No more 74 – Work Capacity is the way to go

A work capacity decision issued by a Scheme Agent is a determination as to a worker's entitlement to weekly compensation. It can be the subject of an internal review by the insurer and then a review by iCare then WIRO. The dispute process for a work capacity decision does not incorporate referral to the Workers Compensation Commission. However Scheme Agents have been disputing entitlements to weekly payments based on the contention the injury has resolved or there is no longer any incapacity and workers have been challenging the decisions in the Commission.

The practice of Scheme Agents determining liability with the issue of a Section 74 notice disputing liability on the basis of recovered capacity (Section 33) and injury (Section 4) in circumstances where there has been an earlier inconsistent work capacity decision, has been the focus of Presidential consideration in *Sabanayagam v St George Bank Limited* [2016] and the door seems to be closing on weekly payments disputes in the WCC.

Ms Sabanayagam sustained injury to her left knee on 3 October 2006 during the course of her employment with St George Bank. She was subsequently made redundant by St George Bank but returned to employment with a number of other employers, the most recent being Lloyds International. On 4 March 2013 that position was also made redundant and Sabanayagam did not return to employment.

A work capacity decision was made by the Scheme Agent on 25 November 2013 at which time it was determined that Sabanayagam had no entitlement to weekly payments of compensation. An internal review was sought and the decision was overturned by letter dated 31 December 2013 and her weekly payments were reinstated.

On 24 September 2014 the Scheme Agent issued a work capacity decision at which time it was indicated that Sabanayagam had no current work capacity.

On 20 March 2015 the Scheme Agent issued a notice pursuant to section 74 of the Act which disputed that Sabanayagam had any incapacity resulting from her injury, relying on Section 33 of the Act. The Section 74 Notice also relied on Section 4, disputing ongoing injury. A further declinature was issued on 26 March 2015 following a review pursuant to Section 287A of the *Workers Compensation Act 1987.*

Sabanayagam subsequently commenced proceedings in the Workers Compensation Commission.

The Scheme Agent argued that the Commission did not have jurisdiction to resolve the dispute. Sabanayagam contended that the section 74 notice was not a work capacity decision and so the Commission could determine the dispute.

At first instance the Senior Arbitrator determined the dispute on the basis that the Commission had no jurisdiction after the second entitlement period (130 weeks) as defined in Section 32A of the *1987 Act* and therefore she declined to make any order.

Sabanayagam's entitlement was to be determined in accordance with Section 38 of the *Workers Compensation Act 1987*. A number of decisions of the Commission including *Rawson* which we discussed in our Newsletter of February 2015 have held that the Commission does not have jurisdiction to determine a worker's entitlement to weekly compensation under Section 38.

Sabanayagam appealed.

The appeal proceeded before Deputy President O'Grady.

On appeal there were three issues to be determined:

- whether the Senior Arbitrator was in error in determining that the section 74 notices issued by the Scheme Agent in 2015 were work capacity decisions;
- whether the Senior Arbitrator was correct in determining the Commission had no jurisdiction;
- whether the Senior Arbitrator erred in determining the Commission had no jurisdiction to determine a dispute as to a work capacity decision.

In dealing with the appeal Deputy President O'Grady first considered the submission that the Senior Arbitrator had made an error when she found the Section 74 Notices of 20 March 2015, 26 March 2015 and 9 April 2015 were work capacity decisions.

The Deputy President noted the reference to "*suspend, discontinue or reduce the amount of the weekly payments of compensation payable"* in Section 43(1)(f) of the *1987 Act* and found that read together with subclauses (a) – (e) this had the consequence on the facts that the decision to discontinue payments was a work capacity decision and the insurer had made a work capacity decision in March 2015. As such the Deputy President found the Commission could not make a decision inconsistent with that work capacity decision.

Sabanayagam's argument that a decision to discontinue payments cannot be construed as a work capacity decision was rejected by the Deputy President on the basis that:

"A decision "about a worker's current work capacity" should be taken to include a decision as to the existence, or otherwise, of such current work capacity as defined."

