The New South Wales State Legal Conference

Thursday 27 March 2014

Session 16: Developments in Workers Compensation

"Update on the experience of the Commission following the introduction of the 2012 legislative amendments"

1. PRACTICE AND PROCEDURE

The past year has been a challenging period for the Commission. Reforms to workers' compensation entitlements and changes to dispute resolution avenues have contracted the jurisdiction of the Commission. Despite this, the staggered implementation of the 2012 legislative reforms and a 2 April 2013 deadline for entitlement to party/party legal costs resulted in a short-term, substantial increase in disputes lodged in the Commission.

(a) Lodgments

Form 2 – Application to Resolve a Dispute lodgments in 2012 totalled 14,164, which was a 54% increase to lodgments from the previous year. The proliferation of applications continued in the first quarter of 2013. By mid-April, the number of disputes pending in the Commission had increased to over 10,600, which was a threefold increase in the Commission's average case load prior to the 2012 reforms.

As expected, following the abolition of entitlement to legal costs, dispute lodgments in the Commission decreased dramatically. The number of applications funded through the Government's workers' compensation legal assistance scheme has steadily increased since May 2013, although the legislative reforms will have a permanent impact on the overall number of applications lodged in the Commission.

(b) Listings and Timeliness

The volume of dispute lodgments between June 2012 and April 2013 strained the Commission's resources and adversely impacted the timeliness of dispute resolution. The Commission implemented a number of strategies to manage the volume of work, including changes to listing practices and modifying the direction for production procedure. In the case of lump sum compensation claims, following assessment by an Approved Medical Specialist the Commission now issues an award for section 66 lump sum compensation and grants leave to the parties to list the matter should the parties be unable to resolve the section 67 claim. It is pleasing that there has been a low take up to list section 67 disputes.

In 2013, the Commission convened 11,036 telephone conferences (teleconferences)and 3,386 conciliation conferences/arbitration hearings (con/arbs), and 4,590 medical assessments were undertaken by Approved Medical Specialists. The Commission retained a strong presence in regional New South Wales, with almost a third of all con/arbs conducted outside the Sydney CBD.

The current number of matters on hand has now reduced to less than 5,000. The Commission is currently listing teleconferences in the first week of June and con/arbs throughout that month. It is expected that the Commission will return to its standard timeframe (35 days from lodgment to teleconference) by early June 2014.

(c) Directions for Production

Practitioners are still encouraged to utilise the *Registrar's Interim Guideline – Requests to Issue Directions for Production Prior to Teleconference*. The guideline was introduced to give parties the opportunity to issue directions for production during the extended period between dispute lodgment and teleconference, rather than potentially incurring additional delays by issuing directions for production after the teleconference.

The guideline expires on 30 April 2014 and, given the Commission will be returning to its usual timeframe shortly thereafter, it is unlikely that the guideline will be extended. The effect will be that from 1 May 2014 the issuing of directions for production will return to the requirement to first obtain leave from an Arbitrator at the teleconference before a direction for production may be issued (refer to Rule 13.4 of the *Workers Compensation Commission Rules* 2011).

(d) Late Documents

As a conjunct to the direction for production process, it has been the experience of the Commission since the 2012 amendments that a large number of disputes lodged are not ready to proceed. Approximately 60% of *Form 2 – Application to Resolve a Dispute* applications lodged in 2012 were the subject of at least one *Form 2C – Application to Admit Late Documents*. For *Form 2 – Application to Resolve a Dispute* applications lodged in 2013, the percentage of late documents applications remained high at 62%. The total number of *Form 2C – Application to Admit Late Documents* applications in 2013 was 20,833, which is an extraordinary number and indicates multiple lodgments in numerous matters. Given the *Form 2C – Application to Admit Late Documents* often attaches multiple late documents, the total number of late documents lodged was substantially higher than the total number of applications.

In the first 10 weeks of this year, the Commission has received 3,692 *Form 2C – Application to Admit Late Documents* applications. While this number is higher than expected, of most concern is that 2,615 of those late documents applications, or 71%, were for disputes lodged after 2 April 2013.

The majority of late documents received from the parties consist of worker statements, *Form 2A – Reply to Application to Resolve a Dispute* and wages schedules.

Practitioners are cautioned of the need to make sure matters are better prepared given the time between lodgment and teleconference is reducing and the opportunity to lodge documents late is also reducing.

The timing of late document lodgments is also an ongoing problem, with many applications being lodged on the day before a listing or on the day of a listing. Apart from the unnecessary administrative burden this places on registry staff to ensure documents reach Arbitrators on time, it also often leads to delays where the other party is unable to meet the late documents. The timely lodgment of late documents is needed by all parties to ensure unnecessary delays are avoided.

(e) Communications with Commission

It is also notable that the practice of copying an opponent into communications with the Commission appears to have become the exception rather than the norm. The reason for this is unclear, although many communications with the Commission now appear to be delegated to paralegal and junior clerical staff. Apart from the professional courtesy of providing a copy of any document or correspondence to your opponent, it is also a requirement of the *New South Wales Professional Conduct and Practice Rules 2013* (refer to Rule 22.5).

It is also inappropriate to contact Arbitrators direct in relation to a proceeding before the Arbitrator. All communications should be directed through the registry.

2. DECISIONS OF INTEREST

Challenges throughout the year were not limited to managing the volume of cases and document lodgments. The Commission was extensively called upon to interpret the operation of a number of new legislative provisions introduced by the 2012 amendments. The following is a brief summary of a number of the decided cases. The facts, issues in dispute and determinations have been abbreviated and practitioners should rely on their own research for a full understanding of each decision.

It is noted that police officers, paramedics, firefighters and coal miners are exempt from the 2012 legislative amendments by operation of clauses 25 and 26, Part 19H, Schedule 6 of the *Workers Compensation Act* 1987 (1987 Act).

