[2014] WADC 86

JURISDICTION	**:**	DISTRICT COURT OF WESTERN AUSTRALIA IN CIVIL
LOCATION	**:**	PERTH
CITATION	**:**	GLENN -v- COMPASS GROUP (AUSTRALIA) PTY LTD [2014] WADC 86
CORAM	**:**	BRADDOCK DCJ
HEARD	**:**	12 MARCH & 29 MAY 2014
DELIVERED	**:**	26 JUNE 2014
FILE NO/S	**:**	APP 89 of 2013
BETWEEN	**:**	JANET MARY GLENN Appellant AND COMPASS GROUP (AUSTRALIA) PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	WORKERS' COMPENSATION ARBITRATION SERVICE (WA)
Coram	**:**	ARBITRATOR POWLES
File No	**:**	A 3163 of 2013

Catchwords:

WorkCover appeal - Leave to appeal - 'Return to work' - Classification of payments made to worker - Prescribed amount exceeded - Relevance of partial incapacity - Schedule 1 cl 7(2)

Legislation:

Workers' Compensation and Injury Management Act 1981 s 5, s 18, s 57A, s 61, s 83, sch 1 cl 7

Result:

Leave to appeal granted
Appeal dismissed

Representation:

Counsel:

Appellant	:	Mr M J Lourey
Respondent	:	Mr G W Nutt

Solicitors:

Appellant	:	Chapmans
Respondent	:	Jarman McKenna

Case(s) referred to in judgment(s):

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Glennan v Commissioner of Taxation [2003] HCA 31; (2003) 77 ALJR 1195
House v The Queen (1936) 55 CLR 499
Pacific Industrial Co v Jakovljevic [2008] WASCA 60
Philmac Pty Ltd v Asti (1980) 26 SASR 213
The Department of Education v Kenworthy (1990) 3 WAR 1

BRADDOCK DCJ:

Introduction

1 By notice of appeal dated 21 October 2013, Ms Glenn commenced an appeal from a decision of arbitrator Powles given on 20 September 2013. In that decision, the arbitrator dismissed Ms Glenn's application for weekly payments of compensation for injury claimed from 23 November 2012. Ms Glenn contends that the arbitrator erred in law.

2 On 24 October 2013, the respondent lodged a notice of intention to take part in the appeal and argued that the primary decision should be upheld on the grounds relied upon by the arbitrator. On 10 December 2013, a registrar ordered that the appeal be listed on 12 March for hearing before a judge. Both parties were ordered to and did file written submissions.

Background facts

3 Ms Glenn was employed by the respondent as 'utility worker' commencing in January 2009 in Dampier, Western Australia. During the course of her employment she had a wide range of duties and was employed mostly on a fly-in/fly-out basis. She initially worked at the Karratha TAFE College, on a Monday to Friday basis, as a kitchen hand, plus housekeeping in the dining room, general administration and waitressing. In February 2010 she was transferred to a construction site at a location called Devil Creek. She was working as a kitchen and dining room attendant with duties including cleaning, housekeeping in the dining room, stocking, re-stocking of fridges and freezers, washing pots and equipment, crockery, laundering and associated activities. In the middle of May 2010, she started to experience symptoms of tingling in her hands, worse in her right hand. She reported this and subsequently took sick leave on the advice of the manager and a paramedic. On 17 May 2010, she flew to Perth. The following day she saw a Dr Blake who ordered tests. Subsequently, she returned to Karratha working on light duties for nine days, followed by a period in Melbourne for rostered time off. Her injury was diagnosed as carpal tunnel syndrome and she made a claim for workers' compensation. Liability was accepted and weekly payments of compensation commenced. The claim form appears to be dated 7 July 2010. The respondent reported the injury to its insurer GIO Workers' Compensation [G10] on 18 June 2010. A workers' compensation 'first medical certificate' was issued and, on 19 June 2010, a return to work plan was signed by both Ms Glenn and the site manager.

4 Thereafter, regular progress medical certificates were issued, medical reports were obtained and further return to work plans were prepared. Over the next two years, Ms Glenn underwent three surgical procedures and had other medical treatment. She had various periods of total incapacity and absence from work. At the appeal these were shown represented on a calendar for the years 2010, 2011 and 2012. At times she was certified fit for restricted duties. When she was so fit, she worked for the respondent at various sites on duties that were within the medical recommendations or restrictions advised.

