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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Supreme Court of New South Wales

No issue estoppel results from an assessment of notional damages in recovery proceedings commenced by a workers compensation insurer under s 151Z WCA

IAG Limited trading as NRMA Insurance v Lucic [2019] NSWSC 620 – Adamson J – 28 May 2019

Background

On 31 August 2005, the first defendant (the claimant) was injured in a motor vehicle accident that occurred in the course of his employment. On 14 August 2016, the plaintiff (the CTP insurer of the negligent driver) admitted liability. The claimant received workers compensation payments in respect of his injuries and in 2007, the workers compensation insurer brought proceedings in the District Court of NSW against the negligent driver under s 151Z *WCA* (the recovery proceedings).

On 3 October 2007, Truss DCJ entered judgment for the workers compensation insurer in the sum of $91,096.79, comprising $82,299.46 (weekly payments and out of pocket expenses) and $8,797.33 (interest). She notionally assessed the damages to which the claimant would have been entitled in a claim in negligence against the driver as being $196,800, comprising: $65,556 for past economic loss; $82,215 for future economic loss; $22,123 for past out of pocket expenses; $15,000 for future out of pocket expenses; and $11,906 under *Fox v Wood.* That became the limit of the worker's compensation insurer's statutory indemnity against the plaintiff and the plaintiff refused to make any further payments.

The claimant then claimed damages under the CTP Scheme, but the plaintiff applied for this claim to be exempted from assessment by CARS on the basis that it was unsuitable for CARS assessment. However, on 30 July 2018, the CARS Assessor refused that application. The plaintiff re-agitated its application at the commencement of the CARS Assessment and pressed its submissions that there was an issue estoppel against the claimant arising from the recovery proceedings.

On 31 August 2018, the Claims Assessor decided that: (1) there was no issue estoppel or abuse of process that would prevent his making, or otherwise affect, the assessment because the claimant was not regarded as "privy" with respect to the recovery proceedings; and (2) he assessed the claimant's damages at $1,548,026.45.

On 22 May 2019, the plaintiff applied to the Supreme Court of NSW for administrative review of the decision of the CARS Assessor, on 3 grounds: (1) alleged errors regarding issue estoppel and abuse of process; (2) alleged error in relying on a concession made by the plaintiff with respect to the neck injury; and (3) alleged error in determining past and future economic losses. The Workers Compensation Nominal Insurer was granted leave to intervene in the proceedings.

The proceedings were heard by ***Adamson J.***

In relation to ground (1), her Honour stated that the matter turned on the question of whether, and in what circumstances, there is a *res judicata* or *issue estoppel* that has the consequence that the result of a worker's action in tort against a wrongdoer affects, or is affected by, the result of the determination of the employer's statutory indemnity order.

She considered a number of authorities and noted that with the exception of the decision in *Manners v Transfield*, there had not been found to be an issue estoppel or res judicata on the basis of sufficient privity of interest between the worker and the employer. She stated:

> 58. The principles established by *Ramsay v Pigram* were applied by the High Court in *Tomlinson v Ramsey Food Processing* on which the Claimant relied….
>
> 60. The High Court in *Tomlinson v Ramsey Food Processing* held that the orders made by the Federal Court did not create an issue estoppel as the worker was not a party to the proceedings and the Ombudsman did not represent the legal interests of the worker so as to give rise to an estoppel. The Ombudsman had been enforcing the award pursuant to his statutory functions and was not enforcing the worker's entitlements on his behalf.

Her Honour regarded this matter as being similar to *Tomlinson,* as the workers compensation insurer was enforcing the statutory indemnity in its favour when it brought the recovery proceedings. It was not bringing a claim on behalf of the claimant and its interests were distinct from his. The issues in the recovery proceedings were materially different from the issues involved in the claims assessor's assessment of his damages, as were the parties. Although both matters involved a consideration of his damages, in the recovery proceedings the assessment was notional and was assessed at the date of judgment in those proceedings, which were within the control of the workers compensation insurer.

Applying the principles in *Ramsay v Pigram*, she found that there is no, or insufficient, privity of interest between the claimant and the workers compensation insurer. She summarised the principles of *res judicata* and issue estoppel, in which "party" includes a "privy" to the party, namely:

> (1) parties to proceedings are bound by judgments between them and essential issues decided in proceedings to which they are parties;
>
> (2) where a party could have made a claim against the other party to proceedings, but did not, the party will not be permitted, in further proceedings, to raise the claim since this would amount to an abuse of process: *Port of Melbourne Authority Pty Limited v Anshun* (1981) 147 CLR 589;

(3) as between the same parties, an issue estoppel will arise in subsequent proceedings on a different cause of action to prevent re-litigation of an issue already determined between them in previous proceedings: *Tiufino v Warland* (2000) 50 NSWLR 104;

(4) persons who were not parties to such proceedings are not affected except to the extent that a party to such proceedings is estopped from re-litigating in new proceedings against a different party an issue on which it was unsuccessful in previous proceedings since this, too, would amount to an abuse of process: *Rippon v Chilcotin* (2001) 53 NSWLR 198.

Accordingly, she rejected ground (1) and held that the claimant was not bound by the notional assessment of damages in the recovery proceedings as he was neither a party nor privy to a party.

Her Honour also rejected ground (2) and found that the CARS Assessor's approach did not reveal any denial of procedural fairness or other error of law. He considered the plaintiff's arguments, submissions and evidence to the effect that the claimant suffered, at best, a transient injury to his neck as a result of the accident and rejected them, preferring instead the evidence of Drs Coyne and Day, not only as to impairment but also as to causation.

Her Honour also rejected ground (3) and found that the CARS Assessor had adopted a blended approach by discounting the capitalised sums for past and future economic loss calculated by reference to weekly figures. His reasons sufficiently explained the decision to assess damages in that way and he sufficiently complied with s 126 when the reasons are read fairly as a whole.

Accordingly, she dismissed the summons and ordered the plaintiff to pay costs.

