Bulletin

Edited by Michelle Riordan

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue

1. Insurance Australia Group Ltd t/as NRMA Insurance v Keen [2021] NSWCA 287
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Court of Appeal Decisions

Judicial review – Assessment of WPI – Adequacy of MA's reasons – Requirement to distinguish jurisdictional error from error of law on the face of the record – Requirement to state grounds of review with specificity

Insurance Australia Group Ltd t/as NRMA Insurance v Keen [2021] NSWCA 287 – Leeming JA (Basten JA & Simpson AJA agreeing) – 25/11/2021

On 17/01/2014, the Respondent was injured in a MVA. There was no dispute that he had a prior history of back pain. In July 2017, he underwent disc replacement surgery at the L5/S1 level and in January 2018, he claimed compensation under s 66 *WCA*.

On 11/06/2019, Dr Meakin issued a MAC which assessed 15% WPI of the lumbar spine (20% WPI less a deduction of 5% for the pre-existing condition) and 0% WPI of the thoracic spine.

The insurer applied for a review by a MRP and asserted that the assessment was incorrect in a material respect and that the MA did not consider whether the need for the disc replacement was causally related to the MVA. Alternatively, it argued that if causation was considered, no reasons were given for the finding that the surgery was causally related to the MVA.

On 20/09/2019, the proper officer of SIRA dismissed the application for review and the insurer applied to the Supreme Court of NSW for judicial review of both the proper officer's decision and the MAC.

Rothman J dismissed the summons and found that the appellant's complaints regarding causation and failure to provide lawful reasons with respect to both decisions were not made out.

The appellant appealed to the Court of Appeal and asserted that: (1) The primary judge failed to consider whether *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372 at [121]-[122] ("*Vegan*") informed the duty to give reasons that was imposed on the medical assessor in the proceedings the subject of the Amended Summons below ("the medical assessor"), even though the appellant had made a substantial and clearly articulated argument that Vegan did apply; (2) The primary judge failed to apply *Vegan* when determining whether the medical assessor had provided lawful reasons for his decision; and (3) The primary judge failed to determine a substantial part of the appellant's case below, namely, the case outlined at grounds 2(g) and 2(h) of the Amended Summons.

Leeming JA described the grounds in the insurer's summons as "both numerous and poorly formulated" and he stated that every ground was framed in terms of "*jurisdictional errors and/or errors of law on the face of the record*". His Honour stated:

> 26 This Court has consistently emphasised the distinction between error of law on the face of the record and jurisdictional error and the need for practitioners to have regard to it. A recent example is *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236 at [19]-[20]. But the same points were made in earlier decisions: see for example *Allianz Australia Insurance Ltd v Kerr* (2012) 83 NSWLR 302; [2012] NSWCA 13 at [19] ("*These considerations require the applicant to identify with a degree of precision which grounds are said to involve jurisdictional error and which errors of law on the face of the record*") and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; 77 MVR 348 at [45] ("A*s has been repeatedly emphasised, the distinction is important*").
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> 27 Paragraph two of the insurer's summons contained 13 sub-paragraphs identifying various complaints with the medical assessment decision. These included a failure to set out "*proper or lawful reasons*" for the decision as required by s 61(9) and also a complaint that the assessor was required to respond to substantial and clearly articulated arguments, including arguments going to causation such as the nominal nature of the accident and the pre-existing injury to the claimant, it being said that the failure to respond to those arguments amounted to a denial of procedural fairness or alternatively a constructive failure to exercise jurisdiction.
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> 28 Paragraph three identified complaints concerning the decision of the proper officer which are outside the scope of this appeal, and then paragraph four provided:
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>> The medical assessor and the proper officer have committed error of law and/or fallen into jurisdictional error and/or they have constructively failed to exercise their jurisdiction in respect of each of or any of or a combination of the above grounds of judicial review and the decisions and certificates are accordingly invalid and should be set aside.
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> 29 The result is a conspicuous failure to comply with the obligation to state "with specificity, the grounds on which the relief is sought": UCPR r 59.4(c).
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> 30 The foregoing is not merely yet another lament for precision by a sophisticated litigant retaining experienced lawyers who ought to know better. It assumed some significance, because at the forefront of the insurer's attack in this Court upon the decision of the primary judge was a complaint about the approach taken in [72], which was as follows:
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>> While these reasons for judgment seek to separate out the grounds of appeal, there is much support for the proposition that each of the grounds of appeal is a different way of expressing the same issue. The complaint as to causation is that the Assessor did not address the proposition that the surgery was caused by the pre-existing work injury as distinct from the motor vehicle accident. That, too, is the basis upon which it is said there is insufficient reasons for the Assessor's decision; and the basis upon which it is said a clearly articulated argument was not addressed.
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> 31 With respect, it was entirely appropriate for the primary judge to cut through the imprecise and prolix formulation of grounds in the insurer's summons and attend to the substance of the underlying complaints.