5 Return to work plans were prepared dated 19 June 2010, 20 January 2011, 16 May 2011, 11 November 2011 and 11 July 2012.

6 On 29 August 2012, Ms Glenn received a letter from GIO advising that she had received $223,880.20 in weekly payments, which exceeded the prescribed amount to which she was entitled and that her weekly payments would cease.

7 Ms Glenn continued to work on restricted duties and received payment from the respondent until 23 November 2012, when she was advised that she could not continue at the site where she had been working. She has not been rostered to work since.

8 Payslips contained within the appeal book show that her remuneration was described at various times as 'ordinary time', as 'workers' compensation' and there are entries for annual leave and the like.

9 Unfortunately, Ms Glenn's treatment and rehabilitation did not result in a return to normal functioning in her hands and at no time was she certified fully fit. All medical certificates contained in the appeal book up to and including 30 August 2012 describe her capacity for work as being for modified duties, full-time, with no use of the right arm, avoiding repetitive use of the left arm and no lifting over 2 kg with the left arm.

10 Curiously, payslips from the respondent to Ms Glenn continued into 2013, the last showing a pay period finishing on 3 February 2013.

11 Ms Glenn claims that the respondent is liable to pay weekly payments 'as for total incapacity from 23 November 2012 and continuing'. A dispute in relation to medical expenses was resolved prior to arbitration.

12 The respondent disputes that Ms Glenn is entitled to ongoing payments of compensation, because the amount already paid to her exceeds the prescribed amount, which at the relevant time was $198,365.

Ms Glenn argued before the arbitrator that she returned to work for extended periods, prior to August 2012, and thus payments then received from the respondent were wages rather than compensation.

Decision of the arbitrator

13 On 20 September 2013, having heard the matter on 21 May 2013, the arbitrator dismissed the application brought by Ms Glenn, on the basis that Ms Glenn had not returned to work prior to 19 August 2012. Therefore, the payments made to her from the date of injury until that date were weekly payments under the *Workers' Compensation and Injury Management Act 1981* (WCIMA) . She also found that Ms Glenn had received additional payments in excess of the statutory amount. Accordingly, Ms Glenn had no further entitlement to weekly payments for incapacity from 23 November 2012.

Appeal to this court

14 This is an appeal pursuant to s 247 of the WCIMA, which provides:

> **247. Appeal against arbitrator's decision made under Part XI**
>
> (1) If written reasons for an arbitrator's decision under Part XI in respect of a dispute are given to a party to the dispute (whether as required by section 213(3) or otherwise), the party may, with the leave of the District Court, appeal to the District Court against the decision.
>
> (2) Subject to subsection (3), the District Court is not to grant leave to appeal unless —
>
> (a) in the case of an appeal in which an amount of compensation is at issue —
>
> (i) a question of law is involved and the amount at issue in the appeal is both —
>
> (I) at least $5 000 or such other amount as may be prescribed by the regulations; and
>
> (II) at least 20% of the amount awarded in the decision appealed against;
>
> or
>
> (ii) a question of law is involved and, in the opinion of the District Court, the matter is of such

> importance that, in the public interest, an appeal should lie;
>
> and
>
> (b) in any other case, a question of law is involved.
>
> …
>
> (5) An appeal under this section is to be by way of review of the decision appealed against and, except as provided by this Part or section 267, is to be conducted in accordance with the rules of court of the District Court.
>
> (6) Evidence that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the decision appealed against cannot be given on an appeal to the District Court except with the leave of the District Court.
>
> (7) On hearing an appeal made under this section, the District Court may —
>
> (a) affirm, vary, or quash the decision appealed against, or substitute, and make in addition, any decision that should have been made in the first instance; and
>
> (b) subject to section 267, make any further or other decision, as to costs or otherwise, as the District Court thinks fit.

15 This appeal is one in which the amount of compensation in issue is unquantified, being dependent entirely on the question of whether the prescribed amount had been exceeded. The respondent did not make any concession in relation to the amount of compensation in issue. Ms Glenn in the notice of appeal stated that the question of law was the application of:

> (1) clause 7 of sch 1 of the Act (s 18);
>
> (2) the operation of an estoppel; and
>
> (3) the appellant worker was afforded procedural fairness.