District Court of New South Wales

Court refuses leave to revoke an election to claim lump sum compensation for permanent impairment under s 151A WCA

Glogoski v Workers Compensation Nominal Insurer [2019] NSWDC 154 – Russell SC DCJ – 3 May 2019

Background

In 1997, the plaintiff commenced employment with Ansett Australia as a Freight Handler. On 28 February 2000, he suffered a significant lower back injury and he underwent surgery on 8 September 2000. On 21 August 2001, he elected to receive compensation under s 66 WCA. That election was irrevocable, except with leave of the Court under s 151A (4) WCA and the Court's power to grant leave was found in s 151A (5) WCA, which provided:

If,

(a) a person elects to claim permanent loss compensation in respect of an injury; and

(b) after the election is made, the injury causes a further material deterioration in the person's medical condition that, had it existed at the time of the election, would have entitled the person to additional permanent loss compensation; and

(c) at the time of the election, there was no reasonable cause to believe that the further deterioration would occur,

the person may, with the leave of the court and on such terms (if any) as the court thinks fit, revoke the election and commence proceedings in the court for the recovery of damages in respect of the injury.

In October 2001, the plaintiff assisted to lift a heavy weight at work and suffered severe lower back pain and he did not return to work following this incident. On 8 February 2019, he applied for leave to revoke the election dated 21 August 2001.

Judge Russell SC noted that the leading authority in relation to the meaning of s 151A *WCA* is the decision of the High Court in *State of New South Wales v Taylor* [2001] HCA 15; (2001) 204 CLR 461, in which the majority judgment summarised the applicable test as follows:

> 4. Section 151A (5) (c) requires the court to determine whether it would be unreasonable for a person to believe that the evidence before the court, concerning the applicant's condition at the time of election, demonstrated that the further deterioration would occur. The reasonable cause for belief is determined by reference to the evidence before the court concerning the applicant's condition at that time and expert opinion as to what the medical prognosis for that condition was at that time. What the applicant knew or ought to have known is irrelevant. If the court determines that it would not be unreasonable for a person to believe that the further deterioration would occur, the application for revocation fails…
>
> 11. It follows that the belief of the injured person, reasonable or otherwise, is not the criterion on which leave to revoke depends. For the same reasons, the belief of a reasonable person in the position of the injured person is irrelevant…
>
> 13. Hence it is the court's view of all the evidence and not the injured person's belief, reasonable or otherwise, that is decisive. On this view, the test for the court is: given the medical condition of the applicant at the time of the election and the expert opinions as to its prognosis at that time, would it be unreasonable for a person to believe that the condition would further deteriorate as it had? The applicant for leave must prove a negative. He or she must show that it would be unreasonable for a person to hold that belief. The applicant will prima facie discharge that onus by tendering evidence indicating that such a belief could not be reasonably held. If a prima facie case is established, the employer has the evidentiary burden of showing that there exists another body of evidence that indicates a contrary conclusion. Ultimately, it is for the court to determine whether "there was no reasonable cause to believe that the further deterioration would occur" in accordance with the test that we have formulated.
>
> 14. In determining the issue of "no reasonable cause to believe", the court does not determine whether, as a matter of probability, there was cause to believe that the further deterioration would occur. To approach the section in that way is to invert the negative proposition that it contains. On the evidence, two opposite beliefs may have been reasonably open as to whether the further deterioration would occur. If there was, the application for revocation fails. If on the whole of the evidence, whatever its source or sources, the court concludes that it would not be unreasonable to believe that the further deterioration would occur, the applicant fails. It is irrelevant that, on the same body of evidence, it would also be reasonable to believe that the further deterioration would not occur. In a case where the evidence admits of two reasonable, but opposing, conclusions, the applicant has failed to show that there was no reasonable cause to believe that the further deterioration would occur.

Therefore, the Court needed to consider the plaintiff's medical condition at the time of the election and the expert opinion regarding the prognosis at that time.

His Honour found that when the election was made, the plaintiff was permanently unfit for work involving heavy or moderately heavy lifting; he was doing work involving heavy lifting, even though he was under medical advice not to; he had begun to experience the recurrence of symptoms in June 2001; and he had lumbar pain and restriction of movement with some symptoms down the back of the left leg and he was taking Valium for sedation and quinine for left leg cramps. In relation to the expert opinion regarding prognosis, he found that: there was potential for increase in the level of permanent impairment in the back and permanent loss of use in each leg; the prognosis was guarded; no doctor suggested that the plaintiff would improve; and all doctors said that the plaintiff was permanently unfit for work involving heavy lifting, and that he should not do such heavy work.

He found that the plaintiff failed to discharge his onus to prove that there was no reasonable cause to believe, based upon the findings of the doctors and their prognoses, that further deterioration would occur. Accordingly, he dismissed the application with costs.

WCC Presidential Decisions

Proof of injury under s 4 (b) (ii) WCA

Cathay Pacific Airways Pty Ltd v Ralph [2019] NSWWCCPD 21 – Deputy President Michael Snell – 24 May 2019

Background

The worker commenced employment with the appellant as a commercial pilot on 17 January 2011. He had a prior history of injury to his neck, back and kidney while employer by a different entity on 23 January 1998. He was off work until 1 May 1998 and then resumed flying duties. On 24 July 2006, he underwent surgery to decompress the right S1 nerve root and had further surgery to repair a Dural tear on 28 July 2006 and resumed flying on 8 December 2006.

In 2011, the worker suffered worsening back symptoms and on 15 September 2011, he underwent a laminectomy at the L5/S1 level. On 30 September 2011, he had further surgery *"to deal with fragments of discs still protruding"*. He then suffered a locked knee during rehabilitation and required an arthroscopic menisectomy and his recovery was further complicated by a staph infection, which required debridement of the L5/S1 disc and an instrumented fusion on 23 November 2011. He last worked for the appellant on 9 September 2011. The appellant paid him wages until 24 June 2013, but then terminated his employment effective from 13 November 2013.

The worker discontinued 4 previous sets of WCC proceedings (in 2016, 2017 (x 2) and 2018). In this ARD, he alleged that he suffered a disc prolapse at the L5/S1 level when he twisted around in the pilot's seat with his left arm to retrieve a log book that was located behind the seat and that this injury *"manifested sufficiently"* from that activity or *"was the final result of workplace activity over some time"*, including sitting for prolonged periods, frequent twisting and rough landings. He claimed continuing weekly payments from 24 June 2013, s 60 expenses, domestic assistance under s 60AA *WCA* and lump sum compensation for injuries to the lumbar spine and a psychological injury.