His Honour rejected grounds (1) and (2). He held that the MA's reasons were brief, but they did address the insurer's complaint that the current impairment was causally related to the MVA. The primary judge addressed this by reference to the statutory requirements in s 61(9) and what had been said of the similar scheme in *Wingfoot* and he correctly addressed the adequacy of the MA's reasons as a principal aspect of the application for judicial review.

His Honour also rejected ground (3) and he stated (at [39]) that the court's task is *"…to resolve justiciable controversies, constituted by the parties' competing claims. A court should address substantial and clearly articulated submissions, not least because there is a danger that the entirety of the dispute will not be resolved if some substantial submission is not addressed. A court may not need to resolve every issue, but it should make it clear why the submissions it has resolved are dispositive of the case and ideally why it is unnecessary to determine other submissions which have been advanced by the parties unless they are patently insubstantial."*

His Honour held that the function of the MA is quite different. The MA was obliged to determine a quintessentially factual issue: the degree of permanent impairment suffered by the claimant caused by the MVA, reduced to a percentage calculated in accordance with the Guidelines. As the High Court emphasised, speaking of the decisions of medical panels under the *Accident Compensation Act 1985 (Vic)* in *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480; [2013] HCA 43 at [47], the Medical Panel was not required to decide a dispute or make up its mind by reference to competing contentions or competing medical opinions:

> The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

His Honour noted that Dr Meakin received more than 2,000 pages of material and his task was to make binding factual determinations, following his review of that material and following a clinical examination of the claimant. He did just that and it was not part of his function to assess the cogency of the "case" advanced on behalf of the insurer. In any event, the standard of reasons required of a MA is different from the standard required of a court. It is to be borne firmly in mind that Dr Meakin was a qualified medical specialist, and ultimately his certificate reflected his own professional judgment as to the WPI of the claimant and whether it had been caused by the MVA. His Honour stated:

> 43 The reasons required to be given by the medical assessor must be sufficient to explain the actual path of reasoning by which the opinion is reached, and in sufficient detail to enable a court to see whether that opinion involves any error of law. When pressed, the insurer accepted the applicability of what the High Court said in *Wingfoot* at [63] as follows:
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>> The answer to the Worker's complaint lies in the implicit finding of the Medical Panel that the Worker on 16 October 1996 sustained only a soft tissue injury, and not an injury to his spine. That finding was one of fact. Whether or not that finding of fact was open to the Medical Panel is a question of law. But no further explanation of the reasoning process adopted by the Medical Panel is necessary to enable a court to address that question.

His Honour found that the MA was required to make the findings of fact required by the referral to him and he held that the primary judge was: correct to conclude that the MA had not failed to respond to an articulated argument; to place emphasis on the passage in *Wingfoot,* that it was not the function of a MA to adjudicate or arbitrate between competing opinions; and to observe that this ground reduced to an alleged failure to provide reasons as to why Dr Meakin preferred his own opinion and dismissed the opinion of Dr Dalton.

Judicial review – jurisdictional error – extent of functions and powers of MRP – procedural unfairness – scope of procedural fairness determined by reference to statutory scheme – no opportunity given to address MRP on definition of medical condition – medical experts' function is to form opinion as to medical condition – MRP restricted to determining whether error in applicant's grounds of appeal – no expansion of MRP's functions

Queanbeyan Racing Club Ltd v Burton [2021] NSWCA 304 – Basten, Leeming & McCallum JJA – 10/12/2021

On 5/06/2013, the worker was thrown from a racehorse that she was riding at Queanbeyan Racecourse in the course of her employment with the appellant and she alleged injury to the lumbar spine and a consequential nerve disorder in both legs.

The worker claimed compensation under s 66 WCA for 17% WPI (11% WPI of the lumbar spine and 3% WPI of each lower extremity (peripheral nerve)) based upon assessments from Dr Patrick. However, the appellant disputed that there was any ongoing disability related to the accident.

The dispute was referred to Dr Davies, AMS, who assessed 9% WPI (7% WPI of the lumbar spine and 1% WPI of each lower extremity). He accepted that the worker injured her right hip and lower back and that she had developed symptoms of meralgia paraesthetica in both legs.

The worker appealed against the MAC and asserted that the AMS made a demonstrable error regarding the lower extremities.

The appeal was referred to a MRP, which conducted a preliminary review and determined that it was not necessary for the worker to be re-examined. The MRP revoked the MAC and issued a fresh MAC, which assessed 15% WPI (7% WPI of the lumbar spine and 4% WPI of each lower extremity).

The appellant applied for judicial review of the MRP's decision in the Supreme Court of NSW. However, on 31/03/2021, ***N Adams J*** dismissed the summons.

The appellant sought to appeal to the Court of Appeal, but required leave to do so as the amount in issue is less than $100,000.

Basten JA (***Leeming & McCallum JJA agreeing***) identified the primary issue as being the scope of the functions and powers of a MRP under s 327 *WIMA,* namely whether, having found error on the part of the AMS, it was obliged to reconsider the assessment afresh, or whether its remit was limited to correcting the identified error.