(a) Weekly payments

The entitlement to weekly compensation was completely restructured by the *Workers Compensation Legislation Amendment Act* 2012. By the amendments, workers are entitled to weekly compensation benefits under four entitlement periods:

1. First entitlement period – weeks 1 to 13 (section 36 of the 1987 Act);
2. Second entitlement period – weeks 14 to 130 (section 37 of the 1987 Act);
3. Third entitlement period – weeks 131 to 260 (section 38 of the 1987 Act); and
4. Fourth entitlement period – after week 260 (section 39 of the 1987 Act).

The weekly compensation amendments commenced on 1 October 2012.

By clause 3, Part 19H, Schedule 6 of the 1987 Act, the new weekly compensation provisions apply to all injuries, claims and Commission proceedings, except as otherwise provided. One exception is regarding "existing recipients of weekly payments", who continue to receive weekly compensation in accordance with the legislative provisions prior to the 2012 amendments until transitioned to the new provisions.

Following the commencement of the 2012 legislative amendments , the entitlement to weekly compensation payments under the new or old provisions was summarised by Roche DP in *Kilic v Kmart Australia Ltd* [2013] NSWWCCPD 37 (set out further below).

Jurisdiction of Commission

Section 43(3) of the 1987 Act provides that the Commission does not have jurisdiction to determine any dispute about a work capacity decision of an insurer and is not to make a decision in respect of a dispute before the Commission that is inconsistent with a work capacity decision. By analogy, the 2012 legislative amendments do not curtail the jurisdiction of the Commission to determine disputes concerning entitlement to weekly compensation payments in the absence of a work capacity decision.

A limitation on the Commission's jurisdiction, in the absence of a work capacity decision, exists in relation to the third entitlement period, under section 38, which provides that a worker's entitlement to weekly compensation payments beyond 130 weeks is subject to assessment by the insurer.

For the period to 31 December 2012, calculation of weekly compensation is under the former weekly compensation provisions. From 1 January 2013, weekly compensation is calculated under the new provisions. As section 38 requires assessment by the insurer, the Commission's jurisdiction to determine weekly compensation entitlements from 1 January 2013 is effectively limited to the first two entitlement periods under sections 36 and 37 of the 1987 Act (that is, up to the first 130 weeks).

Cases:

Kilic v Kmart Australia Ltd [2013] NSWWCCPD 37 (Roche DP)

- There are three categories of claimant, following the 2012 legislative amendments:

1. Claims made on or after 1 October 2012 – the 2012 amendments apply (clause 3(1), Schedule 8 of the 2010 Regulation);
2. Existing recipients of weekly compensation immediately before 1 October 2012 – the weekly payments amendments apply on a date three months after the insurer makes a work capacity decision (clause 6, Part 19H, Schedule 6 of the 1987 Act; clause 22, Schedule 8 of the 2010 Regulation); and
3. Claims made before 1 October 2012 but the worker is not an existing recipient of weekly compensation – the weekly payments amendments and transitional arrangements do not apply until 1 January 2013 (clause 3(1), Schedule 8 of the 2010 Regulation).

- The combined effect of section 32A and clause 9(4), Part 19H, Schedule 6 of the 1987 Act is that the entitlement periods commence at the time when a weekly compensation has been paid or is payable and includes periods before the commencement of the 2012 legislative amendments.

Inghams Enterprises Pty Ltd v Sok & Anor [2013] NSWWCCPD 39 (O'Grady DP)

Facts:

- The worker alleged injury in the course of employment, first with Integrated (a labour hire company) and then with Inghams. After periods of intermittent employment, the worker claimed weekly compensation from 10 May 2011 to date and continuing.

Issue:

- The jurisdiction of the Commission to make awards of weekly payments under the amended legislation for periods after 31 December 2012.

Held:

- Notwithstanding the profound changes introduced by the amending Act, in the absence of a work capacity decision, the Commission has not been deprived of its jurisdiction to enter awards for weekly benefits compensation, either expressly or impliedly.

- It cannot be said that such withdrawal of jurisdiction appears "clearly and unmistakably" from the terms of the amendment. It cannot be said that such "repeal, alteration or derogation" of jurisdiction appears from the terms of the amending Act "expressly or by necessary intendment" (see discussion in *Shergold v Tanner* [2002] HCA 19; 209 CLR 126 at 136-137).

** The decision is subject to appeal to the Court of Appeal and is listed for hearing on 6 June 2014.*

Lee v Bunnings Group Limited [2013] NSWWCCPD 54 (Keating P)

Facts:

- The worker suffered a work injury on 2 June 2010.
- She received weekly payments of compensation from the date of injury until 12 June 2012.
- The insurer terminated weekly payments as it was of the opinion that the worker's earning capacity was equal to or greater than her pre-injury earning capacity.
- At first instance, an Arbitrator found in the worker's favour and made an award for weekly compensation from 12 June 2012 to 31 December 2012.
- As the worker was not an existing recipient or weekly payments and as she had exhausted her entitlement to weekly compensation under sections 36 and 37 (the first two entitlement periods), the Arbitrator determined that because she could not currently satisfy the requirements of section 38 (third entitlement period), an award should be made in favour of the employer from 1 January 2013.

Issue:

- Whether the Arbitrator erred in making an award in favour of the employer in respect of the third entitlement period.

Held:

- It was clear from the unambiguous terms of section 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission.
- The insurer did not undertake a work capacity assessment of the worker's residual capacity for work following the expiration of the second entitlement period (after 130 weeks). In those circumstances, the Arbitrator erred by concluding that the worker had no ongoing entitlement to weekly compensation in the absence of such an assessment. Those rights had not yet been determined.
- In the circumstances, the Arbitrator should have declined to make any order in respect of the period from 1 January 2013.