On 27 November 2018, ***Arbitrator Brett Batchelor*** issued a COD. He entered an award for the respondent regarding the allegation of frank injury on 9 September 2011, but found that the worker had suffered an aggravation, acceleration, exacerbation or deterioration of

a pre-existing disease from 17 January 2011 to 9 September 2011 (deemed date of injury being 9 September 2011) and that employment was a substantial contributing factor to that injury. He held that the worker was totally incapacitated and awarded him weekly compensation from 24 June 2013 to 12 March 2014 and 60 expenses for the lumbar spine (excluding the cost of surgery on 9 September 2011). He entered an award for the respondent in respect of all other s 60 expenses and remitted the matter to the Registrar for assessment of permanent impairment of the lumbar spine.

Appeal

The appellant appealed on 4 grounds, namely: (1) The Arbitrator erred in fact and law finding that the worker suffered injury to his back/lumbar spine as a result of the nature and conditions of employment with the employer between 7 January 2011 and 9 September 2011; (2) The Arbitrator erred in fact and law in relying on the opinion of Dr Donald Dingsdag, who is not medically qualified, when finding that the worker suffered injury to his back/lumbar spine as a result of the nature and conditions of employment with the employer; (3) The Arbitrator erred in fact and law in failing to properly consider whether employment was a 'substantial contributing factor' pursuant to s 9A and/or s 16 of the 1987 Act; and (4) The Arbitrator erred in law in failing to give adequate reasons as to what aspect of the 'nature' and the 'conditions' of the worker's duties gave rise to injury.

Deputy President Michael Snell determined the appeal on the papers and considered grounds (1) and (2) together. He stated (citations excluded):

> 45. The worker needed to prove that the work duties were a contributing factor to the alleged aggravation of lumbar spinal disease. This was an issue, at least in part, of medical causation, that did not fall within Dr Dingsdag's expertise. The attempt to rely on Dr Machart's opinion cannot succeed, as it involves, for reasons given above, a misreading of the doctor's opinion when his report is read as a whole. This is not, like *Bes* (to which the worker refers) a matter where medical experts find a possibility reasonably acceptable, and a court or tribunal may look to the whole of the facts to consider whether the possibility is established. Accepting, as the Arbitrator did, that there was an increase in lumbar symptoms during 2011, the worker cannot succeed in establishing the alleged 'disease' injury. The medical evidence does not deal with the issue of whether the worker's duties as a pilot contributed to that symptomatic change. The worker cannot, on the evidence, establish that the employment was a contributing factor to the aggravation. The Arbitrator's finding on this issue was not available on the evidence, and involved error.

He noted that the Arbitrator referred to a decision of O'Grady DP in *Kara Australian Integrated Suppliers t/as Guven Kebab Factory*, and he stated:

> 46. …In *Kara v Australian Integrated Suppliers t/as Guven Kebab Factory* O'Grady DP held at [48] that an increase in symptoms in the worker's neck in the presence of significant pre-existing degenerative changes in the neck, must constitute a finding that injury to the neck was received at the relevant time." (footnote omitted)
>
> 47. Simply stated in this fashion, the decision appears to be stated as authority that an increase in symptoms, in the presence of significant degenerative changes, must of itself be consistent with a finding of injury. That proposition cannot be correct. *Kara* involved a worker who fell in the course of his employment, and thereafter suffered from increased neck symptoms. The Arbitrator made findings both that the worker did not injure his neck in that incident, and that the increase in neck symptoms resolved within a period of three years. The findings were attacked as being contradictory. On appeal, O'Grady DP said that "acceptance of the manifestation of such symptoms must represent a finding that an injury within the

meaning of s 4 of the 1987 Act had been received". The reference to that decision, in the context of its own facts, makes sense. The decision in *Kara* was not relied on by either of the parties in this appeal. I refer to it for the sake of completeness. It is not of importance to the outcome of this appeal.

Snell DP upheld grounds (1) and (2) and found that the worker only succeeded before the Arbitrator based upon the disease provisions. However, as he found that the evidence could not support a finding that employment was a contributing factor to the symptomatic aggravation in 2011, the more stringent test under s 9A *WCA* could not be satisfied.

Accordingly, he revoked the COD and entered an award for the respondent.

Burden of proof – Briginshaw standard of "comfortably satisfied" does not apply to a determination of injury under s 4 WCA

Elsamad v Belmadar Pty Ltd [2019] NSWWCCPD 22 – Deputy President Elizabeth Wood – 28 May 2019

Background

On 5 February 2015, the appellant allegedly injured his neck, back and right shoulder as a result of a fall at work. However, the respondent accepted liability for the shoulder injury but disputed injury to the neck and back. The worker claimed lump sum compensation for permanent impairment of his neck, back and right upper extremity and medical and related treatment expenses, including the costs of cervical fusion surgery in 2016.

Arbitrator Rachel Homan conducted an arbitration hearing and she issued a COD, in which she held that the appellant had injured his neck, but that she was not comfortably satisfied that he had injured his back as a result of the fall in 2015. She entered an award for the respondent with respect to the injury to the lumbar spine and held that the cervical fusion surgery was reasonably necessary as a result of the injury. She remitted the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the cervical spine and right upper extremity.

The appellant appealed on 6 grounds, namely: (1) error of law in failing to determine the question of injury on the balance of probabilities and instead applying a more onerous standard of proof (needing to be "comfortably satisfied"); (2) error of mixed fact and law by overlooking, and giving insufficient weight to the contemporaneous evidence that the appellant injured his lumbar spine on 5 February 2015; (3) error of mixed fact and law by overlooking the evidence that the injury involved a high velocity impact of the appellant's back against a brick wall, which should lead to a common sense conclusion that the kind of injury would cause injury to the lumbar spine; (4) error of mixed fact and law in basing her determination on the bald assertion by Dr Pope that the appellant's low back symptoms were not related to the injury, without reconciling that opinion with the contemporaneous evidence, the opinions of Dr Ng, Dr New and Dr Chow, the history provided by the appellant to the medical practitioners, and the appellant's own evidence; (5) error of mixed fact and law by failing to acknowledge the appellant's own statement evidence that prior to the injury his back was "manageable", that he injured his back in the incident on 5 February 2015, he had significant pain in his back when he arrived home, and his back pain "dramatically" and "considerably" increased, and (6) error of mixed fact and law by failing to provide proper reasons for preferring the unexplained opinion of Dr Pope over the contemporaneous evidence, the opinions of Dr Ng, Dr New and Dr Chow, the history given to the medical practitioners and the appellant's statement.