His Honour noted that ground 1 was said to raise the following issues:

- Must the appeal panel first find error as particularised in the written submissions of the applicant on the appeal, before it has jurisdiction to revoke the certificate of assessment and issue a further certificate of assessment, and how narrowly should the requirement that an appeal panel confine itself to the 'grounds of appeal' (section 328(2) of the WIM Act) be construed?
- Did the Court err in finding that the appeal panel confined itself to the error particularised by the worker (the applicant on the appeal), rather than identifying an error of its own?

His Honour noted that ground 3 was identified by reference to 4 questions, the first one being:

> If the appeal panel's task was first to identify error, and then, if error is found, to review every aspect of the assessment anew and make its own assessment, did the appeal panel fail to perform that task, given it provided no reasons for certifying the rest of the assessment, and did not otherwise give any indication that it had so satisfied itself?

His Honour also noted that the following 3 questions were based on the premise that in question 1.

His Honour noted that ground 2 was said to raise the following 2 questions:

- Did procedural fairness require the appeal panel to invite the parties to comment on the definition of dysesthesia that they introduced from a medical association for the study of pain medical, either in writing or at an oral hearing?
- Did the appeal panel otherwise breach procedural fairness by determining the matter on a basis that differed from that put forward by the applicant on the appeal without first warning the parties and giving them an opportunity to be heard, and did the Court err in finding that it did not?"

His Honour rejected grounds 1 and 3. He noted that the appellant sought to rely upon decisions in *Drosd v Workers Compensation Nominal Insurer* [2016] NSWSC 1053 (*Drosd*) and *Roads and Maritime Services v Rodger Wilson* [2016] NSWSC 1499 (*Wilson*). He stated, relevantly:

> 29. It is difficult to find in the statutory provisions support for the Club's analysis. Reading s 328(2) and (5) together, it is inevitable that the limited review will, where there are aspects of the assessment which were not challenged, adopt those aspects of the assessment in issuing a further certificate. This reading of the statute was that applied by the primary judge, correctly. She was, however, invited to follow two authorities which would, in some circumstances, lead to a different view. It is therefore necessary to address the Club's reliance on these cases.

His Honour noted that in *Drosd*, the AMS identified an impairment of the right lower extremity, half of which resulted from a pre-existing injury/ condition, and it attributed all of the impairment of the left lower extremity to a pre-existing condition. The MAP found no error with respect to the right lower extremity, but reassessed the finding regarding the left lower extremity. The judicial review proceedings raised 2 challenges with respect to that assessment on the basis that the MAP's findings

did not accord with the Guides. Garling J accepted that the figure adopted was not permitted by the Guides and that the MAP's adoption of that figure was a jurisdictional error.

His Honour stated:

> 33. To suggest that once the Panel has determined to set aside the certificate, it was "required to undertake a fresh assessment of the plaintiff's whole person impairment in accordance with the Guides" is also erroneous. The fact that the Panel decided to set aside the certificate did not expand the scope of its appeal function: rather, setting aside the certificate was the necessary consequence of the proper exercise of the appeal function. It is not necessary, for present purposes, to determine whether the approach adopted in *Dros*d was consistent with prior authority in the Common Law Division, though that may be doubted.

However, in *Wilson*, Fagan J held that once the MAP determined that the MAC should be revoked, it was incumbent upon it, as a matter of law, to apply the Guides fully in arriving at a fresh assessment and issuing a new MAC.

His Honour stated:

> 35. To the extent that these decisions are inconsistent with the statements of principle based on the statute, set out above, they should not be followed. The Appeal Panel was correct in the present case to address the subject matter of the ground of appeal, set aside the medical assessment certificate and issue another certificate including the amended assessments and the original unchallenged assessment. In doing so it neither purported to reassess the unchallenged finding nor to adopt the medical assessors' reasoning with respect to that finding; neither course was part of its statutory function.

His Honour also rejected ground 2. He noted that before the Primary Judge, the appellant relied upon a statement by Button J in *Pascoe v Mechita Pty Ltd* [2019] NSWSC 454*,* which was a case that dealt with a failure to inform the worker that the MAP would rely upon particular tables to assess progressive noise-induce hearing loss, which the plaintiff had not seen. Button J stated:

> [70] In my opinion, the plaintiff is correct: it was a denial of procedural fairness for the Panel to take into account the ISO adversely to the plaintiff without giving him notice that it proposed to do so.
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> [71] It is important to my reasoning that the ISO was not mentioned in the decision of the specialist, and barely mentioned in the report of Dr Williams. In other words, the plaintiff had no notice that this extrinsic material could play such an important role in the subsequent adverse determination.
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> [72] Nor was the ISO incorporated directly or indirectly in the Guidelines that the Panel was called upon to apply in its task.
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> [73] Speaking more generally, it is true, of course, that experts – whether in coming to an opinion, or giving evidence, or sitting on a Panel such as this – are permitted to take into account previously unmentioned material if it is unassailable, or can be understood to be within common knowledge, including that of the parties. For example, as I remarked in discussion with counsel, an expert is entitled to take into account the propositions that the sun rises in the East, or that gravity causes items to fall towards the ground, or that, other things being equal, locations are darker in the night time than they are in the day. And they can do so without elaboration, and without providing notice that they will do so.
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> [74] But I do not believe that that characterisation can apply to the ISO. It can hardly be equated to propositions such as those; indeed, its provenance is unclear on the evidence before me, and its use by the Panel is complex to a layperson."

