Independent
Review Office

Resolution of disputes under Section 60 of the Workers Compensation Act 1987 (NSW) in the Personal Injury Commission

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Executive Summary

Section 60(1)(a) of the Workers Compensation Act 1987 (NSW) (*WCA*) provides that an employer is liable to pay the cost of any medical or related treatment (other than domestic assistance) if it is reasonably necessary as a result of a work injury.

A review of decisions published by the Personal Injury Commission (PIC) indicates that a large number of s 60 disputes are proceeding to formal determination and that the PIC has adopted a consistent evidence-based approach to determining them.

This paper focuses upon the relevant test and how the PIC has applied it in determining disputes and it is intended to assist legal practitioners in properly prosecuting or defending s 60 claims.

The relevant test

In *Diab v NRMA Ltd* [2014] NSWWCCPD 72 (*Diab*), Roche DP adopted the test that was initially stated by Burke CCJ in) *Rose v Health Commission (NSW)* (1986) 2 NSWCCR 32 (*Rose*) (at 48A-C):

> 3. Any necessity for relevant treatment results from the injury where **its purpose and potential effect is to alleviate the consequences of injury**.
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> 4. It is reasonably necessary that such treatment be afforded a worker **if this Court concludes, exercising prudence, sound judgment and good sense, that it is so**. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
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> 5. In so deciding, the Court will have regard to medical opinion as to the **relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition**.

Meaning of "reasonably necessary"

In *Clampett v WorkCover Authority (NSW)* (2003) 25 NSWCCR 99 at [23] (*Clampett*), the Court of Appeal (Grove J, Meagher and Santow JJA agreeing) held that in considering the meaning of "*reasonably necessary*" there is this statutory obligation specifically to have regard to the nature of the worker's incapacity.

In *Moorebank Recyclers Pty Ltd v Tanlane Pty Ltd* [2012] NSWCA 445 at [113] (*Moorebank*), the Court of Appeal (Bathurst CJ, Beazley JA (as her Honour then was) and Meagher JA agreeing) determined that "*reasonably necessary*" does not mean "*absolutely necessary*".

The Court stated that if something is "*necessary*", in the sense of indispensable, it will be "*reasonably necessary*", because this is a lesser requirement than "*necessary*". A worker does not have to establish that the treatment is "*reasonable and necessary*", which is a significantly more demanding test that many insurers and doctors apply.

In *Diab*, Roche DP held that the matters relevant to determining reasonableness, include, but are not necessarily limited to:

(a) the appropriateness of the particular treatment;

(b) the availability of alternative treatment, and its potential effectiveness;

(c) the cost of the treatment;

(d) the actual or potential effectiveness of the treatment, and

(e) the acceptance by medical experts of the treatment as being appropriate and likely to be effective.

However, Roche DP stated that the effectiveness of the treatment is not determinative and the evidence may show that the same outcome could be achieved by a different treatment, but at a much lower cost. Similarly, as all treatment, particularly surgery, carries a risk of a less than ideal result, a poor outcome does not necessarily mean that the treatment is not reasonably necessary and each case will depend on its facts. The essential question remains whether the treatment was reasonably necessary: *Margaroff v Cordon Bleu Cookware Pty Ltd* (1997) 15 NSWCCR 204 at 208C.

Determinations by the PIC

The PIC's approach to determining s 60 disputes indicates the importance of medical evidence that is soundly based upon the available evidence in a successful prosecution or defence of a s 60 claim, as indicated by the following decisions.

Shipp v Community First Development Ltd t/as Indigenous Community Volunteers [2021] NSWPIC 2.

Member Beilby found that bariatric surgery for weight loss was reasonably necessary medical treatment for a work-related lumbar spine injury.

The Member applied *Diab* and found that all of the doctors placed significant importance upon weight loss, primarily to ameliorate pain and that the evidence also indicated that the worker tried alternative treatments for pain management, without significant benefit.

The Member also found that the worker did not have to pursue all alternative weight loss paths because the Respondent did not file any evidence that provided a platform to consider the efficacy of alternative treatments.

Bliss v State of NSW (Illawarra Shoalhaven Local Health District) [2021] NSWPIC 269

Member Snell found that medical cannabis was reasonably necessary treatment for a work-related low-back injury that occurred in 2013.

The evidence indicated that the worker commenced medical cannabis treatment in February 2019. In June 2020, after a complicated recovery from lumbar surgery, he successfully ceased using opioid medication and reported an improved quality of life and that he was better able to manage his pain in order to improve his functional capacity to enable a safe and durable return to gainful employment due to the medical cannabis.

However, in September 2020, the insurer disputed the treatment. The worker complained of an escalation of his pain and a decline in his health and well-being. He then resumed the treatment and claimed compensation under s 66 WCA for 23% WPI, and under s 60 WCA for past costs of medical cannabis treatment and future treatment costs for medical cannabis and psychological/psychiatric treatment.

The claims under s 66 and for psychological/psychiatric treatment costs were resolved, but the dispute regarding medical cannabis treatment proceeded to determination.