16 Ms Glenn must establish that the appeal involves the question of law before the jurisdiction to grant leave to appeal is enlivened. An appeal will not involve an error of law merely because it is asserted that it does: ***Glennan v Commissioner of Taxation*** [2003] HCA 31; (2003) 77 ALJR 1195 [14]. A decision will not involve an error of law unless the error is material to the decision in the sense that it contributed to it so that but for

the error the decision would have been or might have been different: ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321, 353.

17 By s 247(5) WCIMA, the appeal is a review and whilst a review is not a hearing de novo, once a question of law is identified and the jurisdiction enlivened, the review is not limited to pure questions of law: ***Pacific Industrial Co v Jakovljevic*** [2008] WASCA 60.

18 An appellant must show some proper basis within an appellate process for disturbing the decision under challenge, such as an error of fact, law or logic: it is not sufficient that the court undertaking the review would have come to a different conclusion on the facts to that of the arbitrator: ***House v The Queen*** (1936) 55 CLR 499, 504 – 505. Unless the review persuades the court that the arbitrator's decision should be varied, discharged or otherwise disturbed it should stand.

19 It was not in contention but that issue of leave should be determined together with the appeal.

The grounds of appeal

20 The notice of appeal apart from indicating the questions of law as set out above, set forth three grounds of appeal. The first ground was abandoned by the appellant on 12 March 2014.

21 The remaining grounds are as follows:

> 2. Wrongly having regard to the issue of whether the appellant worker had 'returned to work', (as that phrase is defined in the decision of ***Department of Education v Kenworthy*** (1990) 3 WAR 1).
>
> **Particulars**
>
> 2.1 The learned Arbitrator confused the appellant worker's contention she had done work that required the payment of wages with the question of whether the appellant had 'returned to work' as that phrase is used in the Act for in particular section 61;
>
> 2.2 The learned Arbitrator whilst describing the employer's obligation to compensate an injured worker in accordance with the Act [21] confused that with an injured worker's right to have weekly compensation payments not ceased or reduced other than in accordance with the Act;
>
> 2.3 The learned Arbitrator failed to recognise that the mere payment of wages pursuant to subclause 7(2) interferes

with neither an employer's obligation, nor an injured worker's rights.

3. Failing to have regard to subclause 7(2) of the Schedule 1 of the Act and thereby not determining what the appellant worker was 'earning or was able to earn' for the purposes of that subclause.

Particulars

3.1 (See particulars for Ground 2 above).

22 The appellant sought that the decision of the arbitrator be quashed, a determination of the balance of the prescribed amount at 23 November 2012 and that the respondent pay her weekly payments for deemed total incapacity, from 23 November 2012.

Statutory framework

23 The WCIMA is a statutory scheme consolidating the law relating to compensation for and the management of employment related injuries, to provide for WorkCover WA, and for the resolution of disputes and related purposes. The purposes of WCIMA are set out in s 3 and include not only the payment of compensation but the management of injuries in a manner enabling injured workers to return to work and specialised retraining programs for injured workers and ancillary matters.

24 The WCIMA creates the statutory obligations on employers to compensate workers for injuries in s 18:

18. Employers liable to compensate workers for injuries

If an injury of a worker occurs, the employer shall, subject to this Act, be liable to pay compensation in accordance with Schedule 1.

25 Section 21 of the WCIMA prescribes that an employer is liable to pay compensation from the date of incapacity resulting from the injury but cl 9 applies in any case (cl 9 concerns medical expenses where no incapacity results).

26 The WCIMA lays down procedures for the making of claims, the notification of claims to insurers, and provides for the circumstances in which weekly payments cease, amongst many other detailed provisions.

27 Section 60 of the WCIMA provides that where weekly payments are made the employer may apply for an order at any time to an arbitrator for such payments to be discontinued or reduced. The section goes on to specify that the employer must satisfy the arbitrator that there is a genuine

dispute about the liability to pay the compensation or the proper amount of the weekly payment.