Deputy President Elizabeth Wood decided to determine the appeal on the papers. There were no threshold issues.

In relation to ground (1), Wood DP discussed the phrase "comfortable satisfaction", which has been adopted by decision makers in various tribunals and found its origin in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 (*Briginshaw*). She stated:

> 132. In his consideration of the words used in the statute, Rich J said:
>
> > The phrase 'satisfy itself, so far as it reasonably can' obviously reflects the influence of the common expression 'reasonable satisfaction.' In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and **a comfortable satisfaction** [my emphasis] that the tribunal has reached both a correct and just conclusion.
>
> 133. Following a lengthy examination of the legal history and development of the common law standards of proof, Dixon J (as his Honour then was) made the following observations (citations omitted):
>
> > Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency. Thus, *Mellish* L.J. says: *'No doubt the court is bound to see that a case of fraud is clearly proved, but on the question at what time the persons who have been guilty of that fraud commenced it, the court is to draw reasonable inferences from their conduct."*
>
> 134. Put simply, while *Briginshaw* did not establish a third standard of proof, in circumstances where a serious allegation requires proof, a more careful approach must be taken in reaching the necessary conclusion that the allegation is made out…
>
> 136. The expression by Rich J in *Briginshaw* of the term "comfortable satisfaction" was used in the context of the application of the civil standard of proof of a fact in a matter that, according to the social mores of the time, was a serious allegation. In the circumstances of this case, where there had been no attack on the appellant's credit, the mechanism of injury was accepted by the Arbitrator, and the respondent's case was that the medical evidence did not support that the appellant had suffered an injury because there had been no pathological change, the Arbitrator was not required to reach a "comfortable satisfaction" in the circumstances in which Rich J adopted the term.

Wood DP that by finding that she was not "comfortably satisfied", the Arbitrator was applying a higher standard of proof than the circumstances required, which the appellant failed to meet. She held that the Arbitrator erred in requiring herself to be so satisfied.

In relation to ground (2), Wood DP relied upon the decision of the Court of Appeal in *Pollard v RRR Corporation Pty Ltd* [2009] NSWCA 110 per McColl JA (Ipp JA and Bryson AJA agreeing) at [66], and stated:

> 148. Where it is apparent from a decision that the decision maker made no analysis of the evidence competing with evidence apparently accepted, and gave no explanation for rejecting it, it is apparent that the process of fact-finding has miscarried.

Wood DP considered what is required to prove an injury in the nature of an aggravation of a disease under s 4 (b) (ii) *WCA*. She found that the Arbitrator's reasoning process was overshadowed by an attempt to find corroborating pathology in circumstances where the appellant's case was that there had been an aggravation of a lumbar condition. The appellant complained that his lumbar symptoms were made worse by the fall and there was corroborating evidence to support that complaint. It was incumbent on the Arbitrator to assess the weight of that evidence against the competing evidence and the rejection, or lack of consideration of the probative value of that evidence discloses error. She held, relevantly:

> 155. By disregarding that evidence, it also suggests that the Arbitrator required evidence other than the appellant's account of the effects of the injury, and the evidence that supported it, to satisfy herself on the question of injury. That is, the appellant's evidence "could never suffice to establish injury." By implication, the Arbitrator attached a higher standard than that required to determine the fact that the lumbar spine was injured.

Accordingly, grounds (1) and (2) were made out and it was not necessary to determine the remaining grounds.

Wood DP revoked the Arbitrator's determination of injury to the lumbar spine, but she held that the alleged lack of probative value of Dr Pope's opinion regarding causation was not raised before the Arbitrator. She stated, relevantly:

> 158. …It is not a matter for me to comment as to whether Dr Pope's opinion as stated in his report dated 23 March 2015 ought to have been accepted, in circumstances where an argument as to its probative value was not made at the arbitration. It is also not desirable to reach a conclusion as to whether the evidence not considered in the Arbitrator's reasoning process was sufficient, in the context of the balance of the evidence, to establish that the lumbar spine was injured as alleged.

Accordingly, she remitted the matter to a different Arbitrator for re-determination of this issue and revoked the remitter to the Registrar for referral to an AMS.

No entitlement to compensation under s 67 WCA where the only claim for lump sum compensation made before 19 June 2012 was resolved by complying agreement – a resolved claim cannot be amended in order to preserve rights to benefits under the former s 67 WCA

Yildiz v Fullview Plastics Pty Ltd [2019] NSWWCCPD 24 – President Phillips DCJ – 30 May 2019

His Honour held that an entitlement to compensation under s 67 *WCA* was not preserved by cl 10 of Pt 1 of Sch 8 of the *2016 Regulation* because the only claim for lump sum

compensation that was made before 19 June 2012 was resolved by a complying agreement and was not capable of amendment in order to preserve it.

Background

On 1 March 2004, the appellant injured his right shoulder, hip and knee at work. On 6 June 2005, he suffered an aggravation of his right shoulder injury and he underwent surgery on 31 May 2006. On 9 October 2006, he allegedly suffered a consequential injury to his left shoulder.

On 15 January 2007, the appellant claimed lump sum compensation under s 66 *WCA* and on 11 April 2007, a complying agreement was entered for 7% WPI (right shoulder).

On 30 May 2017, the appellant made a further claim under s 66 *WCA* for 18% WPI and he also claimed compensation under s 67 *WCA.* However, on 25 July 2017, the insurer declined these claims.

Arbitrator Rachel Homan conducted a conciliation and arbitration hearing on 6 November 2018. By consent, the ARD was amended to include the injury on 1 March 2004 and the disputes under s 66 WCA were remitted to the Registrar for referral to an AMS.