His Honour noted that the Primary Judge did not apply *Pascoe*, but accepted the proposition that unless something was "within common knowledge, including that of the parties" procedural fairness required that the Panel not rely upon the matter without informing the parties. He stated:

41. This reasoning is fraught and apt to give rise to error in two respects. First, the concept of "common knowledge" should not be proposed as a guideline to what must be conveyed in the interests of procedural fairness and what need not be conveyed. Secondly, the underlying foundation to this reasoning is, apparently, that the parties are entitled to make submissions to the Appeal Panel in relation to any matters adverse to their interests.

42. With respect to both issues, the starting point for any understanding of procedural fairness must be the statutory scheme within which it is said to operate. The following statement by the High Court in *Wingfoot Australia Partners Pty Ltd v Kocak*, made in relation to the standard required of reasons given by a medical panel, is equally applicable to the functions of an Appeal Panel under the New South Wales legislation:

> [47] ... The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

43. A definition of a medical term is inherently something within the medical experience or expertise of the medical members of the Appeal Panel. They do not have to express those terms in language which is within the experience or expertise of the parties. Nor, if they wished to identify a distinction between evoked and spontaneous sensations, did they need to identify the authority which permitted either or both to be taken into account in assessing a particular condition. These were matters to be determined by the Panel in the exercise of their medical expertise. However, if in giving reasons both the distinction and the medical authority were identified, they did not become matters which fell within any obligation of advance disclosure to the parties.

44. Turning to the second issue, it follows from this reasoning that there was no occasion requiring that the Panel give the parties an opportunity to make submissions. Given the terms of s 324(1) and s 328(2)-(4), there will be limited circumstances in which a panel is obliged to allow a party to make additional submissions beyond those made to the Registrar in support of or in opposition to the proposed appeal. The Registrar's notice of decision in this matter advised that the Appeal Panel "may determine an appeal on the basis of the written application and any written Notice of Opposition." Because the appeal involved the formation of a medical opinion by medical experts that will often be the case. There should be no contrary presumption.

His Honour held that the MRP was required to give the grounds of appeal their ordinary meaning, in accordance with the understanding of the medical experts and that the Primary Judge did not err in concluding that it would have erred if it sought to identify an error of its own (not being that particularised in the grounds of appeal). The appellant complained that the AMS did not assess, or correctly assess, dysesthesia. The MRP found that this was an error and assessed the question itself and it was a question for medical opinion as to whether the worker suffered from the particular medical condition.

Accordingly, the Court granted leave to appeal, but dismissed the appeal and ordered the appellant to pay the worker's costs.

PIC – Medical Review Panel Decisions

Motor accidents – Claim for cost of referral to a Cannabis clinic and for medical cannabis – Held: the proposed treatment was not reasonable and necessary – Original medical assessment confirmed

Bradley v Allianz Australia Insurance Ltd [2021] NSWPICMP 226 – Principal Member Harris, Dr D Gorman & Dr S Moloney – 1/12/2021

On 4/12/2018, the claimant was injured in a MVA, when another vehicle failed to give way and hit the left side of her vehicle.

The issues in dispute were whether a referral for specialist review at the Cannabis Access Centre and associated prescription cannabis medication would improve the claimant’s recovery and whether that proposed treatment is reasonable and necessary and relates to the MVA.

The medical disputes were referred to Dr T Rosenthal and on 3/03/2021, he issued a MAC, which concluded that the specialist referral would not improve the claimant’s recovery and was not reasonable and necessary in the circumstances.

The claimant applied for a review of the Assessor’s decision and the application was referred to the MRP, which issued a number of directions to the parties, including a direction dated 15/11/2021, which attached a Media Release from the Faculty of Main Medicine of the Australian and New Zealand College of Anaesthetists, a clinical memorandum issued by the Royal Australian and New Zealand College of Psychiatrists and a statement on medicinal cannabis issued in 2019 by the Australian and New Zealand College of Anaesthetists. The claimant was directed to file and service any further articles or evidence by 22/11/2021.

The claimant applied for an extension of time and this was granted, but the claimant did not file any further material.

The MRP conducted a re-assessment of the claimant by AVL, as she suffered from psychological conditions including somatoform disorder and panic disorder. It noted that the claimant ceased work about 7 or 8 years ago mainly because of severe panic disorder and agoraphobia and she has been on the Disability Support Pension since then. She had widespread musculoskeletal pain, which was diagnosed as fibromyalgia, and had developed osteopenia/osteoporosis and suffered a fractured left shoulder, left patella and a stress fracture in a foot, as well as migrainous vertigo and that prior to the MVA, she used a walking frame and received assistance from the NDIS. She stated that she was prescribed cannabis oil and that her headaches improved when she took this treatment, but she could not afford this on an ongoing basis.