28 Section 61 provides for the continuation of weekly payments; specifically:

> (1) Subject to subsections (7) and (8) and section 84, where weekly payments of compensation for total or partial incapacity are made to a worker under this Act, they shall not be discontinued or reduced without the consent of the worker or an order of an arbitrator unless the worker has returned to work or a medical practitioner has certified that the worker has total or partial capacity for work or that the incapacity is no longer a result of the injury and a copy of the certificate (which shall set out the grounds of the opinion of the medical practitioner) together with at least 21 clear days' prior notice of the intention of the employer to discontinue the weekly payments or to reduce them by such amount as is stated in the notice, has been served by the employer upon the worker and unless within that period the worker has not made an application under subsection (3).

Provisions are made for the referral of disputes to an arbitrator with requisite notices as prescribed.

29 Section 61(5) provides:

> (5) Subject to subsections (7) and (8), weekly payments shall not be discontinued or reduced otherwise than in accordance with this Act.

This is a penal provision, carrying a fine of $2,000.

30 Section 61(7) provides that s (1) and s (2) do not apply to a discontinuance on payment in full of the prescribed amount (inter alia).

31 Section 5 defines return to work as follows:

> ***return to work***, in relation to a worker who has suffered an injury compensable under this Act, means —
>
> (a) the worker holding or returning to the position held by the worker immediately before the injury occurred, if it is reasonably practical for the employer who employed the worker at the time the injury occurred to provide that position to the worker; or
>
> (b) if the position is not available, or if the worker does not have the capacity to work in that position, the worker taking a position —
>
> (i) for which the worker is qualified; and

(ii) that the worker is capable of performing,

whether with the employer who employed the worker at the time the injury occurred, or another employer;

32 The prescribed amount is defined in s 5 of the WCIMA and relevantly was $198,385.

33 Section 84 provides where a worker who has been incapacitated by injury resumes or attempts to resume work, and is unable, on account of the injury, to work or continue to work, the resumption or attempted resumption of work by him shall not deprive him of any entitlement to compensation under this Act which he otherwise had.

34 Schedule 1 to the WCIMA deals with compensation entitlements in varied circumstances. Clause 7 deals with total or partial incapacity.

(1) Subject to section 56 and subclause (3) when total incapacity for work results from the injury a weekly payment during the incapacity equal to the weekly earnings of the worker calculated and varied in accordance with this Schedule.

(2) Subject to section 56 and subclause (3), where partial incapacity for work results from the injury, a weekly payment during the partial incapacity equal to the amount by which the total weekly earnings of the worker calculated and varied in accordance with this Schedule would exceed the weekly amount exclusive of payments for overtime or any bonus or allowance which he is earning or is able to earn in some suitable employment or business after the occurrence of the injury.

(3) An entitlement of a worker to weekly payments for an injury under this Act ceases if and when the total weekly payments for that injury reaches the prescribed amount, unless an arbitrator makes an order to the contrary under section 217, and there shall be no revival of, or increase in, that entitlement upon any subsequent increase in the prescribed amount.

35 Clause 8 concerns deemed total incapacity and provides:

Where a worker who has so far recovered from his injury as to be fit for employment of a certain kind satisfies an arbitrator that he has taken all reasonable steps to obtain, and has failed to obtain, that employment and that the failure is a consequence, wholly or mainly, of the injury, the arbitrator may, without limiting the arbitrator's powers of review, order that the worker's incapacity be treated, or continue to be treated, as total incapacity, for such period, and subject to such conditions, as the order may provide.

Evidence before the arbitrator

36 On this appeal no challenge was made to the findings of fact by the arbitrator. At the arbitration evidence was called from Ms Glenn, and Mr McGregor and a Ms Albers. Numerous medical certificates, return to work plans already referred to, and payslips were introduced into evidence, as was the correspondence from GIO and the form 3A. Various medical reports, occupational health reports and rehabilitation documentation were included. The only apparent issue on these matters was resolved at the outset of the hearing of the appeal with the production of a signed copy of the form 3A notice accepting liability by the insurer and specifying the rates of weekly payments.

Reasons of the arbitrator

37 The arbitrator set out the background and chronology of events concerning Ms Glenn's injury, treatment and subsequent attendance at work. The claim before the arbitrator was for weekly payments of compensation and Ms Glenn contended that the prescribed amount had not been reached. Ms Glenn argued that when she was back at work the payments she received were not weekly payment but wages paid for the work she had performed.

