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WHAT CONSTITUTES AN 'ARTIFICIAL AID'?

Pacific National v Baldacchino [2018] NSWWCCPD 12 (28 March 2018)

Section 59A of the *Workers Compensation Act 1987* (NSW) ('1987 Act') provides that an injured worker is not entitled to compensation in respect of any treatment, service or assistance that is given or provided after the compensation period has elapsed. However, there are a number of exceptions to that rule. Importantly for the purpose of this case note, the rule does not apply to the provision of "artificial aids".

The Workers Compensation Commission recently determined that a total knee replacement did in fact constitute an "artificial aid" in the context of Section 59A(6)(a).

Material Facts

In 1999 Mr Baldacchino ("Respondent") suffered an accepted left knee injury in the course of his employment with Pacific National (the "Appellant"), for which he underwent a left knee arthroscopy surgery.

More recently, the Claimant was diagnosed with post-traumatic arthritis in the left knee. He subsequently made a claim for medical expenses in respect of a total knee replacement. That claim was made outside of the legislative compensation period. The Appellant declined liability for the proposed surgical treatment, primarily on the basis that it was not reasonably necessary as a result of the initial frank injury.

Arbitration

At Arbitration, it was determined that the proposed surgery was reasonably necessary pursuant to Section 60 of the 1987 Act. Further, the application of the Section 59A rule was considered. By reference to *Thomas v Ferguson Transformers Pty Ltd [1979]* 1 NSWLR 216 ('*Thomas*'), it was determined that the proposed total knee replacement was designed for the Respondent to overcome the effects of his disability and clearly fell within the meaning of an "artificial aid" in Section 59A(6) of the 1987 Act. Accordingly, the Claimant was entitled to compensation for the proposed surgery and the Arbitrator made orders to that effect.

The Appellant challenged that decision on two primary bases:

1. The Arbitrator made an error of law in relying on *Thomas*, in finding that the total left knee replacement constituted an 'artificial aid'.

2. The Arbitrator made an error of law in failing to construe Section 59A(6)(a) of the Act by reference to its text, context and purpose.

Interestingly, the State Insurance Regulatory Authority ('SIRA') exercised its statutory power to be heard by the Commission on appeal. SIRA's submissions were largely consistent with those of the Respondent.

Decision on Appeal

Thomas was decided approximately 38 years ago and applied to the now repealed 1926 Act. The Appellant contended that the Legislature's intention in respect of the ambit of an "artificial aid" in the 1987 Act was plainly

different to its intention in respect of the same phrase in the 1926 Act. On that basis, it was submitted that *Thomas* is no longer authoritative.

Further, the Appellant contended that the Arbitrator erred in broadly construing Section 59A(6). It submitted that the 2012 Amendments were patently restrictive, which is evidenced by the opening words of Section 59A(6) – "Compensation is not payable…". The Appellant submitted that since the 2015 Amendments were intended to ameliorate the restrictive 2012 Amendments, they ought to be interpreted by reference to their predecessor's intention. On that basis, the Appellant contended that the phrase "artificial aid" should be construed in a limited way rather than in a broad sense.

Finally, the Appellant contended that the Arbitrator failed to construe Section 59A(6) of the 1987 Act by reference to its text, construct and purpose. The Appellant's main argument was that the generic phrase – "artificial aid" – should have been read down to have the meaning of the specific words listed in Section 59A(6). It was submitted that the genus of the words listed in Section 59A(6) is "aids that are external, visible and externally accessible to an injured worker's body". The Appellant concluded that a total knee replacement did not fit the genus of Section 59A(6).

Deputy President Snell found that *Thomas* remained authoritative despite its age. Though *Thomas* pertained to a claim for modification of a motor vehicle, his Honour concluded generally that an "artificial aid" is "anything which has been specially constructed to enable the effects of the injury to be overcome".

In respect of the Legislature's intent, Deputy President Snell agreed with the Arbitrator's application of the 're-enactment presumption' established in *Ex parte Campbell (1870)* LR 5 Ch App 703. It was determined that the relevant definition in the 1987 Act is substantially the same as the relevant definition in the 1926 Act. The re-enactment of virtually identical words in the 1987 Act is indicative of the Legislature's intention to re-enact the same meaning as construed in *Thomas*.

Deputy President Snell confirmed that the clear purpose of the 2015 Amendment was to widen the potential benefits available for workers to recover the costs of specific medical and related expenses beyond the expiry of the time periods specified in Section 59A. It was found that, although the 2015 Amendment ought not to be construed widely, they should not be read in the same vein as the 2012 Amendment, which clearly disclosed a cost-saving objective.

Deputy President Snell rejected the Appellant's submission in respect of reading down the phrase "artificial aid" in Section 59A(6)(a). It was determined that in any event, reading down would not have the effect desired by the Claimant. For example, Section 59A(6)(a) makes reference to eyes and teeth which are clearly not external to the body. Finally, it was concluded that the plain words of the text in Section 59A(6)(a) are consistent with a total knee replacement falling within the definition of an artificial aid.

Accordingly, Deputy President Snell rejected the appeal.

Implications of the Decision

The Commission's decision provides that *Thomas* is still the key authority in respect of Section 59A(6) of the 1987 Act. To put it simply, an "artificial aid" is defined as any internal or external thing which has been specially constructed to enable the effects of the injury to be overcome. Evidently, that decision creates quite a broad scope for injured workers to claim Section 60 medical expenses outside the legislative compensation time frame.

If you have any questions about a particular workers compensation matter, please contact our team by phoning 02 4929 9333 (Newcastle) or 02 8297 5900 (Sydney).