On 6 November 2008, a reconsideration MAC assessed 2% WPI with respect to the 2004 incident (2% WPI for the right shoulder and 0% for the left shoulder) and 15% WPI with respect to the 2005 incident (6% for the right shoulder and 10% for the left shoulder).

On 7 December 2018, the Arbitrator issued a COD, which awarded the appellant further compensation under s 66 *WCA* for 17% WPI, but she entered an award for the respondent regarding the claim under s 67 *WCA* on the basis that the savings and transitional provisions to the 2012 amending Act did not preserve that entitlement.

The appellant appealed against the Arbitrator's determination and alleged that she erred by: (1) determining that he was estopped from making a further claim under s 67 *WCA*; and (2) not applying and following the Presidential decision in *Wagg* and in distinguishing that decision from this matter.

President Phillips DCJ determine the appeal on the papers.

The appellant argued that the Arbitrator erred in not applying the decision in *Wagg,* because the matter was factually similar and that decision offers binding guidance as to the determination of the issue as to the s 67 entitlement in this matter, such that there must be an award in his favour under s 67 having regard to the determination in the MAC.

However, the respondent submitted that the Arbitrator did not err and that the appeal offends s 352 (5) *WIMA* as the grounds of appeal were not elucidated. It submitted that the Arbitrator distinguished this matter from the decision in *Wagg* because in this matter, a claim was made and resolved before 19 June 2012, and in *Wagg* there was an unresolved claim. In *Sukkar v Adonis Electrics Pty Ltd* it was found that there is a difference between a resolved claim and an unresolved claim.

His Honour stated that although ground (1) referred to the appellant being *"estopped from making a further lump sum claim under 67…",* the principle of estoppel was neither argued nor decided by the Arbitrator. Rather, the Arbitrator held that the original claim was resolved by the complying agreement dated 17 April 2007, when there was no entitlement under s 67 *WCA*, and that the appellant made a further claim for lump sum compensation (including a claim under s 67 *WCA*) in March 2017.

He held that the Arbitrator erred by finding that the current claim was *"a further lump sum compensation claim under s 67 of the 1987 Act", as* cl 11 defines a *"lump sum compensation claim"* as a claim *"specifically seeking compensation under section 66 of the*

1987 Act". This was not the correct approach, but he found that this error did not affect the outcome of the appeal for reasons that included the following:

- Cl 15 of Pt 19H of Sch 6 *WCA* protects entitlements that are the subject of claims made before 19 June 2012 from the general application of cl 3 of Sch 6 of Pt 19H *WCA.* This protection is *"liable to be affected by regulation"* and this clause must be read subject to cl 10 of Sch 8 of Pt 1 to the *2016 Regulation.*
- Cl 10 provides that the amendments introduced by Sch 2 to the 2012 amending Act extend to a claim for compensation made before 19 June 2012, but not to a claim that specifically sought compensation under s 66 *or* s 67 of the 1987 Act. This was confirmed by the High Court in *Goudappel.*
- In *Wagg*, President Keating said that the High Court in *Goudappel "did not limit the exclusion from the operation of cl 10 (cl 11 as it then was) to one set of proceedings for s 66 compensation, but expressed the exclusion as occurring when there has been a claim before 19 June 2012." (emphasis included in original)* As Mrs Wagg made a claim that specifically sought lump sum compensation before 19 June 2012, which remained on foot and was unresolved, the 2012 amendments to ss 66 and 67 made by the 2012 amending Act did not apply to her and her entitlement to s 67 benefits was preserved.
- This finding was consistent with the Court of Appeal's decision in *Sukkar;* that if there is an unresolved claim that was specifically for lump sum compensation for permanent impairment that was made before 19 June 2012, the 2012 amending Act did not apply.
- It was open to the Arbitrator to distinguish the current matter from the decision in *Wagg* and her finding on this matter disclosed no error.
- The claim for s 67 benefits was a new and separate claim, to the original claim for s 66 benefits and further claim for s 66 benefits. It materialised on 30 March 2017 and was made in respect of the same injury with the same pathology as the original s 66 claim that was resolved by complying agreement in 2007. Therefore, the s 67 claim was made after 19 June 2012 and the amendments made by Sch 2 to the *2012 amending Act* apply - unless an exemption applies.
- The s 67 claim is not a claim for compensation that was capable of payment under *WCA* and the appellant cannot seek to attach the current impairment assessment of 17% to his original (resolved) claim under s 66 *WCA* in an attempt to preserve his entitlement to s 67 benefits.
- If Parliament intended that entitlement to s 67 benefits extended to worker's in the appellant's current position it would have expressly provided for this in the savings and transitional provisions. This construction of the savings and transitional provisions is consistent with the language and purpose of the provisions of the 2012 amending Act and the Court of Appeal's decision in *Sukkar*.

Accordingly, he dismissed the appeal.

WCC – Arbitrator Decisions

Application for assessment by an AMS dismissed because there was no medical dispute under s 321 WIMA

Lympike Pty Ltd v Wehbe [2019] NSWWCC 158 – Arbitrator Michael Wright – 3 May 2019

Background

On 25 January 2008, the worker aggravated a pre-existing injury to his lumbar spine at work. Radiological investigations indicated a chronic disc injury at the L4/5 level and evidence of an old laminectomy at the L5 level in 1985 and there was a disc protrusion on the left L5 nerve root. On 10 July 2009, he underwent an L4/5 decompression, laminectomy, discectomy and rhizolysis, but his left leg pain did not resolve.

From 2010 onwards, the 2008 aggravation was the subject of several WCC proceedings, which included claims for lump sum compensation under s 66 WCA. On 18 November 2011, Dr McGroder issued a MAC, which assessed 15% WPI in respect of the lumbar spine injury (after a 1/10 deduction for pre-existing impairment). However, the employer appealed against that MAC and on 13 March 2012, a MAP revoked the MAC. It applied a deductible of 1/3 for pre-existing impairment and issued a new MAC that assessed 12% WPI due to the 2008 aggravation. On 5 August 2016, the worker underwent fusion surgery at the L4/5 level, after which his lumbar pain improved but did not completely resolve.