38 The arbitrator noted the policy and the obligation upon an employer to establish a return to work programme for a worker as soon as practicable under s 155C of the WCIMA. The respondent contended that the essential nature of the payments made was not to be determined by the reference to the description on the pay slips alone. The nature of the payment had to be determined in all the circumstances of the case.

39 The arbitrator agreed with the submission that the characterisation of the payments as either weekly payments or remuneration was a question to be determined upon consideration of the actual circumstances. She expressed the view that the essential character of payment could not be altered by the employer identifying the payment as one or other on the pay slip. She stated that it was necessary to consider whether there was a proper basis for weekly payments to be discontinued, the nature of the work restrictions at the time and the nature and the extent of the duties she was actually performing in the workplace.

40 The arbitrator made reference to the obligation to continue weekly payments under WCIMA unless certain circumstances came into existence. One of which was a return to work. Ms Glenn submitted she had returned to work. The respondent's position was that at any time

Ms Glenn was at work, she was being assisted to return to work in accordance with a programme.

41 Accordingly, the arbitrator considered the question to be whether Ms Glenn had returned to work. She referred to the definition of the phrase return to work in s 5(1) of the WCIMA (above). She found that Ms Glenn had not returned to work within the meaning of sub-par (a) of that definition. There was no dispute that Ms Glenn had not at any time returned to the position she held immediately before the injury occurred, as she had not regained the capacity to perform her pre-injury duties.

42 The arbitrator accepted the evidence of the respondent's witnesses, Ms Albers and Mr McGregor, that Ms Glenn was assigned a combination of work duties that met the requirements of the return to work programme that had been established. She found that Ms Glenn did not have a specific position at either the Devil Creek site or Eramurra Village. She concluded that Ms Glenn's circumstances did not fall within the meaning of sub-par (b) of the definition of return to work.

43 The arbitrator referred to the decision of ***The Department of Education v Kenworthy*** (1990) 3 WAR 1. She also referred to dicta by King CJ in ***Philmac Pty Ltd v Asti*** (1980) 26 SASR 213:

> Return to work is considered a sufficient reason, as it seems to me, because it involves the reestablishment of the injured worker as a wage earner who is no longer in need of the weekly payments of compensation. For return to work to have significance for this purpose it must be, in my opinion, a return as a settled or established member of the wage earning workforce.

44 The arbitrator then considered Ms Glenn's progress after the initial incapacity. Her summary is not contested and gives the full flavour of the situation:

> 37. Since suffering the injury in May 2010, there have been a number of periods when Ms Glenn was totally incapacitated for work and various periods when she has been certified fit for restricted duties. On each occasion when she was certified fit for work with restrictions, a return to work program was established.
>
> 38. the first return to work plan (R2) is dated 19 June 2010. In accordance with the plan, Ms Glenn was redeployed from the Devil Creek construction site where he had been working as a Utility, to an alternate site working her normal hours doing modified duties. About three weeks later Ms Glenn underwent bilateral carpal tunnel and right thumb release surgery. For the

remainder of the 2010 year she was certified totally unfit for work and received weekly payments of compensation. I find that in the short period Ms Glenn was working modified duties on a return to work plan in June/July 2010 she did not 'return to work'. She was clearly in need of compensation.

39. On 24 January 2011, Ms Glenn was certified fit for restricted duties, (normal hours but with a restriction of no repetitive use of hands and no lifting more than 1 kilogram: see exhibit A38). A return to work plan was established by Compass Care (R7) under which Ms Glenn worked at Peninsula Palms, working restricted duties which she performed on her regular roster until 7 March 2011, when she underwent a second operation to her right carpal tunnel, including right ulnar nerve relocation and release of right thumb scar. She was certified totally unfit for work from 7 March 2011 to 4 May 2011.

40. I consider that during the six weeks that Ms Glenn was working restricted duties pursuant to the January 2011 return to work plan she had not returned to work. It could not be said that she was re-established as a settled member of the workforce no longer in need of compensation. Payments from Compass to her continued uninterrupted after she underwent surgery on 7 March 2011. I find she had not returned to work prior to that date.

41. The next return to work plan (R8) was created by Compass Care on 16 May 2011, after Ms Glenn was certified fit for alternative duties with the restriction 'unable to use right arm'. Under the plan, Ms Glenn worked for Compass at RSL Park, which is a site in Melbourne. Ms Glenn worked at RSL Park until 4 August 2011, when she returned to the Devil Creek site and resumed working on light duties at that site.