The MRP stated, relevantly:

> **Reasonable and necessary in the circumstances**
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> 60. Ms Bradley is required to establish that the treatment is both “reasonable and necessary”. This test differs from the workers compensation legislation which requires a worker to establish that the treatment is “reasonably necessary”. There is a stricter requirement under the motor vehicle accidents legislation because there is no moderation of the requirement that the treatment is “necessary”.
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> 61. When discussing the meaning of “reasonably necessary” under s 60 of the Workers Compensation Act 1987 in *Clampett v WorkCover Authority of NSW*, Grove J stated:
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>> 22 I return to the expression "reasonably necessary" in s60. Dictionaries stipulate that "necessary" has relevant definition as "indispensable, requisite, needful, that cannot be done without" - (Shorter) Oxford English Dictionary, 3rd Ed and "that cannot be dispensed with" - Macquarie.
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>> 23 The essential issue is what effect flows from conditioning such qualities as "reasonably". The consequence is to moderate any sense of the absolute which might otherwise be conveyed by the word "necessary" if it stood alone. In order to contemplate such moderation it is apt to consider surrounding circumstances, but the question to be addressed is whether modification of a worker's home, having regard to the nature of the worker's incapacity, is reasonably necessary. In contemplation of what might be "reasonably necessary" there is this statutory obligation specifically to have regard to the nature of the worker's incapacity. It provides emphasis towards moderating the meaning of "necessary" in this context.
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> 62. Similar observations have been subsequently made by the Court of Appeal on the meaning of “reasonably necessary” under other legislation.

63. Factors relevant to but not determinative of the criteria of reasonableness in the context of the workers compensation legislation are well settled. They include:

(a) the appropriateness of the particular treatment;

(b) the availability of alternative treatment;

(c) the cost of the treatment;

(d) the actual or potential effectiveness of the treatment, and

(e) the acceptance by medical experts of the treatment as being appropriate or likely to be effective.

64. Whilst the observations in *Diab* were directed to the test of "reasonably necessary" in the workers compensation legislation, we adopt it insofar as they have relevance, although not determinative, of the stricter test of "reasonable and necessary". In our view, treatment can clearly be "reasonable and necessary" despite the fact that the patient suffers a less than desirable outcome.

65. The insurer referred to clauses 4.76 - 4.77 of the Guidelines which applied a framework to insurers for approving treatment. These clauses do not define reasonable and necessary.

66. The Panel provided statements from two medical bodies recommending against the use of medicinal cannabis other than for the terminally ill or as part of a clinical trial. The concerns expressed by these eminent bodies arise from the lack of effectiveness of CBD because it is generally ineffective in reducing pain. Further, adverse effects of the use of CBD include habituation/addiction, sedation and dizziness.

67. The other concern is that the use of CBD often leads to the use of cannabis products which include THC. Products containing THC cause adverse event profiles in cannabis users including psychotic symptoms and disorders and cognitive impairment.

68. We have considered the further material filed by Ms Bradley which includes a report from her counsellor and Ms Bradley's further detailed statement of her circumstances. That evidence does not address the concerns raised by medical bodies which recommend against the use of medicinal cannabis save in limited circumstances.

69. That material, and the supportive medical opinion does not persuade us that the proposed treatment is reasonable and necessary.

70. The Panel does not accept, in Ms Bradley's circumstances that the referral for specialist review to the Cannabis Access Clinic and to fund the cost of medical cannabis is reasonable and necessary. It does not accept that the proposed treatment is appropriate and effective, and we believe it is likely to lead to harm and addiction. The treatment is otherwise not accepted by medical experts as being appropriate or likely to be effective.

Accordingly, the MRP confirmed the MACs issued by the Medical Assessor.

PIC – Member Decisions

Workers Compensation

A psychologist is not a medical practitioner and the insurer cannot compel a worker to attend an examination by a psychologist - Entitlement to compensation was not suspended under 119(3) WIMA

Green v Seven Network (Operations) Ltd [2021] NSWPIC 458 – Member Rimmer – 16/11/2021

A decision in this matter was reported in Bulletin no. 93 (*Green v Seven Network (Operations) Limited* [2021] NSWPIC 75), which I have summarised as follows:

- The worker was employed by the respondent as a contestant on a reality television program – "My Kitchen Rules".

- She alleged that she suffered a psychological injury as a result of vilification and bullying from producers and the network, which involved "over 40-hour work weeks, control over her phone, distortions of her actions and words after editing, victimisation, bullying and harassment and unfair treatment and adverse interactions with other workers, producers and staff".
- She claimed continuing weekly payments from 24/12/2018 at the rate of $1,000 per week.
- The respondent disputed the claim and raised issues concerning:
    - Whether the applicant was a worker or deemed worker;
    - Whether she received an injury as alleged;
    - Whether employment was a substantial contributing factor to the injury;
    - Whether she was incapacitated at all or as alleged;
    - Whether any incapacity was related to an injury at work;
    - The rate of weekly compensation claimed;
    - Whether notice of injury was given as required by the legislation;
    - Whether the claim was made within the time limits prescribed by *the WIMA*;
    - Whether the events alleged were real events or actually occurred; and
    - Whether she suffered a psychological injury or had misperceived events.
- During a teleconference conducted by Arbitrator Rimmer, the respondent agreed to make voluntary payments to the worker and the Arbitrator determined a dispute regarding PIAWE.