In 2017, the worker applied for a referral to an AMS to determine whether the degree of permanent impairment was fully ascertainable under s 319 (g) *WIMA*. On 15 June 2017, Dr Beer issued a MAC, which determined that the degree of permanent impairment would not become fully ascertainable until "three to four months". On 20 October 2017, the insurer qualified Dr Darveniza, who found that maximum medical improvement had been reached and he assessed 27% WPI (DRE Lumbar Category 4 = 22%, which he combined with 3% for residual radiculopathy + 2% for a second operation + 1% for a third operation).

On 12 February 2018, the insurer qualified Dr Machart to comment on the potential permanent impairment. He opined that there would be a minimum of 23% WPI, but that persisting radiculopathy would attract a further 3% WPI and impairment of activities of daily living could not be assessed until maximum medical improvement had been reached and scarring could not be assessed without viewing the scar.

On 15 May 2019, Dr Darveniza further reported to the employer's solicitor that he elected not to apply a deductible for the 1985 injury, but that a standard 1/10 deduction would be reasonable and he therefore assessed 24% WPI.

On 3 January 2019, the employer's solicitors wrote to the worker's solicitors, stating that they intended to apply to the WCC for an assessment by an AMS to determine whether the degree of permanent impairment was fully ascertainable and whether it is more than 20% for the purposes of satisfying the threshold under s 39 *WCA.* While they noted that Dr Darveniza opined that the degree of permanent impairment was fully ascertainable and was 27%, they also stated that the insurer had decided that the 1/10 deductible was inappropriate and that a 1/3 deductible should be applied and that the degree of impairment resulting from the injury is not greater than 20% WPI.

On 14 January 2019, the worker's solicitors replied that there was no threshold dispute regarding permanent impairment as the only post-operative assessment was that of Dr Darveniza, who assessed 27% WPI.

On 25 March 2019, after the employer's solicitors lodged the current application, the worker's solicitors wrote to them accepting Dr Darveniza's WPI assessment and stating

that the worker opposed the matter being referred to an AMS as there was no dispute and the proceedings should be discontinued.

On 3 April 2019, the Registrar directed the employer to file and serve submissions addressing: (a) whether there was a medical dispute; and (b) whether in the absence of a medical dispute, the proceedings should be dismissed under s 354 (7A) *WIMA.*

On 11 April 2019, the employer's solicitors advised the Registrar that for the reasons set out in their letter to the worker's solicitors dated 3 January 2019, the employer does not accept Dr Darveniza's assessment, and that they were simply trying to ascertain whether the worker should continue to be exempt from the operation of s 39 *WCA* either because he has still not reached maximum medical improvement or he has a degree of permanent impairment of at least 21% WPI.

On 29 April 2019, the worker's solicitors submitted that the only dispute is apparently between the employer and/or the insurer and Dr Darveniza and that there is no medical dispute.

Arbitrator Michael Wright decided to determine the matter on the papers. He referred to the definition of "medical dispute" in s 319 *WIMA* and rejected the employer's submission that there was a medical dispute on foot.

He held that there was no medical dispute between the parties that could be capable of referral for assessment by an AMS under *WIMA.* He held that the evidence of Dr Darveniza and Dr Machart clearly indicates that the worker has suffered a minimum of 23% WPI and that he would therefore be exempt from the application of s 39 *WCA.* He held, relevantly:

> 34. Section 321 of the 1998 Act provides for referral of a medical dispute to an AMS. A medical dispute is defined in s 319 of the 1998 Act as, among other things, a dispute "between a claimant and a person on whom a claim is made …about…the degree of permanent impairment of a worker as a result of an injury." There is no medical dispute, pursuant to s 319 of the 1998 Act. Indeed, the worker accepts the only medical evidence attached to the Application in respect of his degree of permanent impairment. That is, the worker accepts Dr Darveniza's assessment of whole person impairment in respect of the lumbar spine which exceeds 20%. While the employer may seek to cavil with Dr Darveniza's assessment, it has not explained how its disagreement with the doctor's assessment constitutes a "medical dispute" for the purposes of s 319 of the 1998 Act.
>
> 35. Even if it could be argued that there is a "medical dispute", the employer does not have any medical evidence to support its position that Dr Darveniza's assessment should not be accepted. The assertion that Dr Darveniza should have assessed the worker and applied a deductible amount of one third without medical evidence in support is not accepted. The employer or insurer is not qualified to step in the shoes of an independent medical expert and make an assessment of a worker's degree of permanent impairment.

Accordingly, he dismissed the proceedings under s 354 (7A) (b) *WIMA.*

Cl 28C of Pt 2A of Sch 8 of the 2016 Regulation does not entitle a worker to weekly compensation before the date on which an AMS certified that he had not reached maximum medical improvement – Hochbaum applied

Strooisma v Coastwide Fabrications and Erections Pty Ltd [2019] NSWWCC 173 – Arbitrator Paul Sweeney – 16 May 2019

Background

On 23 September 2003, the worker suffered injury to his lumbar spine at work. The insurer accepted liability and paid weekly compensation for all periods of incapacity. In 2008, he was paid compensation under s 66 *WCA.* He was an existing recipient of weekly payments for the purposes of the 2012 amending *Act*.

On 12 September 2017, the insurer issued a notice under s 39 *WCA* and advised the worker that his weekly payments would cease on 25 December 2017.

In November 2017, 2 neurosurgeons recommended that the worker should undergo further surgery at the L5/S1 level and on 18 July 2018, he underwent an interbody fusion at that level.

On 12 October 2018, an AMS certified that the worker had not reached maximum medical improvement and that the degree of permanent impairment was not fully ascertainable. The insurer resumed weekly payments from the date of that MAC.

On 21 February 2018, ***Arbitrator Paul Sweeney*** conducted a conciliation and arbitration. The issue for determination was whether the worker was entitled to weekly payments from 26 December 2017 to 11 October 2018.

Referral of questions of law to the President under s 351 WIMA

During conciliation, counsel for the insurer applied to refer the following questions of law to the President:

> *(1) does the Commission lack jurisdiction to determine whether a worker is entitled to weekly compensation on the basis of s 38 of the Workers Compensation Act 1987?*
>
> *(2) Does cl 28C of Pt 2A, Sch 8 to the 2016 Regulation operate to exclude the application of s 39 of the 1987 Act only from the date one of the conditions in clause 28C (a) or (b) is satisfied or from some other date?*

However, before he determined this matter, the President delivered a decision in *RSM Building Services Pty Limited v Hochbaum* [2019] NSWWCCPD15 (*Hochbaum*), which concerned the application of s 39 *WCA*, which rejected Arbitrator Sweeney's reasoning in *Kennewell*.

