WORKERS COMPENSATION COMMISSION

e-Bulletin No. 65 March 2016

President's Welcome

Welcome to e-Bulletin No. 65 of the Workers Compensation Commission.

This bulletin outlines:

Darlinghurst premises access

Practitioners are advised that access to the registry on level 20 and to the conference rooms on level 21 are now restricted to business hours, from 8:30 am to 4:30 pm. Legal practitioners and parties will not be able to gain access to those floors outside of those times. Access from levels 20 and 21 to the ground floor will still operate after 4:30 pm.

Electronic service of Commission documents

Following a successful trial, the Commission will be issuing all Certificates of Determination (CODs) and Medical Assessment Certificates (MACs) electronically, to the email address of the legal representative stated on the Application or Reply. No hard copies will be issued by DX or post, except where an email address is not provided.

Practitioners will need to ensure that email addresses are appropriately monitored as the Commission will not re-issue CODs and MACs if an “out of office” or “on leave” reply email message is received.

The move to electronic service of CODs and MACs will ensure that all legal representatives receive decisions at the same time.

Regional venues

In 2015, an extensive review was undertaken of the regional venues used for con/arbs. Thirty-seven new venues were added to the Commission’s list of preferred venues.

Ongoing feedback from legal practitioners regarding the suitability of current regional venues and possible alternative venues is important. Feedback can be emailed to Tony Gill, Manager, Business Services Unit (tony.gill@wcc.nsw.gov.au).

Road shows update

In November last year, the Commission completed a series of nine seminars across Sydney and regional New South Wales. This is the third occasion that the Commission has completed what have become known as the road shows.

The road shows have again proved to be highly successful, with over 600 registrations to attend the road shows and 94% positive feedback.

It is pleasing that the road shows were so well supported by the legal profession and that the content was favourably received.

The Commission is planning to hold another road show series later this year, with the target audience this time being insurer and scheme agent staff.

Form amendment

An Application to Resolve a Dispute (Form 2) requires completion of relevant wages information at Parts 5.1 and 5.2, where weekly compensation is in dispute. Part 3 of the Reply (Form 2A) is completed if the respondent disputes the information contained in the Application to Resolve a Dispute. Where further information regarding wages is submitted during Commission proceedings, the relevant form to use is the Wages Schedule (Form 18).

The Wages Schedule has been amended to include a summary of the weekly periods and amounts in dispute. In addition, the form now includes a section to insert dependants, consistent with Part 5.1 of the Application to Resolve a Dispute.

Case notes

The following are some recent Commission decisions of interest. Arbitral decisions are published on the Commission's website. Presidential decisions are published on AustLII, LexisNexis and BarNet Jade. The Commission also provides a summary of appeal and judicial review decisions through its publications, *On Appeal* and *On Review*, which may be accessed by visiting the Commission's website (www.wcc.nsw.gov.au).

Whole Person Impairment

***Tokich v Tokich Holdings Pty Ltd* [2015] NSWWCCPD 72**

The worker made a claim for permanent impairment compensation in respect of his physical injuries. The amount claimed was paid by the insurer. In 2014, the worker claimed further permanent impairment compensation for a primary psychological injury.

Roche DP held that section 65A of the 1987 Act makes it clear that a primary psychological injury is a separate and distinct injury from physical injuries, even though arising out of the same incident. Special provisions apply to such injuries and in order to determine the injury that results in the greater amount of permanent impairment compensation payable (as required by section 65A(4) of the 1987 Act), there must be two claims and two assessments; one for the physical injuries and one for the primary psychological injury.

The Deputy President held that the 'one claim' restriction in section 66(1A) means one claim for the physical injuries and one claim for a primary psychological injury, noting that a worker is still limited to lump compensation only for the injury that results in the greater entitlement.

***O'Callaghan v Energy World Corporation Ltd* [2016] NSWWCCPD 1**

The Commission issued a Medical Assessment Certificate (MAC) in 2013 which assessed 10% whole person impairment in respect of the lumbar spine. By and with the consent of the parties, a Certificate of Determination (COD) was issued in 2015 in accordance with the MAC. The worker subsequently qualified a doctor who assessed further permanent impairment albeit in respect of the cervical spine and for the impact of the injury on activities of daily living.

The worker lodged an Application to Appeal Against Decision of Approved Medical Specialist (Form 10) alleging deterioration (section 327(3)(a) of the 1998 Act) and the availability of additional relevant information being the further permanent impairment assessment report (section 327(3)(b) of the 1998 Act). The appeal application was dismissed by a Registrar's delegate as the dispute had been the subject of a COD (applying section 327(7) of the 1998 Act).

The worker, relying on the reconsideration power under section 350(3) of the 1998 Act, applied to the Commission to rescind the COD. That application was refused by Arbitrator Harris as the appeal application was in respect of the deterioration of a condition not referred to or assessed by the Approved Medical Specialist (AMS).

The worker sought to appeal the Arbitrator's decision however Roche DP did not allow the appeal as he was not satisfied the case reached the monetary threshold under section 352(3) of the 1998 Act. As to the merits of the appeal, the Deputy President was not satisfied that the Arbitrator's decision was affected by error. Roche DP was of the view that the worker could not bring an appeal in respect of a body part that was not previously the subject of a dispute or medical assessment. The referral set the parameters or limits for the AMS's assessment.

The Deputy President also held that section 322A(1) of the 1998 Act works in concert with section 66(1A) of the 1987 Act. Consistent with a worker now having the right to make only one claim under section 66(1A), only one assessment may be made of the degree of permanent impairment pursuant to section 322A(1).