The current dispute related to whether the worker's right to recover compensation was validly suspended under s 119(3) *WIMA* because she failed to submit herself to an examination by a psychologist at the insurer's request. The insurer arranged examinations with both a psychologist and a psychiatrist, but the worker's solicitor advised that the worker would not be attending 2 medicolegal appointments, but would attend the examination with the psychiatrist.

On 14/09/2021, the respondent's solicitor wrote to the worker's solicitor and stated:

> We remind you of your client's obligation under section 119 of the Workplace Injury Management and Workers Compensation Act 1998 (1998 Act) which states a worker receiving weekly payments of compensation under this Act must, if so required by the employer, from time to time submit himself or herself for examination by a medical practitioner, provided and paid by the employer. In accordance with section 119(3) of the 1998 Act, if your client refuses to submit herself for any examination or in in any way obstructs the examination, her right to weekly payments will be suspended until the examination has taken place".

On 13/10/2021, the insurer issued a notice of suspension of weekly payments under s 119 *WIMA* based on the worker's failure to attend the psychologist's examination.

The worker filed a miscellaneous application and sought an order that she was not required to attend that examination and a declaration that the insurer's decision to suspend weekly payments was void.

In its reply, the respondent asserted that a forensic psychologist was a medical practitioner for the purpose of s 119 *WIMA* and it also relied upon cl 175 of the *Workers Compensation Regulation 2016* and Standard 32.5 of the SIRA Standards of Practice, which allow a psychologist to provide a certificate of incapacity for work.

Member Rimmer identified the relevant issue as being whether the worker refused to submit herself for examination by a medical practitioner. She noted that the term "medical practitioner" is not defined in the *WIMA,* although it was previously defined in s 59 *WCA* (now repealed).

The respondent argued that the PIC should adopt a broad view of the definition, but the Member stated, relevantly:

45. In *Godfrey v Wollongong Women's Information Service Inc* (1999) 19 NSWCCR 74 (*Godfrey*), the respondent arranged for the worker to be assessed by both a psychiatrist and a psychologist. The worker objected on the grounds that a psychologist was not a "medical practitioner". Truss J in that case drew a distinction between the regimes governing the medical examination of workers where a matter was before the Compensation Court and workers subject to s 119 of the 1998 Act. The Court at [18] noted that the former regime employed the term "medical expert", which was found to be broader than the term "medical practitioner" and included other experts such as psychologists. At [19] Truss J said:

> The Court was informed that the respondent wished to have the applicant examined by a psychologist firstly for the purposes of the forthcoming claim in respect to s60 expenses, although the only specific claim is for massage treatment, and secondly to assess the applicant's ongoing entitlement to weekly compensation. The applicant is currently undergoing treatment from a psychologist as well as a psychiatrist and the respondent is paying for the cost of such treatment. As the only matter before the Court is a claim for massage treatment, such right as the respondent has to require the applicant to be examined to assess her ongoing entitlement to weekly compensation lies pursuant to s 119 and cl 43. Such right does not include examination by Ms Farrelly as she is not a medical practitioner.

46. Arbitrator Homan in *Yu v Spotless Services Ltd* [2018] NSWWCC 299 referred to the decision in *Godfrey* when she considered the meaning of the term "medical practitioner" as it is used in s 119 of the 1998 Act and whether the term included a psychologist. Arbitrator Homan noted that the legislation governing the registration of health practitioners in New South Wales is the Health Practitioner Regulation National Law (NSW) 2009 and that statute draws a distinction between practitioners in the "medical" profession and other health professions including "psychology". Section 113 provides that the title "medical practitioner" is a protected titled for use only by persons registered under in the "medical profession". In s 5, psychologist is defined to mean a person registered under that Law in the psychology profession.

47. As noted above, the respondent referred to the decision of Snell DP in *State of New South Wales (Central Coast Local Health District) v Bunce* [2020] NSWWCC PD 48 (*Bunce*) in regard to the interpretation of the term "medical practitioner".

48. *Bunce* was an appeal for a decision of Arbitrator Wynyard in *Bunce v State of New South Wales - Central Coast Local Health District t/as Gosford Hospital* [2020] NSWWCC 62. In that case, the respondent had argued that the worker had not established that the treatment had been given at the direction of a medical practitioner as Ms Paton was a psychologist. Reference was made to the decision of *Bartolo v Western Sydney Health Service* (1997) NSWCC1 where Burke J said: "'Medical practitioner' is defined to mean a medical practitioner registered under the law of a State or Territory of the Commonwealth." However, Arbitrator Wynyard accepted that Ms Paton was registered pursuant to the Commonwealth Income Tax Assessment Act 1970 for the purpose of psychological treatment under the Medicare system and inferred that she was a medical practitioner for the purpose of s 59(b) of the 1987 Act.