Komljenovic v Facility Management Solutions Pty Ltd [2013] NSWWCC 69 (Senior Arbitrator M Snell)

Facts:

- The worker made a claim for weekly compensation payments from 1 April 2011 due to psychological injury. Claims for lump sum compensation and medical expenses compensation were also made.
- The insurer disputed liability, relying on a section 11A defence.

Issue:

- On the basis that the worker was found to be entitled to weekly compensation benefits, the method to determine that entitlement.

Held:

- The worker does not fall within the definition of a "seriously injured worker" and his claim for compensation was made prior to 1 October 2012. In those circumstances, the weekly payments amendments contained in the amending Act have application from 1 January 2013, pursuant to Schedule 1, clause 3 of the *Workers Compensation Amendment (Transitional) Regulation* 2012.
- The worker is entitled to weekly compensation benefits from 1 April 2011 to 31 December 2012 calculated in accordance with the former weekly compensation provisions.
- As the worker remains within what is described as the second entitlement period (weeks 14-130) and he works more than 15 hours per week, his entitlement since 1 January 2013 is governed by section 37(2) of the 1987 Act, in its amended form.

Existing recipients of weekly payments

The most significant exception to the new weekly compensation provisions is for "existing recipients of weekly payments". Clause 1, Part 19H, Schedule 6 of the 1987 Act defines "existing recipient of weekly payments" in the following terms:

> ***Existing recipient of weekly payments*** means an injured worker who is in receipt of weekly payments of compensation immediately before the commencement of the weekly payments amendments.

Clause 6, Part 19H, Schedule 6 of the 1987 Act provides:

> An existing recipient of weekly payments remains entitled to compensation under Division 2 of Part 3 of the 1987 Act as if the weekly payments amendments had not been made, but only until the weekly payments amendments apply to the compensation payable to the person as provided by this Division.

There have been various interpretations by Arbitrators of the phrase "immediately before" in clause 1, Part 19H. There is, to date, no Presidential decisions on the interpretation to be given and, given the diminishing relevance of the provision as the transition of existing recipients to the new provisions advances, it is unlikely that there will be higher authority on the issue.

Cases:

> ***Mohammadi v Chandler Macleod Group t/as Ready Workforce Pty Ltd*** [2013] NSWWCC 75 (Arbitrator Capel)
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> - "Therefore, in my view, the term 'immediately before' connotes a period of time very close to 1 October 2012 and it would seem that on the basis of the definition of 'immediately', for a worker to be an 'existing recipient of weekly payments', he or she must have been in receipt of weekly payments 'closely' or 'in the vicinity' of 1 October 2012, perhaps within the last week or two prior to 1 October 2012."

Soares v Maxitherm Boilers Pty Ltd [2013] NSWWCC 425 (Arbitrator Capel)

- "Nevertheless, having regard to the beneficial nature of the workers compensation legislation, I believe that a period of three business days, as in this case, represents a reasonably short period 'immediately before' 1 October 2012. Any period beyond three business days would be unreasonable in the context of the 1987 Act and the 2012 amending Act."

Ayton v Cargill Meat Processes Pty Ltd [2013] NSWWCC 429 (Arbitrator Caddies)

- "I am satisfied that 3 September 2012 is not immediately before the commencement of the weekly payments amendments on 1 October 2012 and that the worker was not an existing recipient within Part 19H Schedule 6 of the 1987 Act."

McAdam v Kororo Public School P & C Association [2013] NSWWCC 444 (Arbitrator Phillips SC)

- In this recent yet to be published decision the Arbitrator held "that in such a context I find that 19 days, which appears to be the gap between 11 September and 1 October 2012, is close and in the vicinity of the 1 October 2012". In this matter the worker had been in receipt of weekly benefits for approximately 4 years prior to 11 September 2012.

Murphy v Cowra Jockey Club [2013] NSWWCC 451 (Senior Arbitrator M Snell)

- The worker was found to be an existing recipient of weekly payments in circumstances where the insurer had failed to pay an entitlement pursuant to an award in force at the relevant time.

Merchant v Village Roadshow Limited [2013] NSWWCC 495 (Arbitrator Sweeney)

- The worker was not an existing recipient of weekly payments in circumstances where her weekly compensation benefits were suspended at the relevant time for failure to attend a number of medical appointments with an injury management consultant.

(b) Permanent Impairment

The entitlement to lump sum compensation for permanent impairment and related pain and suffering has received the most judicial attention of all the 2012 legislative amendments. The entitlement to permanent impairment compensation was amended in three main respects:

1. The imposition of a threshold for entitlement to compensation of greater than 10% (amendment of section 66(1));
2. The limitation of one claim for permanent impairment that results from an injury (introduction of section 66(1A)); and
3. The abolition of entitlement to compensation for pain and suffering (repeal of section 67).

The amendments commenced on 27 June 2012 but have retrospective operation to claims for compensation made on or after 19 June 2012.

Section 66(1), as amended, provides:

> A worker who receives an injury that results in a degree of permanent impairment greater than 10% is entitled to receive from the worker's employer compensation for that permanent impairment as provided by this section. Permanent impairment compensation is in addition to any other compensation under this Act.
>
> **Note.** No permanent impairment compensation is payable for a degree of permanent impairment of 10% or less.

Section 66(1A) provides:

> Only one claim can be made under this Act for permanent impairment compensation in respect of the permanent impairment that results from an injury.

The transitional provisions in the 1987 Act and a further transitional provision in the *Workers Compensation Regulation* 2010 (2010 Regulation) clarify the timing of the operation of the new provisions. Clause 15, Part 19H, Schedule 6 of the 1987 Act provides:

> An amendment made by Schedule 2 to the 2012 amending Act extends to a claim for compensation made on or after 19 June 2012, but not to such a claim made before that date.