The Deputy President took this approach noting the reference to "*suspend, discontinue or reduce the amount of the weekly payments of compensation payable"* in Section 43(1)(f) of the *Workers Compensation Act 1987* and on this basis found that the decision to discontinue payments was a work capacity decision which had been made in March 2015.

The Deputy President next dealt with the submission that the Senior Arbitrator erred in finding the Commission did not have jurisdiction after the second entitlement period where the requirements of Section 38 had been met and the insurer had assessed the worker as having no work capacity. Reference was made to the decision of President Judge Keating in *Lee v Bunnings Group Limited* [2013], where he noted that:

"It is clear from the unambiguous terms of s 38 that an entitlement to compensation under that section must be assessed by the insurer, not by the Commission."

Deputy President O'Grady accepted the reasoning and conclusion in *Lee* and therefore confirmed that the Commission had no power to rule on, or determine, any such dispute.

Deputy President O'Grady indicated that the question for the Scheme Agent to determine was whether Sabanayagam had a right or claim to weekly benefits and where there was disagreement between the Scheme Agent and Sabanayagam, the Act contained mechanisms for review as prescribed in Section 44BB, that is, review by WIRO or by judicial review by the Supreme Court in Section 43(1). The President confirmed the Commission had no power to rule on, or determine, any such dispute.

The final ground dealt with by Deputy President O'Grady was the submission that the Senior Arbitrator erred when she considered the Commission had no jurisdiction to determine a dispute whether a work capacity decision was binding.

The Deputy President indicated that disputes concerning entitlement to weekly compensation following the expiration of the first two entitlement periods require assessment of a threshold question as to the existence of a work capacity decision. As such questions were not "about" a work capacity decision within the meaning of Section 43(3) the Commission was bound by the decision once made and the Commission cannot make an inconsistent decision. He indicated further that if the decision in March 2015 had not been made, the Commission may have had jurisdiction to determine the medical dispute, that is, whether Sabanayagam had recovered from the effects of the injury.

In concluding remarks Deputy President O'Grady indicated that it was clear despite the March 2015 decision being implied from the facts to be a work capacity decision, the Scheme Agent had not complied with the WorkCover Guidelines which specify the content that is required in a work capacity decision.

Following publication of the decision, WIRO issued a wire advising it will not fund applications to dispute a Section 74 Notice from which it may be inferred that a work capacity decision has been made. WIRO has advised that workers are required to seek a review of the decision in such matters consistent with the process set out in Section 44BB of the *1987 Act.* WIRO has further advised workers should be confident of succeeding on any such review.

This decision confirms there can be no reliance placed on Section 33 in Section 74 Notices where liability has been accepted by an insurer and payments of weekly compensation made. In these circumstances a work capacity decision is the correct form for an insurer to convey a determination a worker has recovered from the effects of an injury. The decision is merely a reminder that any decision concerning capacity should be conveyed by way of a work capacity decision rather than as a liability dispute by way of a Section 74 notice.

Icare has directed Scheme Agents not to issue Section 54 or 74 notices resulting in cessation of weekly payments of compensation where liability has been accepted for an injury.

The decision is subject of an Application for leave to appeal to the Court of Appeal and there have been two arbitral decisions delivered more recently declining to follow the determination that Section 74 notices relying on Sections 4 and 33 constitute work capacity decisions because they do not comply with the requirements of the Guidelines and do not purport to be work capacity decisions.

Nonetheless, the icare directive continues to bind Scheme Agents who will now be required to make reasoned work capacity decisions rather than raise disputes in section 74 notices regarding a worker's continuing incapacity and injury based on medical evidence.

Furthermore Scheme Agents are likely to be subject to a flood of applications for review of Section 74 notices

based on Sections 4 and 33 following the WIRO decision not to fund disputes in the WCC.

The outcome of the appeal is eagerly anticipated.

Olivera Stojanovska
oxs@gdlaw.com.au
Belinda Brown
bjb@gdlaw.com.au