49. In the appeal, Snell DP only considered the question of whether the arbitrator erred in finding that an assistance dog constituted therapeutic treatment for the purpose of satisfying the definition of medical or related treatment pursuant to s 59 of the 1987 Act and whether the arbitrator had given adequate of sufficient reasons. Snell DP at [98] wrote:

> The Arbitrator's findings included one that the requirement in para (b) of s 59, that the relevant treatment be by direction of a medical practitioner, was satisfied on the basis of a direction of Ms Paton, a psychologist. That finding was not challenged on appeal, there have been no submissions in relation to it and I have not considered its correctness. These reasons should not be taken as an endorsement of the approach taken to that issue.

The Member accepted that Part 11 of the Guidelines provide for clinical assessment which may include the results of appropriate psychometric testing performed by a qualified clinical psychologist. However, those test results are not a mandatory requirement for an assessment to take place and she did not consider that the provisions in Pt 11 of the Guidelines really assists the respondent.

The Member also referred to the respondent's argument concerning Standard 32.5 of the SIRA Standards of Practice, which provided that certificates of capacity may be obtained from a treating physiotherapist or psychologist in respect of the second and subsequent certificates only from 17/04/2020 for 12 months. She stated that this standard was introduced for managing claims during the COVID-19 pandemic, but as the initial certificate still had to be obtained from the NTD, she did not consider that this changed the meaning of "medical practitioner" in order to include a psychologist for the purposes of s 119 *WIMA*.

The Member rejected the respondent's argument regarding cl 75 of the *Workers Compensation Regulation 2016,* which provided for a second or subsequent certificate as to work capacity to be given by a medical practitioner or if the worker was receiving medical or related treatment by a physiotherapist or psychologist, by a physiotherapist or psychologist. She noted that the initial certificate still had to be obtained from a medical practitioner and the Regulation only applies for a limited period (until April 2022).

The Member found that the use of the term "medical practitioner" in the legislation and Guidelines, rather that terms such as "health practitioner" or even "medical expert", support the view that the term "medical practitioner" should be read to mean a person who is registered under the relevant law in the medical profession. She agreed with Arbitrator Homan that the term does not include a "psychologist" as this approach is consistent with the decision of Truss J in *Godfrey*.

Accordingly, the Member found that the respondent could not use s 119(1) *WIMA* to compel the worker to submit herself to an examination by a psychologist and that as the worker did not fail to submit herself for examination for the purposes of s 119(3), there was no basis for the suspension.

Motor Accidents

Miscellaneous claims assessment – Whether the claimant was wholly or mostly at fault under s 3.28 of the MAI Act 2017

Gazal v QBE Insurance (Australia) Limited [2021] NSWPIC 492 – Member McTegg – 1/12/2021

On 12/05/2020, the claimant was injured in a MVA. The insurer declined liability for payment of statutory benefits after the first 26 weeks on the basis that she was wholly at fault for the accident. The claimant sought an internal review of that decision, but the insurer maintained the dispute on the basis that the claimant failed to keep a proper lookout resulting in a collision with a pole. The claimant filed a miscellaneous application.

Member McTegg determined the application on the papers. She noted evidence from the claimant that she was blinded by sunlight and collided with a pole in a shopping centre car park and that she was driving at a speed of between 10 kph and 20 kph when the accident occurred. The claimant argued that this was a no-fault accident, or alternatively, that she was not wholly or mostly at fault and the sole cause was "the involuntary impairment of her vision by the sun".

The Member noted that the definition of "no-fault accident" in s 5.1 of the MAI Act is in similar to the definition of "blameless accident" in s 7A of the MAC Act. She was not satisfied that there was no fault on the claimant's part and found that her actions in failing to stop or steer her vehicle away from the cement base of the pole contributed to the accident. The Member stated, relevantly:

> 49. In *Hossain v Mirdha* , the plaintiff braked and swerved to avoid a dog that ran onto the road, causing the plaintiff's vehicle to collide with a stationary truck. Elkaim DCJ held that the act of steering the vehicle away from the dog was an avoidance measure which amounted to an act of causation disentitling the plaintiff to damages under section 7(E) of the MAC Act. His Honour also noted that even if the driver's act of steering was merely a reaction or even involuntary, he would still be disentitled to recover damages because of section 7(E).

> 50. The circumstances of this accident are not dissimilar to the facts in *Hossain*. The claimant conceded she saw a pole in the car park which she steered to avoid, although she failed to steer far enough away from the cement base to avoid a collision.
>
> 51. That act of steering to avoid the pole was either an act or omission by the claimant which, whilst not the sole or primary cause of the injury, undoubtedly contributed to the injury in accordance with section 5.4 of the MAI Act. On this basis I find the accident was not a no-fault accident…
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> 58. The duty to take reasonable care was reiterated in *Vairy v Wong Shire Council* [2005] HCA 34, 59 ALJR 492. The Court stated that the duty of the driver of a motor vehicle to users of the roadway is to take reasonable care for their safety having regard to all the circumstances of the case.
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> 59. It is clear from the diagram that the sun began shining into the claimant's eyes some distance before her vehicle reached the pole, and even though her vision was impeded by the sun the claimant, who was aware of the presence of the pole, continued to move her vehicle forward. This is more than a "momentary" blindness caused by the sun. I do not consider deploying the sun visor was sufficient to constitute the exercise of reasonable care by the claimant.
>
> 60. The risk of harm was foreseeable and a reasonable person in the claimant's position ought to have exercised reasonable care for her own safety by slowing the speed of her vehicle, by reversing her car, by bringing her vehicle to a stop or by steering her vehicle in another direction entirely, noting she was aware of the presence of the pole nearby and where the accident occurred at about 8.30 am in a shopping centre car park.