Clause 11, Schedule 8 of the 2010 Regulation, introduced by the *Workers Compensation Amendment (Transitional) Regulation* 2012 seeks to limit the operation of clause 15, Part 19H. Clause 11, however, has received judicial criticism by the Court of Appeal in *Goudappel v ADCO Constructions Pty Ltd* [2013] NSWCA 94 as it purports to interfere with rights which accrued prior to its publication.

Most litigation has centred on the words "a claim for compensation" in clause 15, Part 19H, Schedule 6.

Cases:

> ***Goudappel v ADCO Constructions Pty Ltd*** [2013] NSWCA 94 (Basten JA, Bathurst CJ and Beazley JA agreeing)
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> Facts:
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> - The worker suffered an injury on 17 April 2010.
> - The worker made a claim for compensation on 19 April 2010.
> - On 20 June 2012 the worker made a claim for lump sum compensation in respect of 6% WPI.

Issue:

- Whether the threshold provision, requiring greater than 10% WPI, applied so as to exclude the worker from entitlement to lump sum compensation.

Held:

- The amendments to Division 4 of Part 3 of the 1987 Act introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 do not apply to claims for compensation pursuant to section 66 which are made before 19 June 2012 in respect of an injury that results in permanent impairment, whether or not the claim specifically sought compensation under sections 66 or 67 of the 1987 Act.

** The decision is subject to appeal to the High Court and is listed for hearing on 1 April 2014.*

Di Matteo v RDM Ceramics Pty Ltd [2013] NSWWCCPD 27 (Keating P)

Facts:

- The worker suffered injury on 31 May 1994.
- On 5 September 1996 the worker permanent impairment compensation. Further claims for compensation were made in June 2001 and October 2008.
- On 20 June 2012 the worker made a further claim for lump sum compensation, to a different body part but in respect of the same injury.

Issue:

- Whether section 66(1A) applies so as to disallow a worker who has made a previous claim for lump sum compensation before 19 June 2012 from making a further claim for lump sum compensation after 19 June 2012.

Held:

- The amendments to Division 4 of Part 3 of the 1987 Act, introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 do not disallow a worker who has made a claim for permanent impairment prior to 19 June 2012, from making a further claim for permanent impairment on or after 19 June 2012, in respect of the same injury.
- *Goudappel* followed.

Sukkar v Adonis Electrics Pty Limited [2013] NSWWCCPD 59 (Keating P)

Facts:

- There was no dispute that the worker's employment with the respondent was noisy.
- In 1996 the worker made a claim for permanent impairment against the respondent in respect of hearing loss. The claim was resolved by agreement by the payment of compensation for 12.9% binaural hearing loss.

- On 19 June 2012 the worker made a further claim for permanent impairment against the respondent in respect of an additional 9% WPI in respect of hearing loss. The deemed date of injury, by operation of section 17(1)(a)(i) of the 1987 Act, was the date of claim (19 June 2012) being the date of commencement of the new lump sum compensation provisions.

Issue:

- Whether the worker's claim for additional lump sum compensation must reach the threshold of greater than 10% WPI for entitlement to compensation.

Held:

- The amendments to Division 4 of Part 3 of the 1987 Act introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 apply to claims for permanent impairment compensation for hearing loss (to which section 17 of the 1987 Act has application) made on or after 19 June 2012 when a worker has made a previous claim for permanent impairment compensation for hearing loss prior to 19 June 2012.
- Claims for compensation pursuant to section 66 of the 1987 Act, including hearing loss (to which section 17 of the 1987 Act has application), involving the same pathology of injury arising from multiple injurious events of injury, cannot be aggregated for the purpose of determining whether or not the worker's claim exceeds the section 66(1) threshold, in circumstances where the worker has made a prior claim for compensation under section 66.

** The decision is subject to appeal to the Court of Appeal and is listed for hearing on 20 June 2014.*

BP Australia Ltd v Greene [2013] NSWWCCPD 60 (Roche DP)

Facts:

- The worker claimed lump sum compensation for permanent impairment due to noisy employment with the respondent.
- The worker was employed in noisy employment with the respondent between 1963 and 1994.
- The respondent was alleged to be the last noisy employment of the worker, although the worker did work for two subsequent employers for a period of 1994 to 2008.
- On 19 June 2012 the worker claimed lump sum compensation for permanent impairment due to noisy employment against the employer. The notional date of injury, by section 17, was in 1994.
- Clause 3, Part 18C, Schedule 6 of the 1987 Act provides:

> (1) The lump sum compensation amendments do not apply in respect of an injury received before the commencement of the amendments (even if the injury is the

subject of a claim made after the commencement of the amendments) except as follows:

(a) the amendments to section 66A apply in respect of an injury received before the commencement of the amendments (even if the injury is the subject of a claim made after the commencement of the amendments) and so apply:

(i) subject to such modifications to that section as may be prescribed by the regulations, and

(ii) as if an agreement registered before that commencement by the Authority were registered by the Commission,

(b) the repeal of section 72 applies in respect of an injury received before the commencement of the amendments, but only to the extent that the injury is the subject of a new claim.

(2) There is to be a reduction in the compensation payable under Division 4 of Part 3 (as amended by the lump sum compensation amendments) for any proportion of the permanent impairment concerned that is a previously non-compensable impairment. This subclause does not limit the operation of section 323 of the 1998 Act or section 68B of the 1987 Act.

(3) A ***previously non-compensable impairment*** is loss or impairment that is due to something that occurred before the commencement of the amendments to Division 4 of Part 3 made by the lump sum compensation amendments, being loss or impairment that is of a kind for which no compensation was payable under that Division before that commencement.