42. A return to work plan by Compass Care dated 11 November 2011 (A21) provided for Ms Glenn to work normal roster hours at Devil Creek. In relation to her work duties the plant states 'Primary duties can include various administrative/light catering duties in accordance with current medical restrictions'.

43. In early 2012, as Devil Creek changed from construction to production, Ms Glenn was moved to Eramurra Village where she was performing restricted duties. Her payslips throughout this time identify payments made to her as for *'ordinary time'*.

44. On 20 April 2012 Ms Glenn underwent further surgery in Melbourne in the form of right radial nerve relocation. She was certified totally unfit for work for six weeks. The payslips from that date record payments as *'workers compensation'* and also record part of the subsequent pay as *'ordinary time'*.

> 45. After being certified fit for modified duties, a Compass Care return to work plan (A11) was established on 11 July 2012, in accordance with which Ms Glenn returned to Eramurra Village. She was working restricted duties under the return to work plan when she was notified on 19 August 2012 that weekly payments of compensation would cease as she had been paid the prescribed amount.

45 The arbitrator concluded that Ms Glenn had not returned to work at any time from mid-May 2010 to mid-August 2012, when she was notified that the prescribed amount had been reached. She found that Ms Glenn was working duties that consisted of a combination of tasks from other roles that were combined together to create a role that she had the capacity to perform within her restrictions. She considered she was not re-established as a settled member of the workforce no longer in need of compensation. She accordingly found that the payments she received from the respondent throughout the time prior to notification in August 2012 were weekly payments of compensation.

46 In reaching this conclusion, the arbitrator considered the arguments advanced by both parties, she noted that Ms Glenn had significant restrictions in the work that she could do, she accepted that Ms Glenn was employed in a role specifically generated for her, she noted that at all times Ms Glenn was certified fit for full-time duties with restrictions: 'no use of the right arm, to avoid repetitive use of the left arm and a lifting restriction of under 2 kg'. She expressly noted that Ms Glenn agreed that she had ongoing symptoms since she suffered the injury and that her symptoms had not abated. Ms Glenn agreed that she was pretty restricted as she was not able to use her right arm, and she was right hand dominant. The arbitrator found that Ms Glenn was working in a role that comprised specifically identified duties that were suitable for her restrictions with the aim of assisting her to be rehabilitated back to work. Regrettably, however, Ms Glenn did not experience the recovery that would have been hoped.

47 In relation the argument advanced on behalf of Ms Glenn, she specifically said she did not find it helpful to categorise the work done by Ms Glenn as 'meaningful' or otherwise and that there was no authority to pursue any such inquiry.

48 Having regard to the fact that weekly payments for the first 13 weeks were to be at a rate of $2,060.80, and thereafter at $1,876.31, the prescribed amount would have been reached by about 17 June 2012.

Thus, the prescribed amount would have been exhausted on or before 19 August 2012.

49 The arbitrator observed that it was regrettable that Ms Glenn may have been led to believe that she was receiving ordinary pay and not compensation at various times in the process of her rehabilitation back to work but that the question of whether weekly payments have ceased on the basis that an injured worker has returned to work is a matter requiring analysis and findings of fact.

50 Having found that Ms Glenn did not at any time return to work, pursuant to cl 7(3) of sch 1, the entitlement to weekly payments ceased. Accordingly, Ms Glenn's application for weekly payments from 23 November 2012 was dismissed.

Appellant's submissions

51 It needs to be noted that, before the arbitrator, the focus of submissions was upon the issue of 'return to work' in the context of s 61 of the WCIMA. It was argued on behalf of Ms Glenn that the concept of return to work provided guidance, but that the issue of meaningful work should be construed in favour of the worker to ensure that the worker has received benefits for the actual work carried out for the employer. It was also submitted that the onus was on the respondent to demonstrate that where payments were classified as wages on the pay slips or 'ordinary time' there was no real work carried out and it was not real wages. There were no submissions made in relation to the operation of cl 7(2) of sch 1 of the Act.

