are payable under s38A where there is no other entitlement to weekly compensation payments.

Held: Not entitled to additional benefits under s38A merely by virtue of being a worker with highest needs who suffers an incapacity for work – must also establish that there is an amount of weekly compensation that is payable pursuant to ss34-38 that is less than $788.32.

Appeal dismissed.

Decision Number: [2018] NSWWCCPD 6
Decision date: 26 February 2018
Matter No: A1-2051/17
Decision Maker: Keating P, Workers Compensation Commission

Appeal out of Time – Liability dispute v medical dispute

Vaughan v Secretary, Department of Education

LINK TO DECISION

Claim for lump sum compensation for injury to both shoulders. Insurer accepted injury to right biceps but denied liability for injury to either shoulder. Arbitrator found worker's statement and histories contained in the medico-legal reports were not consistent with contemporaneous evidence and held that the worker had failed to discharge the onus of proof.

Appeal lodged outside the prescribed time frame – no exceptional circumstances upon which the appeal could be allowed as failure to lodge stemmed from an error in procedural non-compliance and did not constitute exceptional circumstances (within the meaning of rule 16.2(12) where to lose the right to appeal would work demonstrable and substantial injustice).

Considering the merits of the grounds of appeal – would not succeed even if time were extended.

The determination on 'injury' was within the jurisdiction of the Commission as required prior to referral to an AMS. The issue between expert witnesses about reliability of MRIs did not constitute a 'medical dispute' within the meaning of s319 of the 1998 Act (requiring referral to an AMS).

Application to extend time refused.

Decision Number: [2018] NSWWCCPD 1
Decision date: 10 January 2018
Matter No: A3-2202/17
Decision Maker: Snell AP, Workers Compensation Commission

Whether total knee replacement is an 'artificial aid' within the meaning of s59A(6)(a)

Pacific National v Baldacchino [2018] NSWWCCPD12

LINK TO DECISION

Deputy President Snell has recently affirmed a decision of Arbitrator Harris that provision of a total knee replacement falls within the meaning of 'other artificial aids' in s59A(6) of the 1987 Act.

The worker suffered a left knee injury in 1999 for which he underwent an arthroscopic medial meniscectomy. Liability for the claim was accepted and payments made at that time. Many years later (in 2013), the worker obtained orders for the payment of lump sum compensation in respect of a 15% loss of use of the left leg at or above the knee consistent with assessment by an AMS.

In 2016, the worker sought orders that the employer was liable for the cost of a total knee replacement on the basis that the treatment arose as a consequence of the 1999 knee injury. The insurer denied liability disputing that the ongoing expenses claimed were reasonably necessary as a result of the employment injury. The worker brought proceedings seeking an order for payment that was heard and determined by Arbitrator Harris who decided that the need for the total knee replacement arose as a result of the 1999 injury.

He later dealt with the question of whether s59A applied observing that the worker being in his 67th year was not entitled to the cost of the total knee replacement due to the operation of the section unless the proposed surgery fell within the meaning of either a provision of an 'artificial member' or an 'artificial aid' in s59A(6) of the Act.

The insurer disputed that s59A(6) was satisfied arguing that the proposed surgery did not fall within the meaning of 'other artificial aid' and that clause 27 of Schedule 8 of the 2016 regulations applied. The arbitrator found that s59A(6) was not subject to clause 27 of Schedule 8 of the 2016 regulations as the clause operated with respect to existing claims. The claim under consideration was not an 'existing claim' as defined in Part 2 of Schedule 8 of the 2016 regulation.

The Arbitrator found that the proposed surgery fell within the meaning of 'other artificial aid' in s59A(6) of the 1987 Act and considered the meaning of those words in *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216 where Justice Hutley defined an artificial aid as "anything which has been specially constructed to enable the effects of the disability… to be overcome".

The insurer appealed the arbitrator's decision. The WCC notified SIRA and invited it to consider whether it wished to be heard. SIRA lodged submissions supporting the decision of the arbitrator.

The insurer argued that having regard to the items described in s59A(6) 'crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries)', that the meaning of 'artificial aids' was a reference to aids that were external, visible and externally accessible to an injured worker's body.

Deputy President Snell considered the decision in Thomas and the plain words of the statutory definitions and statutory construction. He also cited a number of examples including that of an artificial eye which could not be simply described as external and did not accept that the section should be read so narrowly as contended by the insurer.

Arbitrator's decision confirmed.

Decision Number: [2018] NSWWCCPD 12
Decision Date: 28 March 2018
Matter Number: A1-2148/17
Decision Maker: Snell DP, Workers Compensation Commission

Judicial Review – Merit review by SIRA – Denial of procedural fairness

Bhusal v Catholic Health Care Ltd

LINK TO DECISION

The worker suffered a back injury in the course of her employment in 2014. The worker made a claim for compensation, liability for which was initially accepted and payments made until February 2016 when she was informed by the insurer that following review, it had decided that she had a current capacity to work that disentitled her to further payments.

The insurer affirmed its decision following an internal review. The worker did not receive notice of this decision until 2 June 2016 when she returned from overseas but stated on her application that she had been notified of the decision on 2 May 2016. On 30 June 2016, SIRA notified the worker that it did not have jurisdiction as the application was not made within 30 days of her being notified of the decision. The worker sought a judicial review but was unsuccessful.

On appeal, the Court noted that it was common ground that SIRA's decision was wrong; there was undisputed evidence that the worker had lodged her application within time.

The Court found that the worker had been denied procedural fairness as the procedure adopted (by SIRA) had caused 'practical injustice' in the absence of any opportunity to make submissions to SIRA on the issue that proved critical to the outcome of her application.

Decision Number: [2018] NSWCA 56
Decision date: 7 March 2018
Matter No: 2016/330368
Decision Maker: NSW Court of Appeal