(4) No contribution or payment of apportioned share in respect of compensation under Division 4 of Part 3 (as amended by the lump sum compensation amendments) is required under section 15, 16, 17 or 22 to the extent that the employment or injury in respect of which contribution or payment would otherwise be required relates to a previously non-compensable impairment.

Issues:

- The employer argued that it was not the last noisy employer, which was unsuccessful.
- The second issue was whether the worker was not entitled to lump sum compensation because he did not reach the threshold of greater than 10% WPI.

Held:

- The amendments introduced by Schedule 2 of the *Workers Compensation Legislation Amendment Act* 2012 did not repeal clause 3, Part 18C, Schedule 6 of the 1987 Act and therefore, for injuries received before 1 January 2002, section 66 applies as it existed prior to its amendment by the *Workers Compensation Legislation Amendment Act* 2012.

Roche v Australian Prestressing Services Pty Ltd [2013] NSWWCCPD 7 (Roche DP)

Facts:

- In 8 July 2008 the worker suffered an injury in the course of his employment.
- On 19 April 2009 the worker entered into a complying agreement with his employer in respect of 6% WPI. The 6% assessment consisted of 2% WPI in respect of the left ankle and 4% WPI in respect of the left wrist.
- On 7 March 2011 the worker claimed an additional 10% WPI (and compensation for pain and suffering) in respect of the lumbar spine, left wrist and left ankle. The claim in respect of the lumbar spine was discontinued on 27 June 2011.
- An Approved Medical Specialist assessed the worker as suffering 9% WPI consisting of 9% WPI in respect of the left ankle and 0% WPI in respect of the left wrist.

Issue:

- Whether the worker is entitled to the 7% WPI (being the difference between the previous settlement in respect of the left ankle and the new assessment by the Approved Medical Specialist) or 3% WPI (being the difference between the previous settlement of 6% WPI and the new assessment of 9% WPI).

Held:

- If a worker suffers two injuries in the one incident, his or her impairments and entitlement to lump sum compensation have to be assessed together, not as separate injuries.
- Where a worker, having previously been assessed and received compensation, brings a claim for further impairment resulting from the same incident, he or she is only entitled to receive compensation for the difference between the previous combined assessment and the new combined assessment.
- The worker is therefore entitled to 3% WPI.

(c) Medical Expenses

Division 3, Part 3 of the 1987 Act (Compensation for Medical, Hospital and Rehabilitation Expenses etc.) was amended in two main respects:

1. The introduction of section 59A;
2. The amendment of section 60 by the introduction of section 60(2A).

Section 59A provides:

> (1) Compensation is not payable to an injured worker under this Division in respect of any treatment, service or assistance given or provided more than 12 months after a claim for compensation in respect of the injury was first made, unless weekly payments of compensation are or have been paid or payable to the worker.

(2) If weekly payments of compensation are or have been paid or payable to the worker, compensation is not payable under this Division in respect of any treatment, service or assistance given or provided more than 12 months after the worker ceased to be entitled to weekly payments of compensation.

(3) If a worker becomes entitled to weekly payments of compensation after ceasing to be entitled to compensation under this Division, the worker is once again entitled to compensation under this Division but only in respect of any treatment, service or assistance given or provided during a period in respect of which weekly payments are payable to the worker.

(4) This section does not apply to a seriously injured worker (as defined in Division 2).

Section 60(2A) provides:

> The worker's employer is not liable under this section to pay the cost of any treatment or service (or related travel expenses) if:
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> (a) the treatment or service is given or provided without the prior approval of the insurer (not including treatment provided within 48 hours of the injury happening and not including treatment or service that is exempt under the WorkCover Guidelines from the requirement for prior insurer approval), or
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> (b) the treatment or service is given or provided by a person who is not appropriately qualified to give or provide the treatment or service, or
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> (c) the treatment or service is not given or provided in accordance with any conditions imposed by the WorkCover Guidelines on the giving or providing of the treatment or service, or
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> (d) the treatment is given or provided by a health practitioner whose registration as a health practitioner under any relevant law is limited or subject to any condition imposed as a result of a disciplinary process, or who is suspended or disqualified from practice.

Section 59A

Except in the case of a seriously injured worker[1], the entitlement to medical expenses compensation is limited to a period of 12 months after a claim was first made unless weekly compensation payments are or have been paid. If weekly compensation payments are or have been paid, a worker is entitled to ongoing medical treatment until 12 months after weekly compensation payments cease.

Section 59A was commenced by proclamation on 1 October 2012.

[1] "Seriously injured worker" is defined in section 32A of the 1987 Act as a worker who suffers or is likely to suffer more than 30% WPI or if WPI is not fully ascertainable.

By clause 17(2), Part 19H, Schedule 6 of the 1987 Act, if a claim for compensation is made before 1 October 2012 the claim is deemed to have been made immediately before the commencement of section 59A and no regard is to be had to any weekly compensation paid before 1 October 2012.

For claims made before 1 October 2012, where the worker was not in receipt of weekly benefits, the 12 month period after weekly compensation payments ceased is deemed to have commenced on 1 January 2013 (Schedule 8, Part 1, Clause 5 of the 2010 Regulation). Therefore, the earliest time that entitlement to medical expenses expired was 31 December 2013.

If a medical expense, for a worker who is not in receipt of weekly compensation, was incurred at any time on or before 31 December 2013, the worker is entitled to make a claim for reimbursement of that expense.