52 On appeal, the appellant in written submissions raised two issues in relation to the arbitrator's reasons:

> 1. The learned arbitrator miscomprehended cl 7 of sch 1 of the Act by effectively finding no economical commercial value ought to be attached to the work the appellant carried out for the respondent at times when she was not totally incapacitated and the respondent provided her with suitable work, thereby overlooking sub-cl 7(2) of sch 1; and
>
> 2. The learned arbitrator effectively approved the process whereby respondent paid wages for work done to the appellant at times she carried out work under the respondent's direction, only to subsequently claim reimbursement in full from its own insurer (and thereby transferred the benefit of statutory entitlements from the appellant to itself) without considering whether:

- the respondent had afforded the appellant procedural fairness in so doing; and/or
- the respondent was estopped from re-characterising the nature of the payments made after the event.

53 The appellant submitted that it was inconsistent with the objects of WCIMA for the respondent itself, as employer, to deem the worker's incapacity to be total without the worker's knowledge, for periods of time.

54 It was argued that Ms Glenn had some capacity to work, and had worked to the benefit of the respondent, in the belief that she was being paid for work done. It was submitted that the legislation is generally regarded as remedial and to be construed beneficially in terms of the objects of the legislation from the perspective of injured workers. It was submitted that Ms Glenn had at all times been keen to get back to do useful work, had put considerable effort into doing so and had used up her entitlements and been caught unawares by the consequences. It was suggested that the respondent had retrospectively and for its own benefit deemed her to be totally incapacitated.

Respondent's submissions

55 The respondent submitted that the expression 'return to work' was well established by authority. The arbitrator had taken the correct approach in accordance with the statutory requirements in continuing payments of weekly compensation unless an order was made or s 61 applied. The question of whether there was value to an employer in work done under restricted duties was not to the point and that the concept of 'work done that required the payment of wages' was not recognised by WCIMA. The respondent submitted that there was no question raised in relation to cl 7(2) of the first schedule to WCIMA. There was no return to work and no evidence that the work being performed was available on an open market basis. The evidence was, and Ms Glenn accepted, that she was significantly incapacitated during the entire period. Accordingly the respondent contended that the arbitrator's ruling was correct for the reasons that she gave.

Determination of the appeal

56 It was apparent from the submissions advanced passionately by counsel for Ms Glenn that the appellant's position was philosophically diametrically opposed to that taken by the respondent. They were viewing the same set of circumstances through completely different lenses.

57 However, there was no suggestion of any factual error by the arbitrator. Clearly, having reviewed the evidence on the materials before her, the findings of fact made by the arbitrator were open to her, it was the interpretation placed upon events that was in dispute.

58 Ms Glenn accepted that she made a claim for workers' compensation which was accepted on behalf of the employer respondent. She accepted that she was paid compensation, and medical expenses. She accepted that she had in fact been paid in excess of $200,000 since the incapacity. From her evidence, Ms Glenn clearly believed that she was paid wages at the time she was working and compensation when she was unfit for work due to medical procedures or immediate recuperation from them. As the arbitrator remarked, she may have been led to believe this, as she asserted. It came as a surprise to her to be advised that she had been paid compensation in excess of the prescribed amount. Although it is not material for the purposes of this decision, there must have been some misunderstanding, or breakdown in communication or failure to communicate adequately about these matters, or all of these things combined.

59 It is an undisputed fact, in view of the chronology of the events in this case, that at all times Ms Glenn, after suffering the initial incapacity was either off work due to the injury (a period of 47 full weeks) or 'at work' with medical certification imposing significant restrictions upon her duties, and pursuant to signed return to work plans. Initially she performed restricted light duties, whilst medical investigations were undertaken. Then she underwent surgery and was fully incapacitated for a period of six months. She made a claim for workers' compensation pursuant to WCIMA. That claim was accepted and payments made according to WCIMA. Once the mechanism of the WCIMA was invoked, the obligations of the employer and the worker, and the payments are subject to the provisions of WCIMA. Ms Glenn was never certified as fit for work in any unrestricted capacity either full or partial. Her capacity at all relevant times was subject to very significant restrictions. The arbitrator found that the duties that she was performing did not constitute a recognised role or job description independent of the rehabilitation efforts that were being made. She could not use her right arm and had limited function of her left. There would be relatively few occupations recognised as meeting such requirements, if any.