The Member held that the claimant contributed to the cause of the accident and considered the degree of her contributory negligence, noting that a finding of greater than 61% means that she was mostly at fault. The Member stated:

> 63. In *Podrebersek v Australian Iron and Steel* the High Court at [10] stated:
>
>> The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i.e. of the degree of departure from the standard of care of the reasonable man … and of the relative importance of the acts of the parties in causing the damage …and cases there cited. It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination. The significance of the various elements involved in such an examination will vary from case to case.

The Member assessed the claimant's contributory negligence as being more than 61% because: (a) the pole was situated between the two parking spaces; (b) the claimant was aware of the presence of the pole; (c)the claimant was aware of the sun shining into her eyes impairing her vision for some distance prior to the point of collision; (d)the claimant steered her vehicle and in doing so collided with the pole; and (e) the claimant failed to stop or slow her vehicle her vehicle when she knew her vision was impaired by the sun and where she was aware of the presence of the pole.

Accordingly, the claimant was not entitled to ongoing weekly payments.

PIC – President's Delegates' Decisions

Work capacity dispute – physical injury and secondary psychological condition – suitable employment under s 32A WCA – WCD set aside

<u>Patel v Philip Leong Stores Pty Ltd</u> [2021] NSWPIC 493 – Delegate Gamble – 1/12/2021

On 12/07/2019, the worker injured his lumbar spine at work and he developed a secondary psychological condition.

On 29/07/2021, the respondent made a WCD that the worker had current capacity to work 40 hours per week in suitable employment as a customer service manager, catering manager and concierge and was able to earn $1,337 per week. It decided to reduce weekly payments to $49.25 per week from 5/11/2021. The worker challenged the WCD and sought a continuing award under s 37 *WCA*.

Delegate Gamble conducted a teleconference on 24/11/2021. She noted agreement that PIAWE is $1,732.81 and that the worker is not able to resume his pre-injury employment. She noted there was radiological evidence of a disc bulge at the L3/4 level, although Dr Smith (qualified by the respondent), opined that the worker suffered a "simple thoracic strain injury… there is no evidence of radiculopathy or discogenic injury in the lumbar spine."

In September 2020, the worker's GP diagnosed an adjustment disorder with depressed mood. In May 2021, Dr Rastogi (psychiatrist) diagnosed chronic adjustment disorder with anxious mood and distress and that there were psychological impediments that impacted upon the worker's ability to return to work. In May 2021, Dr Damodaron (psychiatrist) diagnosed adjustment disorder with general anxiety and depressed mood and a chronic pain disorder and he stated that purely from a psychological perspective, the worker had capacity for alternative duties for up to 20 hours per week within his physical limitations.

In May 2021, Mr Ting (occupational therapist) conducted a vocational assessment and he identified the roles that the insurer relied upon in its WCD. However, he noted that the worker was certified as having no current work capacity and stated that "*he is not ready to work at this stage. His ongoing treatment needs, physical restrictions, psychological difficulties, cognitive sequelae, persistent pain, disturbed sleep pattern, and restricted access to the open labour market have resulted in his low level of readiness for work…*" He concluded that the worker did not demonstrate a real earning potential and he recommended a number of rehabilitation and vocational services to improve his work readiness.

In May 2021, Dr Assem (rehabilitation specialist) assessed the worker as being fit for suitable duties commencing at 16 hours per week, with assistance from a rehabilitation provider, but that he would have difficulty working in a regular and reliable manner.

In June 2021, IPAR conducted a vocational assessment and reported that no job options could be identified as appropriate for the worker based on his physical and psychological tolerances, transferrable skills, previous education and work experience.

In July 2021, Dr New (orthopaedic surgeon) diagnosed significant lumbar spondylosis, particularly at the L3/4 level, and substantial gait disturbance.

In September 2021, Dr Lim stated that the worker has alternate skills to perform some office-based work and that he could resume alternate work with workplace modifications if his chronic back pain resolved, but he was prevented from doing so due to his psychological state and he is not psychologically well enough to retrain.

The Delegate found that the weight of medical opinion supports a view that the worker is not able to undertake the roles identified in the WCD and that Dr Ting's opinion regarding work capacity is contingent upon the worker becoming work ready. She also found that Dr Smith's opinion pre-dated the diagnosis of the secondary psychological condition and that the WCD was inconsistent with the IPAR vocational assessment report in July 2021.

Accordingly, the Delegate set aside the WCD, found that the worker has not current work capacity and awarded him continuing weekly payments under s 37 WCA.