Cases:

Duval v Stryker Australia Pty Ltd [2013] NSWWCC 212 (Arbitrator Wynyard)

Facts:

- The worker brought a claim for future section 60 expenses, being the supply of remedial massage for a work injury on 24 January 2001.
- The insurer disputed that the treatment was reasonably necessary.
- The worker had not been in receipt of weekly compensation payments in the 12 months preceding the claim for medical expenses.
- Pursuant to section 60(5), the worker was assessed by an Approved Medical Specialist who supported the claim for the treatment.
- The parties did not reach agreement and the matter was referred to an Arbitrator for determination.

Issue:

- Whether the worker is entitled to the continued provision of remedial massage and whether the treatment is reasonably necessary.

Held:

- The worker had not received weekly compensation payments since shortly after the injury.
- Clause 5, Schedule 8 of the 2010 Regulation has the effect that the limitation to entitlement to medical expenses by section 59A is delayed until 1 January 2013.
- The worker was therefore entitled to the provision of medical expenses until 31 December 2013.

Barsoum v Salim, Odette and Helda Boyaji t/as All Sales Plastics [2013] NSWWCC 323 (Arbitrator J Snell)

Facts:

- The worker made a claim before 1 October 2012 for medical expenses compensation.
- The insurer disputed liability for the claim.

Issue:

- The operation of section 59A, as a secondary issue to the operation of section 60(2A).

Held:

- As the worker had made his claim for compensation before 1 October 2012, clause 5, Schedule 8 of the 2010 Regulation deems that he had made his claim immediately before 1 January 2013 and so the limiting effects of section 59A have not yet come into play because he is still within the deemed first 12 month period.
- However, the amendments to section 60 needed to be considered in respect of any treatment or service provided to the worker after the commencement of the amendments (27 June 2012).

Rofail v Our Lady of Consolation Aged Care Services Ltd [2013] NSWWCC 359 (Arbitrator Capel)

Facts:

- The worker suffered injury to her right shoulder on 18 September 1998.
- The worker has been paid weekly compensation payments since the injury.
- On 23 November 2011 the worker claims for medical treatment in respect of the left shoulder.
- The insurer disputed liability for treatment to the left shoulder.

Issue:

- Whether the left shoulder condition resulted from the injury to the worker's right shoulder.

Held:

- On the balance of probabilities, the left shoulder condition resulted from the work injury.
- As the worker continues to receive weekly compensation payments, the limitations imposed by section 59A have no application.

Section 60(2A)

Section 60(2A) commenced operation on 27 June 2012. It provides that a worker's employer is not liable for the cost of any treatment or service unless the worker has obtained the prior approval of the insurer.

There are two exemptions, namely:

1. Treatment or service obtained within 48 hours of the injury, and
2. Treatment or service exempt by WorkCover Guidelines.

The Commission and Registrar are exempt from the operation of section 60(2A) by the *WorkCover Guidelines for Claiming Compensation Benefits* dated 4 October 2013, gazetted on 8 October 2013.

Cases:

> ***McIntosh v Impact Scaffolding Pty Ltd***, 12903/12, 12 April 2013, unreported (Delegate S Paterson)
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> Facts:
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> - The worker claimed the cost of a permanent impairment medical certificate and examination as a section 60 medical expense pursuant to section 73 of the 1987 Act.
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> Issue:
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> - The operation of section 60(2A), being the liability of the insurer to pay for medical treatment or service where prior approval was not sought.
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> Held:
>
> - Pursuant to section 73, permanent impairment medical certificates are deemed to be medical or related treatment for the purposes of Division 3. The legislation as amended has an intractable meaning requiring prior approval from an insurer.
> - The jurisdiction of the Commission is limited by section 60(2A). As prior approval was not sought, the insurer was not liable to pay the cost of the medical certificate.
>
> ***Barsoum v Salim, Odette and Helda Boyaji t/as All Sales Plastics*** [2013] NSWWCC 323 (Arbitrator J Snell)
>
> Facts:
>
> - In a previous decision in the same matter, a general order for medical expenses was made by the Arbitrator in relation to a claim made before 1 October 2012.
>
> Issue:
>
> - The respondent disputed the Commission's jurisdiction in relation to medical expenses incurred after 27 June 2012, pursuant to section 60(2A) of the 1987 Act.

Held:

- If the NSW Parliament had wished to curtail the Commission's jurisdiction to deal with disputes about claims under section 60, it could have enacted a provision to that effect.
- The Arbitrator formed a different view to the Registrar's Delegate in *McIntosh*. The Arbitrator held that the legislation remains beneficial and the Commission has the power to determine a dispute where no prior approval was sought or where it was not given.

Harbison v Department of Education and Communities, 4280/13, 5 December 2013, unreported (A/Registrar Parsons)

Facts:

- The dispute concerned a claim for prescription lenses for glasses.
- At teleconference, section 60(2A) of the 1987 Act was relied on.

Issue:

- Whether the respondent could rely on section 60(2A) of the 1987 Act.

Held:

- It was not necessary to determine, as by the *WorkCover Guidelines for Claiming Compensation Benefits* dated 4 October 2013, gazetted on 8 October 2013, determinations of the Commission and Registrar are exempt from the requirement under section 60(2A) to obtain prior approval by an insurer.

Section 60(5)

Section 60(5) provides:

> The jurisdiction of the Commission with respect to a dispute about compensation payable under this section extends to a dispute concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service. Any such dispute must be referred by the Registrar for assessment under Part 7 (Medical assessment) of Chapter 7 of the 1998 Act, unless the regulations otherwise provide.

Clause 17 of Part 19H of Schedule 6 of the 1987 Act provides:

> (1) An amendment made by the 2012 amending Act to section 60 of the 1987 Act does not apply in respect of any treatment or service provided before the commencement of the amendment.
>
> (2) In the application of section 59A (Limit on payment of compensation) of the 1987 Act in respect of a claim for compensation made before the commencement of that section:

(a) the claim is deemed to have been made immediately before the commencement of that section, and

(b) no regard is to be had to any weekly payment of compensation paid or payable to the worker before the commencement of that section (for the purpose of determining when a worker ceased to be entitled to weekly payments of compensation).