***Lizdenis v Centrel Pty Ltd* [2016] NSWWCC 21**

The worker lodged an application for reconsideration, seeking to rescind a Certificate of Determination (COD). The COD determined that the worker was entitled to lump sum compensation in respect of 14% whole person impairment, such assessment being in accordance with a Medical Assessment Certificate (MAC). The reason the worker sought to rescind the COD was to enable an appeal application to be lodged against the MAC; noting section 327(7) prohibits an appeal if the dispute has been determined.

The worker sought to appeal the MAC on the ground of deterioration for the purpose of pursuing further lump sum compensation and work injury damages.

Arbitrator Harris made a number of observations concerning the entitlement to seek reconsideration of a COD (at [69]-[72]). As regards the worker's entitlement to claim further lump sum compensation, Arbitrator Harris determined that section 327(3)(a) of the 1998 Act must be read subject to the operation of section 66(1A) of the 1987 Act. Accordingly, the further claim for permanent impairment compensation could not proceed as it would be in breach of section 66(1A).

As regards the threshold claim for work injury damages, the Arbitrator held that section 66(1A) had limited operation to claims for 'permanent impairment compensation'. The work injury damages claim was not a claim for 'permanent impairment compensation'. Accordingly, section 66(1A) did not limit the worker from pursuing the threshold dispute by way of a medical appeal pursuant to section 327(3)(a).

Arbitrator Harris also found that the threshold dispute was not "the subject of a determination by … the Commission" within the meaning of section 327(7) of the 1998 Act and therefore there was no requirement for the COD to be rescinded before the medical appeal could proceed.

Weekly Compensation

***Sabanayagam v St George Bank Ltd* [2016] NSWWCCPD 3**

The worker suffered an injury in 2006. Work capacity decisions in 2013 and 2014 determined that the worker had no current work capacity. In 2015, a section 74 notice was issued disputing liability on the basis the injury was no longer causing incapacity as required by section 33 of the 1987 Act. The decision to dispute liability was reviewed and confirmed by two further notices issued by the insurer in 2015.

O'Grady DP noted that the three decisions to dispute liability in 2015 were not work capacity decisions. However, the Deputy President held, on the facts, it may be inferred that a work capacity decision had been made prior to the section 74 notice. Therefore, the decision to discontinue weekly compensation payments was a work capacity decision, reading section 43(1)(a) and (f) together. In those circumstances, the Commission had no jurisdiction to determine the dispute regarding entitlement to weekly compensation payments, by operation of section 43(3) of the 1987 Act.

***Goncalves v Menzies Port Jackson 2 Pty Ltd* [2016] NSWWCC 43**

The worker suffered injuries in 2006 and 2010. In 2013, the insurer made a work capacity decision that the worker had no current work capacity. In 2014, the insurer issued two section 54 notices, declining liability for ongoing payments.

A threshold issue was whether the Commission had jurisdiction to deal with the dispute. This turned on whether the insurer had made a work capacity decision subsequent to the 2013 work capacity decision and prior to the 2014 decision to dispute liability. Senior Arbitrator Snell held that such decisions are "fact sensitive" and that it was appropriate to consider the terms of the dispute notice, accompanying material and compliance with the guidelines and legislative requirements. The Senior Arbitrator commented that the form of the notice to the worker may provide guidance as to the nature of the decision.

Having reviewed the 2014 decision, Senior Arbitrator Snell was not prepared to infer the insurer discontinued weekly payments on the basis of a decision going to work capacity. He held that a decision that there is no "present inability" to perform pre-injury employment is not a decision about "current work capacity" as defined in section 32A of the 1987 Act. Accordingly, the Commission had jurisdiction to determine the insurer's decision to dispute liability for ongoing payments (the liability issue).

Senior Arbitrator Snell determined the liability issue in the worker's favour. He was then satisfied that, in compliance with section 43(3) of the 1987 Act, he could make a decision consistent with the work capacity decision that was in place, namely, the 2013 decision that the worker had no current work capacity (*Urquhart v Rainbow Home & Respite Service* [2015] NSWWCC 212 followed).

***Go v UltraFloor Installations Pty Ltd* [2016] NSWWCC 42**

The worker suffered an injury in 2007 and was paid ongoing weekly compensation. In 2014, the insurer made a work capacity decision that the worker had no current work capacity. In 2015, the insurer issued a section 74 notice disputing liability.

Arbitrator Harris was asked to determine whether the insurer had made a work capacity decision, either by the section 74 notice or by inference.

The Arbitrator was satisfied that the matters raised in the section 74 notice were liability issues and the notice could not constitute a work capacity decision having regard to section 43(2) of the 1987 Act. The Arbitrator observed that a worker who, in the opinion of the insurer, has recovered from the effects of an injury does not come within the definition of "current work capacity" in section 32A of the 1987 Act because the worker can return to his or her pre-injury employment.

The Arbitrator stated whether the decision was regarding work capacity or liability must be determined objectively. Having reviewed the section 74 notice, Arbitrator Harris was satisfied that there was nothing in the dispute notice that had the character of a work capacity decision.

Arbitrator Harris also determined that he was not bound by the decision in *Sabanayagam*.

Having determined the liability issue in favour of the worker, like Senior Arbitrator Snell in *Goncalves*, Arbitrator Harris followed the decision of Arbitrator Wynyard in *Urquhart* and made an award consistent with the 2014 work capacity decision.

Judge Greg Keating

President