60 The law in relation to a return to work in this context is clear: s 5 of the WCIMA applies. Ms Glenn had not returned to the position she held immediately prior to her injury. She had not returned to any other distinct

position either; the position she did occupy was a collation of duties to fit her restrictions. In my view, the arbitrator had to consider the payment of weekly compensation in these circumstances under s 61 of the WCIMA. Under s 21 of the Act, an employer was liable to pay compensation from a date of incapacity resulting from an injury. The respondent had done so, but ultimately did not continue to do so. The employer argued that s 61(7) applied due to the payment in full of the prescribed amount. Ms Glenn argued that that was not the case because she had, during significant periods, 'returned to work'.

61 The primary issue therefore was, as the arbitrator rightly concluded, whether there had or had not been a return to work in the sense required by s 61. She had not consented to the discontinuance of the payments, and none of the other provisions were suggested to apply.

62 Neither could it be said that Ms Glen had returned to work in the sense that she no longer had any need of compensation or rehabilitation, given the symptoms that she was still admittedly suffering. The arbitrator found, rightly on the evidence, that her positions were modified duties constructed to meet her needs. The fact that she did work and no doubt that work had some benefit to her employer was not the question.

63 Ground 2 asserts that the arbitrator wrongly had regard to the issue of whether the appellant had returned to work. The particulars alleged that firstly the arbitrator confused the appellant worker's contention that she had done work that required the payment of wages with the question of whether she had returned to work. There is no basis for the allegation that the arbitrator in any way confused the relevant issue. She viewed the factual situation within the context of a claim for workers' compensation under the provisions of the WCIMA. Accordingly, return to work was the relevant question. It was the point argued for Ms Glenn. The second head of particulars allege that the arbitrator confused the obligation to compensate an injured worker in accordance with WCIMA with an injured worker's right not to have payments ceased or reduced otherwise and in accordance with the Act.

64 The obligation to compensate in accordance with the WCIMA includes the right not to have payments ceased otherwise than in accordance with its terms. I find no evidence of confusion in the arbitrator's approach.

65 The third head of particulars alleges that the arbitrator failed to recognise that payment of wages under s 7(2) did not interfere with the employer's obligation or the worker's rights.

66 This assertion pre-supposes that payments should have been made for partial incapacity on top of some unspecified remuneration paid for work done.

67 The sums paid to Ms Glenn were calculated on the basis of total incapacity, in accordance with mechanisms in cl 11 of sch 1 of WCIMA. The rates were specified in form 3A.

68 There was no evidence to support or calculate payments being made on the basis of partial incapacity. There is no basis to conclude that the arbitrator failed to recognise this proposition.

69 Ground 2 must fail.

70 Ground 3 alleges the arbitrator failed to have regard to cl 7(2) of sch 1 and did not determine what the appellant was earning or able to earn for the purposes of that subclause. The application of cl 7 of sch 1 was also relied upon as one of the questions of law said to be raised in this appeal.

71 The arbitrator did not consider cl 7(2). She was not asked to do so. In my view, the issue could not arise on these facts. Once Ms Glenn was in receipt of payments for total incapacity, which was indubitably the case from her first surgery onwards, they could not be discontinued or reduced save in accordance with the WCIMA. Schedule 1 is concerned primarily with the calculation of entitlements in particular circumstances. On the facts cl 7(1) applied. A total incapacity for work resulted and payments were then made. There was no partial incapacity certified. It was not a case of injury for example where a person might work four hours per day, or 20 hours per week for pro rata pay.

72 The submissions put for Ms Glenn would have the effect that the arbitrator should have by some unspecified means assessed the value of the duties performed by her and quantified the balance of payments made in excess of that sum as compensation. This was firstly impossible on the evidence and secondly not in accordance with the WCIMA.

73 Ground 3 is not made out.

Conclusion

74 Neither ground 2 nor 3 is made out on this appeal. The arbitrator did not err in relation to the application of cl 7 of sch 1 of WCIMA.

75 To return to the question of leave to appeal under s 247(2) of WCIMA: the matters canvassed in this application concerned the applicability of cl 7(2) of sch 1 where a worker resumes modified duties, on medical advice, under a return to work plan. Where full weekly payments for total incapacity had been commenced, I have determined that s 61 WCIMA governed the cessation of those payments, as found by the arbitrator on these facts. This does involve a question of law in my view.

76 Leave to appeal is granted and the appeal is dismissed.