Note. Section 59A limits the payment of compensation to a period of 12 months after a claim for compensation is made or 12 months after weekly payments of compensation cease. Subclause (2) ensures that for existing claims the 12 month period will commence no earlier than the commencement of the section.

Clause 17 of Part 19H of Schedule 6 of the 1987 Act creates an interesting tension between section 60(5) and section 59A. While the Commission is able to determine claims for future medical treatment, by operation of clause 17, section 59A requires that the treatment is incurred within the 12 month limitation period.

The Commission experienced a run of future medical dispute applications in 2013 where workers were statute barred from claiming medical expenses after 31 December 2013. Most of these applications were dealt with under the two-step procedure set up by section 60(5).

Cases:

Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski [2013] NSWCA 449 (Beazley P, Leeming JA and Tobias AJA)

Facts:

- The worker suffered injury to his left leg and knee in 2007.
- In 2012, he claimed medical expenses compensation for proposed bilateral hip surgery as a consequential condition of his accepted work injury.
- The Arbitrator found for the respondent on the basis the worker had not proved he suffered from a consequential condition as a result of his original injury.
- The Arbitrator's decision was overturned by Keating P on the basis that section 60(5) required the worker to first be referred to an Approved Medical Specialist.

Issue:

- Whether referral to an Approved Medical Specialist pursuant to section 60(5) is compulsory.

Held:

- Section 60(5) is not discretionary, but mandatory, and is not a referral of a "medical dispute" but of a new class of dispute, not otherwise within the jurisdiction of the Commission, namely, "a dispute about compensation payable under [section 60]

concerning any proposed treatment or service and the compensation that will be payable under this section in respect of any such proposed treatment or service".

- The grammatical meaning of section 60(5) is unambiguous. The ordinary literal meaning of "*Any* such dispute" is that it means *every* such dispute, so that every dispute must first be referred to an Approved Medical Specialist for opinion with regard to the treatment or service proposed.

Inghams Enterprises Pty Ltd v Stanhope [2012] NSWWCCPD 32 (O'Grady DP)

Facts:

- The worker alleged injury in the form of bilateral carpal tunnel syndrome.
- He claimed medical expenses compensation for proposed surgery.
- The Arbitrator determined that the worker suffered injury as alleged and, in the absence of a dispute that the treatment was reasonably necessary, that the employer pays the costs of the surgery.

Issue:

- What are the consequences, if any, of there having been no referral of the dispute by the Registrar for assessment by an Approved Medical Specialist.

Held:

- Section 60(5) of the 1987 Act makes it mandatory to first refer a dispute concerning proposed treatment or service to an Approved Medical Specialist.
- On a proper construction of section 60(5), the requirement of referral to an Approved Medical Specialist is mandatory and its non-performance has the consequence that the findings and orders of an Arbitrator concerning the dispute relating to a proposed treatment or service are null and void having been made without jurisdiction (citing *Minahan v Baldock* [1951] HCA 27; 84 CLR 1; *Hatton v Beaumont* (1977) 2 NSWLR 211).
- Any assessment of a dispute concerning future medical expenses made in accordance with Part 7, Chapter 7 of the 1998 Act would not be presumed to be correct but would be evidence (but not conclusive evidence) in proceedings before the Commission (section 326(2) of the 1998 Act).

(d) Journey Claims

The entitlement to claim compensation for an injury received while on a journey as defined in section 10(3) of the 1987 Act was amended in 2012 to include the following restriction on entitlement:

> (3A) A journey referred to in subsection (3) to or from the worker's place of abode is a journey to which this section applies only if there is a real and substantial connection between the employment and the accident or incident out of which the personal injury arose.

Section 10(3A) provides that a journey referred to in subsection (3) is a journey to which this section applies only if there is a ***real and substantial connection*** between the employment and the accident or incident out of which the personal injury arose.

Section 10(3A) applies to injuries received on or after 19 June 2012 but does not apply to an injury received before that date (clause 18, Part 19H, Schedule 6 of the 1987 Act).

Cases:

Mitchell v Newcastle Permanent Building Society Ltd [2013] NSWWCCPD 55 (O'Grady DP)

Facts:

- The applicant was an office worker.
- Her usual hours of work were between 8:30 am and 5:00 pm.
- On 20 June 2012 she was requested by her employer to remain at work after normal working hours to undertake "a clean desk inspection".
- The worker left the office shortly after 5:30 pm and while walking to her motor vehicle in the darkness, having commenced her journey home, she tripped on an exposed tree root and was injured.

Issue:

- Whether staying back at work and leaving in the dark provided a real and substantial connection between the employment and the accident.

Held:

- Whether there is a real and substantial connection between employment and an accident or incident out of which an injury arises is a matter to be inferred from the facts based on common sense.
- "Employment" in section 10(3A) is not a reference merely to the fact of a worker being employed but to the employment of a worker in the worker's particular job.
- The word "substantial" is taken to mean "real and of substance" (*Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324 cited).
- "Real", in the context of section 10(3A), should be taken to mean "actual" and that the word "connection" should be taken to mean "association" or "relationship" or "link".

Bina v ISS Property Services Pty Limited [2013] NSWWCCPD 72 (Keating P)

Facts:

- The worker was employed as a cleaner at a school.

- Her usual hours of work entailed a split shift from 5:30 am to 8:00 am and from 3:00 pm to 6:30 pm.
- It was the worker's usual practice to drive home between shifts.
- On a journey home after completing her morning shift on 27 July 2012, the worker suffered an injury in a motor vehicle accident.

