

**RECENT DECISIONS**

## When the failure to record leads to another Hearing

*ISS Property Services Pty Ltd v Abdou* [2017] NSWCCPD (4 July 2017)

[Link to decision](#)

### Summary

An arbitrator of the Workers Compensation Commission handed down an ex tempore (oral) decision in which a finding of injury, payment of weekly benefits and section 60 expenses was made. The orders included a term that the injured worker be referred to an Approved Medical Specialist. No recording of the arbitrator's decision was made. Despite the fact that this related to an interlocutory decision, namely, the referral to an Approved Medical Specialist, President Keating granted leave for the appeal to proceed.

President Keating then found that the absence of any recorded reasons for the decision amounted to a constructive failure to give reasons as required by section 294 of the *Workers Compensation Act 1987* ('the Act'). The matter was remitted to another arbitrator for determination.

### Background

The worker was employed as a cleaner. The worker alleged injury to his back on 29 November 2013, while emptying garbage bins into a trolley. He also alleged injury as a result of the general nature and conditions of his employment. The employer disputed liability for the injury on the basis

that the worker suffered a pre-existing injury and that he did not suffer an injury in the course of employment.

The worker brought proceedings in the Commission in which he sought payment of weekly benefits and medical expenses including payment for a laminectomy and spinal fusion.

The matter proceeded to hearing on 8 May 2017 before the arbitrator. The arbitrator reserved her decision. The matter was listed for teleconference on 10 May 2017 when the arbitrator delivered her reasons orally. A certificate of determination issued on the same day in which a finding of injury, payment of weekly benefits and section 60 expenses was made. The orders made by the arbitrator included a term that the injured worker was to be referred to an Approved Medical Specialist.

The employer requested a transcript of the reasons for the arbitrator's determination. The Commission advised that a transcript was unavailable as the conference had not been recorded.

The employer appealed the arbitrator's decision.

The employer argued that the absence of recorded reasons meant that it was unable to properly determine whether there had been proper compliance with the obligation to provide reasons and, the adequacy or otherwise of those reasons. The absence of the recorded reasons amounted to a constructive failure to give reasons which was an error of law.

The worker agreed with the employer's submissions.

## Decision

President Keating noted the requirements of section 352(3A) of the Act, namely, that there was no right of appeal from an interlocutory decision except with leave of the Commission. The section provides that the Commission was not to grant leave unless it was of the opinion that determining the appeal was necessary or desirable for the proper and effective determination of the dispute. President Keating stated that whilst the order remitting the claim to the Registrar was interlocutory, the arbitrator's orders with respect to the findings on injury and entitlement to weekly compensation and medical expenses were final. Leave was granted for the appeal to proceed.

Section 294 of the Act contains the statutory requirement to provide reasons when a dispute is determined by the commission. Subsection 2 provides that the reasons are to be stated sufficiently (in the opinion of the Commission) to make the parties aware of the Commission's view of the case made by each of them.

President Keating cited his previous decision in *Recyclit Enviro Chutes Pty Ltd v Axisa* [2016] MSWCCPD 41 where he held that the absence of the recorded reasons for the decision amounted to a constructive failure to give reasons as required by section 294. He accepted the submissions of both parties and reluctantly held that the arbitrator erred by failing to provide adequate reasons for the decision. The arbitrator's decision was revoked and the matter was remitted to another arbitrator for a fresh hearing and determination.

## For more information, please contact:



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