The Arbitrator declined to refer the proposed questions of law to the President. He held that the decision in *Hochbaum* authoritatively answered question (2) and the issue of the Commission's jurisdiction to make awards of weekly payments during the third entitlement period under s 38 *WCA* is irrelevant to the outcome in this matter. In relation to question (1), he noted that this issue is currently before the Presidential Unit in the matter of *Whitton* and if necessary, a Presidential member will make an authoritative ruling of it in that case. In any event, that question is not novel and numerous decisions of arbitrators and presidential decisions address it, including *NSW Trustee and Guardian on behalf of Robert Birch v Olympic Aluminium Pty Ltd* [2016] NSWWCCOD 54. While there is some debate about whether the issue has been addressed by the Court of Appeal, it is not necessary to consider those cases in this matter.

Operation of cl 28C

In *Hochbaum*, the President held that there was no entitlement to weekly compensation between the expiry of 260 weeks and the certification of more than 20% permanent impairment. He found that the language of s 39 (2) strongly indicates the present tense application and, if it is speaking in the present tense, it could not apply until the statutory precondition of more than 20% permanent impairment was satisfied. The Arbitrator stated:

> 26. The language of Cl 28C is similar to that utilised in s 39(2). Significantly, it also says that s 39(1) "does not apply" if an assessment of permanent impairment "is pending". Ms Tronson argued in her written submissions that the language of the clause was "constantly speaking in the present". That submission conforms with the President's reasoning in *Hochbaum*. It must be accepted. It follows that my reasoning in *Kennewell* was wrong and that decision cannot be followed.
>
> 27. Certainly, there are contextual differences between the two provisions. It is much easier, for example, to characterise Cl 28C as a beneficial provision for the reasons which I gave in *Kennewell*. Ultimately, however, both provisions address different aspects of the same statutory purpose: to establish the circumstances in which compensation is payable beyond the period limited by s39(1).
>
> 28. To hold that they operate differently would give rise to anomalous outcomes… The legislature cannot have intended such a capricious result.
>
> 29. Accordingly, I hold that Cl 28C on its true construction does not entitle the applicant to weekly compensation before the date on which the AMS certified that his impairment was not fully ascertainable and that he had not reached maximum medical improvement.

Accordingly, he entered an award for the respondent.

Application for reconsideration of a MAC refused

Cooper v Coca Cola Amatil (Aust) Pty Ltd [2019] NSWWCC 176 – Arbitrator Carolyn Rimmer – 20 May 2019

Background

The worker injured his left knee at work on 31 October 2018 and suffered a deep vein thrombosis. He claimed lump sum compensation for 29% WPI (comprising assessments from Dr Berry (9% WPI) and Dr Niesche (22%)).

The dispute was referred to Dr Ho and Dr Crane for assessment. Dr Ho assessed 8% WPI and Dr Crane assessed 3% WPI in a MAC dated 20 December 2018.

On 17 January 2019, the worker lodged an application to appeal against the decisions of the AMS, but the appeal was rejected because no submissions were attached.

On 23 January 2019, Arbitrator Annette Farrell issued consent orders, which awarded the worker compensation under s 66 *WCA* for 13% WPI, based upon the MAC's.

On 18 March 2019, the worker wrote to the Registrar seeking reconsideration and rescission of the COD dated 23 January 2019, under s 350 (3) *WIMA*. He argued that he could not complete submissions in support of the rejected appeal without the further medical evidence that he intended to obtain and that he prepared these and lodged a further appeal application as expeditiously as possible after he received further evidence. However, the respondent opposed the application for reconsideration of the COD.

On 10 April 2019, the worker lodged a further application to appeal against the decision of the AMS, which alleged that Dr Crane's MAC contains a demonstrable error and was based on incorrect criteria because: (1) he did not explain in detail how he came to the conclusion that there was no oedema and real discolouration of the left lower extremity; (2) he did not mention to worker's reported history relating to the injury; (3) he made no mention of enquiring whether the worker wore elastic stockings in an attempt to control oedema; and (4) he is a general surgeon and not a vascular surgeon and is therefore not the most suitable expert to assess vascular injuries.

However, on 11 April 2019, a delegate of the Registrar rejected it and determined that the appeal could not proceed because the Certificate of Determination dated 23 January 2019 had not been rescinded or revoked. The delegate stated that until such time as a decision is made in respect of an application for reconsideration the application to appeal against the decision of the AMS should not be filed.

Arbitrator Carolyn Rimmer determined the matter on the papers. She referred to the decision in *Sebel v Sebel Furniture Ltd* [2006] NSWWCCPD 141, regarding the operation of s 350 (3) *WIMA,* in which of Roche AP extracted the following principles (at [58]):

> (1) The section gives the Commission a wide discretion to reconsider its previous decisions;
>
> (2) Whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> (3) Whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration;
>
> (4) One of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;
>
> (5) Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result;
>
> (6) Given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350 (3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;
>
> (7) Depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 (*Anshun*) may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;
>
> (8) A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration; and
>
> (9) The Commission has a duty to do justice between the parties according to the substantial merits of the case.

The Arbitrator noted that the presumptive onus lies on the party seeking reconsideration of the previous orders. She stated that it is important keep in mind the distinction between

the existence of the power of reconsideration and the occasion of its exercise, and the Commission should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably (*Hilliger v Hilliger* (1952) 52 SR (NSW) 105).