Issue:

- Whether there was a real and substantial connection between the worker's employment and her accident.

Held:

- Whether and in what circumstances section 10(3A) will be satisfied will be a question of fact, applying the words of the provision in a commonsense and practical manner.
- The mere fact that the worker was driving to and from work does not establish a real and substantial connection between employment and the accident.
- For the worker to succeed, she does not have to prove that the accident was caused by the employment as this would probably be enough to establish a personal injury "arising out of "employment (section 4(a) of the 1987 Act).
- There needs to be a real and substantial connection between some feature of what the worker is reasonably required, expected or authorised to do, by reason of her employment, and the accident or incident out of which the personal injury arose.

Dewan Singh and Kim Singh t/as Krambach Service Station v Wickenden [2014] NSWWCCPD 13 (Roche DP)

Facts:

- The worker worked as a casual at a service station.
- Her usual finish times were during daylight hours.
- On 5 July 2012 the worker was travelling home in darkness due to an employment requirement to work late to learn new tasks and duties.
- She was injured while riding her motor bike home when a motor vehicle swerved to avoid cattle on the road and struck her.

Issues:

- Whether the worker established a real and substantial connection between her employment and the accident.
- Whether it was open to infer that darkness played a role in the accident, that is, whether there was at greater or increased peril.

Held:

- For the worker to succeed, she had to prove that there was a real and substantial connection between her employment and the accident, not that the darkness was the sole cause of the accident.
- As a matter of commonsense and general human experience, the compelling conclusion is that the darkness reduced the time that both the worker and the driver of the other vehicle had to react to cattle on the road and avoid a collision.
- It follows that it was open to the Arbitrator to conclude that the time of the journey was a factor that contributed to the accident.

(e) Costs

Prior to the 2012 legislative amendments, the Commission had full power and discretion to determine by whom, to whom and to what extent costs were to be paid.

Costs orders followed the common law principle that costs follow the event, except for the restriction of ordering costs against a claimant unless the proceedings were frivolous or vexatious, fraudulent or made without proper justification.

By the 2012 legislative amendments, section 341 of the *Workplace Management and Workers Compensation Act* 1998 (1998 Act) was amended to provide:

> (1) Each party is to bear the party's own costs in or in relation to a claim for compensation.
>
> (2) The Commission has no power to order the payment of costs to which this Division applies, or to determine by whom, to whom or to what extent costs to which this Division applies are to be paid.

The new provision, which provides that each party bears his, her or its own costs regardless of the outcome of proceedings, applies to all claims for compensation made on or after 1 October 2012.

By clause 8, Schedule 8 of the 2010 Regulation, which was inserted in the 2010 Regulation by the *Workers Compensation Amendment (Transitional) Regulation* 2012, the Commission's power to order costs was preserved in relation to "a claim for compensation made before 1 October 2012" if proceedings on the claim were commenced in the Commission before 1 January 2013.

The 1 January 2013 cut off was extended to proceedings commenced before 31 March 2013, by paragraph [1], Schedule 1 of the *Workers Compensation Amendment (Further Transitional) Regulation* 2012.

The day before 31 March 2013 was Saturday, 30 March 2013. By section 36(2) of the *Interpretation Act* 1987, if the last day of a period of time falls on a Saturday, time is extended to the next working day, which was Tuesday, 2 April 2013, noting that Monday, 1 April 2013 was a public holiday. Therefore, the Commission is able to

make costs orders in any proceedings commenced on or before 2 April 2013 if the claim for compensation was made before 1 October 2012.

With respect to matters where claims are made on or after 1 October 2012 and/or proceedings are commenced in the Commission after 2 April 2013, the Commission has no power to order costs or uplifts for complexity and the 2012 amendments apply, that is, each party is to bear the party's own costs.

In the case of an employer's legal representative, costs will be paid by the scheme agent or the employer in the case of a self-insurer. In the case of a worker's legal representative, costs are payable by the worker however the NSW Government's workers' compensation legal assistance scheme, administered by the WorkCover Independent Review Officer, should be a first port of call for all legal representatives of workers. Proceedings with funding for legal aid now make up about 80% of the total disputes lodged in the Commission.

Cases:

Pen v Arborglen Pty Ltd [2013] NSWWCC 455 (Arbitrator Egan)

Facts:

- Upon the successful resolution of the dispute, the worker raised an entitlement to costs.
- The employer observed that the claim for whole person impairment, upon which the proceedings were commenced, was by letter dated 1 February 2013.

Issue:

- Whether a claim for compensation was made before 1 October 2012.

Held:

- To qualify for the transitional exemption to the new section 341, two conditions must be met:
  1. A claim for compensation must have been made before 1 October 2012
  2. The proceedings on the claim must have been commenced in the Commission before 31 March 2013.
- The reasoning in *Goudappel v ADCO Constructions Pty Ltd* [2013] NSWCA 94 was adopted, to the effect that the reference to a claim for compensation is a reference to a claim generally, rather than a specific claim for lump sum compensation.
- In this case, there was evidence that a claim generally was made well before 1 October 2012.

Del Moral v Mirvac Hotels Pty Limited [2014] NSWWCC 30 (Arbitrator Batchelor)

Facts:

- The worker was successful in a claim for section 60 expenses, namely, chiropractic treatment.
- The worker sought costs of the proceedings.
- The employer argued that no claim was made before 1 October 2012 for the medical expenses to which the proceedings related.

Issue:

- Whether a claim for compensation was made before 1 October 2012.

Held:

- Consistent with the decision in *Goudappel*, if the worker has made any claim for compensation prior to 1 October 2012, provided the proceedings on the claim were commenced by 2 April 2013, section 341 as amended by the 2012 amending legislation does not apply to the proceedings.

Rodney Parsons
Deputy Registrar, WCC