The Member applied the test in *Diab* and noted that the worker failed to disclose his previous use of marijuana/cannabis in his statement of evidence and histories to the medical specialists, but that his treating GP's clinical notes documented his prior long-term use and attempts to cease use under medical supervision.

The Member held that while the worker's failure to disclose his prior use did not allow the medical specialists to provide an opinion with a firm grasp of the past medical history, not all discrepancies are fatal and it is for the tribunal of fact to assess the factual basis for the opinion (*Paric v John Holland Constructions Pty Ltd*, per Samuels JA).

The Member stated that while the weight given to the specialists' opinions is diminished because they were not aware of the prior history, the evidence as a whole clearly demonstrates that the worker suffers significant ongoing pain as a result of the work injury and that his use of medical cannabis effectively alleviates his pain, assists him in reducing his long term reliance on opioid medication, and improves his day to day function and his mental health.

Summers v Sydney International Container Terminals Pty Limited t/as Hutchison Ports [2021] NSWPICPD 35

President Phillips DCJ set aside a Certificate of Determination issued by Member Wynyard, which found that proposed cervical spine surgery was not reasonably necessary as a result of a work injury that occurred in October 2019 (deemed date).

President Phillips DCJ re-determined the dispute. In so doing, he stated that while the PIC is a specialised tribunal and can be seen as having experience enabling it to "*draw inferences from facts which an ordinary tribunal may not*", this expertise can only be deployed to interpret or draw inferences from existing evidence and cannot be used to create evidence.

His Honour found that all of the doctors stated that the appellant suffered from various pathologies at the C3/4, C5/6, and C6/7, but there was a debate about which was the more serious pathology, and there were 3 main opinions that the Member was required to grapple with. However, the Member failed to do this and as a result, he was not able to properly construe the medical opinion, which was to the effect that the proposed surgery was reasonably necessary.

His Honour concluded that this was not a matter in which a specialised tribunal could draw an inference in opposition to the specialist medical evidence.

Honarvar v Professional Painting AU Pty Ltd [2022] NSWPICPD 12

Deputy President Snell upheld an appeal against Member Wynyard's refusal to make a declaration under s 60(5) *WCA* for proposed lumbar fusion surgery and an orthopaedic bed and mattress (claimed at $33,700) as "curative apparatus". He found that the proposed surgery was reasonably necessary and that the bed and mattress were curative apparatus under s 59(e) *WCA*.

Background

The worker injured his right ankle and lumbar spine. He underwent several surgeries on his ankle and extensive conservative treatment for his lumbar spines and psychological treatment. He sought approval for lumbar fusion surgery and a mattress & bed. The insurer disputed these claims.

With respect to the proposed surgery, the Member applied the test in *Diab*. He found that:

- the worker based his case on the assumption that all he had to prove is that alternative treatment was not effective, but this is only one of the factors that he must satisfy and this requires more proof than his own subjective view;
- the treating doctors' reports were not helpful because they supported the need for the proposed treatment on the basis that nothing else had worked;
- the failure of the alternative treatments raised a question about whether the worker's mental state was preventing his recovery. He had been under psychiatric care for many years, but there was no evidence about this; and
- the proposed surgery was unlikely to result in any significant improvement or associated functional gains.

With respect to the curative apparatus claim, the Member held:

- the treating specialist recommended these items to assist in recovery from the proposed surgery and for pain management, but while a firm mattress may assist in minimising pain, this does not impose an obligation on the respondent to supply one;
- there are no particular therapeutic or curative qualities in the purchase of a mattress of a type that is commonly used by members of the public; and
- there was no explanation about the exorbitant cost of the claimed items.

The appellant appealed on 12 grounds.

Deputy President Snell upheld the appeal and redetermined the disputed claims. He applied the decisions in *Diab* and *Rose* and made a declaration under s 60(5) *WCA*. His findings included:

- The Member failed to provide sufficient reasons about why he was not assisted by the appellant's self-assessment regarding the effectiveness of the alternative treatment.
- The Member erred by making factual findings that were not open to him, including that: the evidence about the effectiveness of alternative treatment principally came from the appellant; the treating doctors recommended surgery because nothing else had worked; and there was no evidence from the practitioners who provided the alternative treatment.

- The finding that the proposed surgery would not result in any significant improvement or associated functional gains was infected by erroneous fact finding.
- The amount claimed for the mattress and base was clearly an error and had been reduced by $30,000.
- The mattress and base are '*curative apparatus*' for the purposes of s 59(e) *WCA* as they:
    - could be fairly described as a 'mechanical contrivance';
    - have 'therapeutic qualities'; and
    - are used to achieve a particular medical purpose, as the treating surgeon made clear.
- The Member effectively ignored the treating practitioners' evidence.

Final Points

- The case law indicates that the PIC has adopted a consistent evidence-based approach to determining s 60 disputes by applying the test in *Diab* and *Rose*.
- The insurer is required to make a soundly-based decision when disputing a claim under s 60.
- In order to challenge a s 60 dispute, the onus is on the worker to provide the Member with a sound basis for finding that the disputed treatment is reasonably necessary.
- Therefore, the evidence relied upon must address the relevant criteria.
- Subjective evidence from the injured worker alone will not be sufficient.