The Arbitrator noted that the worker sought to rely upon fresh evidence in the appeal and that this issue was considered by Fleming DP in *Ross v Zurich Workers Compensation Insurance* [2002] NSWWCCPD 7, as follows:

> A number of authorities have considered the tests at common law for the introduction of fresh evidence in appellate proceedings before the Courts. The relevant tests are firstly, that the evidence which is sought to be admitted on appeal was not available to the Appellant at the time of the original proceedings or could not have been discovered at that time with reasonable diligence, and secondly that the evidence is of such probative value that it is reasonably clear that it would change the outcome of the case (Wollongong Corporation v Cowan (1955) 93 CLR 435; McCann v Parsons (1954) 93 CLR 418; Orr v Holmes (1948) 76 CLR 632). These tests are addressed to the underlying principle of the need for finality in litigation and the importance of the ability of the successful party to rely on the outcome of the litigation. They are also addressed the fundamental demands of fairness and justice in the instant case.

The Arbitrator considered the obtaining a medico legal report for the practice of criticising the basis on which an AMS formed his opinion as not being a permissible practice and stated that such evidence is not generally admitted. She felt that the fresh evidence did not support a submission that the AMS had incorrectly assessed the vascular injury and as it would not have a significant influence on the outcome, it should not be admitted. It is not relevant to the application to reconsider the COD, except from providing some background for the delay in bring an appeal and the necessity to apply for a reconsideration, and it is not fresh evidence that would be admitted in any appeal proceedings. There has also not been any adequate explanation as to why the further report was required before appeal submissions could be prepared and an appeal lodged within time and before the COD was issued. A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration, but the delay had not caused the respondent any identifiable prejudice.

The Arbitrator discussed the medical evidence and noted that Dr Niesche was the only doctor who found oedema on examination in the last 2 years and a difference in calf measurement. She noted that the worker made no objection to an examination by Dr Crane before that examination occurred and that Dr Niesche conceded that Dr Crane was an experienced general surgeon who would be familiar with the chronic venous insufficiency and his speciality would have no bearing on his assessment of vascular impairment.

Accordingly, she held that the worker's proposed appeal against Dr Crane's MAC has no arguable prospects of success and she declined the application for reconsideration.

Work Capacity Decision made before 1 January 2019 - WCC lacks jurisdiction to review an insurer's internal review decision

Grima v Bursons Automotive Pty Limited [2019] NSWWCC 184 – Arbitrator John Harris – 24 May 2019

This recent decision clarified the issue concerning "existing" work capacity decisions and their susceptibility to review under either the former s 44BB *WCA* or through the WCC pursuant to Sch 6, Pt 19L, cl 6 *WCA* (as enacted by the *Workers Compensation Legislation Amendment Act* 2018).

Background

The worker suffered an injury at work on 10 July 2017. On 10 April 2018, he claimed weekly payments from 16 July 2017 at the rate of $1,574.59 per week. The insurer made voluntary payments at a lesser rate and the dispute for determination was the correct rate of the worker's PIAWE.

In a letter dated 30 April 2018, the insurer wrote to the worker and advised him that it would pay up to $1,500 for treatment expenses and $960 per week for weekly payments. It also informed him, relevantly:

> I am writing to let you know that we can help you immediately with provisional weekly payments and treatment expenses for your injury. This provisional help might be enough to see you recover fully.

The letter set out the methodology for calculating the worker's PIAWE and states the following:

> How we have calculated the amount of weekly payments we can help you with is outlined in the attached weekly payments details sheet. Because the calculation involves a decision about your PIAWE it is a 'work capacity decision'. This means that you have the right to ask for a review of the decision if you don't agree

The insurer advised the worker that as it did not have sufficient information to calculate the PIAWE, it had used an interim rate, and that the process of reviewing the calculation of the PIAWE is set out including asking for an "internal review" and then a "merit review".

On 15 January 2019, the worker completed a "Review of Decision Request", in which he asserted that PIAWE was incorrectly calculated and that it should be $1,953 per week "in line with offer of employment".

On 14 February 2019, the insurer issued a document headed "A request for review has been completed". It characterised the resulting decision as being "am internal review outcome" and advises that it has decided that PISWE is $981.15 per week. It set out the basis for calculation and informed the worker that he could request a review from SIRA by completing an attached "Merit Review Form". It also referred to a procedural review by WIRO.

On 3 April 2019, the worker applied for a merit review by SIRA. However, that application was dismissed under s 44BB (3) *WCA* as it was made outside the strict 30-day time limit.

The worker then filed this application with WCC. However, during a teleconference, the respondent questioned the WCC's jurisdiction to hear and determine the dispute.

Arbitrator John Harris held that where an insurer made a work capacity decision before 1 January 2019, and it was subject to an internal review at the request of a worker, the date on which the internal review occurred (i.e. before or after I January 2019) was irrelevant in characterising that internal review as either a 'review decision' or a 'new decision.'

The Arbitrator made the following observations:

> 31. In respect of the transitional arrangements for the implementation of the 2018 Amendment Act for existing work capacity decisions, Sch 6, Pt 19L, cl 6 of the 1987 Act provided:
>
> > (1) Subdivision 3A of Division 2 of Part 3 of the 1987 Act continues to apply to an existing work capacity decision (as if the work capacity decision amendments had not been enacted):

(a) during the transitional review period, and

(b) if, immediately before the expiry of the transitional review period, the decision is subject to a review under that Subdivision--until the review is finally determined.

(2) A dispute about an existing work capacity decision that is determined before the expiry of the period during which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision is not subject to referral for determination by the Commission after the expiry of that period.

(3) The work capacity decision amendments do not apply in relation to an existing work capacity decision during the period in which Subdivision 3A of Division 2 of Part 3 of the 1987 Act applies to the decision.

(4) The "transitional review period" is:

(a) the period of 6 months commencing on the day on which Schedule 1.1 [3] to the 2018 amending Act commences, or

(b) any other period prescribed by the regulations.

32. Existing work capacity decision" is defined in cl 1 to mean "a work capacity decision of an insurer made before the commencement of Schedule 1 to the 2018 amending Act.

This means that if an insurer issues a Work Capacity Decision in 2018, or at any earlier time and subsequently a worker seeks an internal review, then the Work Capacity Decision will be found to be an *"existing work capacity decision."*

As a result, any review of that decision will remain subject to the former regime under s 44BB *WCA* including both merit review and procedural review. If that review process is underway when the transitional period expires, the transitional period itself will be extended in that individual case until the completion of that review. In accordance with cl 2, the outcome of that review will not be subject to referral for determination by the WCC.

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling