Whether total knee replacement is an 'artificial aid' within the meaning of s59A(6)(a)

Pacific National v Baldacchino [2018] NSWWCCPD12

LINK TO DECISION

Deputy President Snell has recently affirmed a decision of Arbitrator Harris that provision of a total knee replacement falls within the meaning of 'other artificial aids' in s59A(6) of the 1987 Act.

The worker suffered a left knee injury in 1999 for which he underwent an arthroscopic medial meniscectomy. Liability for the claim was accepted and payments made at that time. Many years later (in 2013), the worker obtained orders for the payment of lump sum compensation in respect of a 15% loss of use of the left leg at or above the knee consistent with assessment by an AMS.

In 2016, the worker sought orders that the employer was liable for the cost of a total knee replacement on the basis that the treatment arose as a consequence of the 1999 knee injury. The insurer denied liability disputing that the ongoing expenses claimed were reasonably necessary as a result of the employment injury. The worker brought proceedings seeking an order for payment that was heard and determined by Arbitrator Harris who decided that the need for the total knee replacement arose as a result of the 1999 injury.

He later dealt with the question of whether s59A applied observing that the worker being in his 67th year was not entitled to the cost of the total knee replacement due to the operation of the section unless the proposed surgery fell within the meaning of either a provision of an 'artificial member' or an 'artificial aid' in s59A(6) of the Act.

The insurer disputed that s59A(6) was satisfied arguing that the proposed surgery did not fall within the meaning of 'other artificial aid' and that clause 27 of Schedule 8 of the 2016 regulations applied. The arbitrator found that s59A(6) was not subject to clause 27 of Schedule 8 of the 2016 regulations as the clause operated with respect to existing claims. The claim under consideration was not an 'existing claim' as defined in Part 2 of Schedule 8 of the 2016 regulation.

The Arbitrator found that the proposed surgery fell within the meaning of 'other artificial aid' in s59A(6) of the 1987 Act and considered the meaning of those words in *Thomas v Ferguson Transformers Pty Ltd* [1979] 1 NSWLR 216 where Justice Hutley defined an artificial aid as "anything which has been specially constructed to enable the effects of the disability… to be overcome".

The insurer appealed the arbitrator's decision. The WCC notified SIRA and invited it to consider whether it wished to be heard. SIRA lodged submissions supporting the decision of the arbitrator.

The insurer argued that having regard to the items described in s59A(6) 'crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries)', that the meaning of 'artificial aids' was a reference to aids that were external, visible and externally accessible to an injured worker's body.

Deputy President Snell considered the decision in Thomas and the plain words of the statutory definitions and statutory construction. He also cited a number of examples including that of an artificial eye which could not be simply described as external and did not accept that the section should be read so narrowly as contended by the insurer.

Arbitrator's decision confirmed.

Decision Number: [2018] NSWWCCPD 12
Decision Date: 28 March 2018
Matter Number: A1-2148/17
Decision Maker: Snell DP, Workers Compensation Commission

Judicial Review – Merit review by SIRA – Denial of procedural fairness

Bhusal v Catholic Health Care Ltd

LINK TO DECISION

The worker suffered a back injury in the course of her employment in 2014. The worker made a claim for compensation, liability for which was initially accepted and payments made until February 2016 when she was informed by the insurer that following review, it had decided that she had a current capacity to work that disentitled her to further payments.

The insurer affirmed its decision following an internal review. The worker did not receive notice of this decision until 2 June 2016 when she returned from overseas but stated on her application that she had been notified of the decision on 2 May 2016. On 30 June 2016, SIRA notified the worker that it did not have jurisdiction as the application was not made within 30 days of her being notified of the decision. The worker sought a judicial review but was unsuccessful.

On appeal, the Court noted that it was common ground that SIRA's decision was wrong; there was undisputed evidence that the worker had lodged her application within time.

The Court found that the worker had been denied procedural fairness as the procedure adopted (by SIRA) had caused 'practical injustice' in the absence of any opportunity to make submissions to SIRA on the issue that proved critical to the outcome of her application.

Decision Number: [2018] NSWCA 56
Decision date: 7 March 2018
Matter No: 2016/330368
Decision Maker: NSW Court of Appeal