Bulletin

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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. Geary v UPS Pty Ltd [2021] NSWPICPD 47
2. Leo Burnett Pty Ltd v Odgers [2021] NSWPICMP 237
3. Van Vliet v Landscape Enterprises Pty Ltd [2022] NSWPIC 14
4. Nizamdeen v University of New South Wales [2022] NSWPIC 17
5. Peel v AAMI [2021] NSWPIC 495
6 Mammone v Insurance Australia Limited t/as NRMA [2021] NSWPIC 501
7. Wiegold v Allianz Australia Insurance Limited [2021] NSWPIC 512

PIC - Presidential Decisions

Anshun estoppel – Appellant is estopped from pursuing a claim for a disease injury (s 4(b)(ii) WCA) because he failed to plead this in previous proceedings

Geary v UPS Pty Ltd [2021] NSWPICPD 47 – President Phillips DCJ – 17/12 2021

The appellant alleged injury to both shoulders and the cervical spine at work. He ceased work on 1/02/2018, as a result of suffering severe right shoulder pain. He claimed compensation under s 66 *WCA* for alleged 37% WPI with respect to the cervical spine and both upper extremities, based on assessments from Dr Guirgis and s 60 expenses for proposed left shoulder surgery.

The respondent disputed the claim and the appellant filed an ARD. On 29/11/2018, the WCC issued consent orders, which:

- amended the ARD to plead physical injuries to the right shoulder and cervical spine and consequential injuries to the left shoulder and neck;
- entered an award for the respondent with respect to the injury and consequential injury to the cervical spine;
- discontinued the claim under s 66 claim was discontinued; and
- The respondent agreed to pay s 60 expenses relating to the left shoulder surgery.

On 14/01/2021, the appellant filed the current ARD, which claimed compensation under s66 *WCA* for 46% WPI, for alleged disease injuries to the cervical spine and both upper extremities and consequential scarring (deemed date: 1/02/2018).

The respondent disputed the claim.

On 9/02/2021, the appellant lodged an amended ARD, which pleaded injury as follows:

> As a result of the nature and conditions of his employment from 2013 to 12 December 2018, the [appellant] sustained physical injuries to his neck. In the alternative, as a result of overuse, overcompensation and overload following on from the right and left shoulder injuries and surgeries, the [appellant] sustained consequential injuries to his neck.

On 10/05/2021, ***Member Perry*** issued a COD and SOR, which found that the appellant was estopped from pursuing an allegation of disease injury to his neck, including on the basis of the nature and conditions of his employment, based upon the principles in *Port of Melbourne Authority v Anshun Pty Ltd*.

The appellant conceded a res judicata and issue estoppel in respect of a claim for WPI for the cervical spine due to a frank injury or as a consequential condition, but maintained his claims for a disease in both shoulders and the cervical spine due to the nature and conditions of employment. However, he argued that the 2019 COD must be read in light of the pleadings, which alleged a frank injury, and the argument that they related to a different cause of injury belies common sense.

The appellant also argued that the only dispute that was determined in 2019 was the claim for left shoulder surgery, and it was not unreasonable that disease injuries to the cervical spine and left upper extremity were not pleaded. He also argued that the discontinuance of the s 66 claim meant that an *Anshun* estoppel did not apply and that it would not align with the PIC's practice to apply *Anshun* to "*mechanisms of injuries and body parts, the liability for which was only required to be determined in respect of a claim that was discontinued and hence not so determined*". He argued that "*a worker is entitled to pursue his rights independently*".

The respondent argued that a consent judgment can create estoppels "*only as to matters which are necessarily decided*", and that a reasonable person: (1) would have construed the 2019 COD to have decided the cervical spine issue with finality; and (2) would have understood that the words "*in respect of the allegation of injury … to the cervical spine*" were intended to include a disease injury, particularly when construed based on Dr Guirgis' opinion.

The respondent relied upon the comments of McColl JA in *Habib v Radio 2UE Sydney Pty Ltd* and argued that it was unreasonable for the appellant not to plead and ventilate a disease injury in the 2019 proceedings. The dispute in the 2021 proceedings was the same as the 2019 proceedings, and there was no valid reason these were not pleaded or litigated in 2019, noting that the medical opinions of Dr Endrey-Walder and Dr Guirgis were premised on a similar history and they each made similar findings.

With respect to the cervical spine, the Member cited the principles set out in *Fourmeninapub Pty Ltd v Booth*, *Habib* and *Secretary, Department of Communities and Justice v Miller & Anor (No 9)*, and considered whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings.

The Member:

- found that disease was "*integral to the dispute between the parties about injury*", as Dr Guirgis attributed 90% of the appellant's injuries to a disease and that Dr Bosanquet and Dr Herald (in respect of the shoulder) diagnosed a disease and Dr Endrey-Walder's opinion was similar to Dr Guirgis'.
- held that the discontinuance of the s 66 claim did not mean that an *Anshun* estoppel did not apply, as the doctrine is concerned with substance and not form: see *Habib*. He found that there was a great overlap between the facts underlying the 2019 proceedings and the 2021 proceedings and that they were "*essentially the same*".
- found that consent orders may create an estoppel and that it was clear that the parties intended for an injury to the cervical spine to be pleaded and for there to be an award for the respondent with respect to that alleged injury and/or consequential injury.
- referred to the decision in *Thompson v George Weston Foods Ltd* [1990] NSWCC 18, and found that it did not matter that the s 66 claim was discontinued because the consent determination "*makes it clear enough that the applicant 'could not succeed in gaining compensation for a consequential benefit', including lump sum benefit notwithstanding that aspect of the proceeding being discontinued*".

With respect to the cervical spine, the Member cited the principles set out in *Fourmeninapub Pty Ltd v Booth*, *Habib* and *Secretary, Department of Communities and Justice v Miller & Anor (No 9)*, and considered whether the claim made in the 2021 proceedings was so closely related to the 2019 proceedings that it would have been reasonably expected to have been raised at the time, having regard to the substance of the proceedings.

On appeal, the appellant alleged that the Member erred as follows: (1) in determining that a disease injury to the cervical spine was a "*claim or issue*" so connected with the subject matter of the 2019 proceedings so as to have made it unreasonable not to have been raised in those proceedings; (2) at law in determining the issue of *Anshun* estoppel without regard to the discontinuance of the lump sum claim in the 2019 proceedings; (3) at law in applying principles of issue estoppel to the determination of the question of *Anshun* estoppel; and (4) in law and fact in determining that there would be the creation of conflicting or contradictory judgments.

President Phillips DCJ dismissed the appeal and his reasons are summarised below:

- *Anshun* estoppel is available for use to defend applications brought before the PIC. In *Israel v Catering Industries (NSW) Pty Ltd* [2017] NSWCCPD 53, Wood DP set out at [114]–[119] various authorities, principally from the Compensation Court, dealing with the application of *Anshun* estoppel: (at [187]).
- The mere fact that a party makes a choice to litigate a matter in other proceedings in and of itself is insufficient to ground an *Anshun* estoppel. However, this does not mean that every decision in a workers compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. Rather, such a decision will only give rise to an *Anshun* estoppel if it was unreasonable not to have pleaded this cause in the earlier action: (at [194]).
- Judge Neilson summarised the principles distilled from the various authorities in *Bruce v Grocon Ltd* [1995] NSWWCC 10, as follows:

  > (a) the principle in [*Anshun*] extends to claims as well as to defences: *O'Brien's case* in the Court of Appeal and *Boles' case*;
  >
  > (b) estoppel will arise if in second or further proceedings there would be a judgment inconsistent with a judgment in the first proceeding or the granting of remedies inconsistent with the remedy originally granted or the declaration of rights of parties inconsistently with the determination of those rights made in the earlier proceedings;
  >
  > (c) the matter being agitated in the second or further proceedings must be relevant to the original proceeding; and
  >
  > (d) it was unreasonable not to rely on that matter in the original proceedings; such unreasonableness would depend on the facts of each particular case: *Boles' case*.

- There is no provision in the 2020 Act that would modify or derogate from the approach taken to questions of *Anshun* estoppel in the WCC or Compensation Court.
- His Honour rejected ground (1).
  - He held that the disease injury to the neck was a claim or issue connected with the subject matter of the 2019 proceedings, the Member was exercising a discretion of the type in *House v The King*[1936] 55 CLR 499 at 504-505 (*House*). In accordance with that decision, the appellant must prove as follows:

    > It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution, for his if it has the materials for doing so.

  - The appellant did not allege a *House*-type error. Rather, he analysed how the matter was pleaded and ultimately disposed of in an effort to make good the allegation that the neck claim was not a claim or issue connected with the 2019 proceedings. This does not assist in terms of revealing the necessary type of error.
  - The problem with the appellant's argument is that it concentrates on the ultimate conclusion in the 2019 proceedings and not the principles associated with *Anshun* estoppel. In *Habib*, McColl JA stated that the doctrine is concerned with substance and not form and the substance of the matter is clear.

- Before the commencement of the 2019 proceedings, the appellant was suffering from pain in his neck and Dr Guirgis stated that this was due to the nature and conditions of employment. The 2019 proceedings pursued a claim for a neck injury initially of a consequential nature, and by way of consent orders, a claim for frank injury on 1/02/2018. However, at all times during the 2019 proceedings, he pursued a claim under s 66 *WCA* with respect to his neck and this is the same claim that is made in the current proceedings, although a different mechanism of injury is alleged.
- The appellant did not challenge the Member's finding that the extent of the overlap between the facts in both proceedings were such that they are essentially the same.
- The Member found that there was no explanation from the appellant about any difficulties that existed or might reasonably have been perceived in raising the disease injury earlier and this pointed towards it being unreasonable for him not to have relied on disease injury in the 2019 proceedings. The appellant did not challenge this approach or allege that this finding of unreasonableness was made in error.
- It is artificial in the extreme for the appellant to assert that the claim in relation to the neck injury was not a claim or issue connected with the 2019 proceedings. It cannot be said that he or his solicitors were ignorant about the medical evidence regarding his condition before and those proceedings.
- He referred to his decision in *Miller No 9* and held that it is possible in the context of workers compensation cases to pursue different statutory benefits in different proceedings, but this does not mean that every decision in a workers compensation matter to litigate separate claims will always be permissible from an *Anshun* point of view. The question is whether it was unreasonable not to have pleaded the cause in an earlier action.

- His Honour rejected ground (2) and he noted that the appellant's argument, that the resolution of the matter as reflected in the 2019 COD was a "*bar*" to making an *Anshun* order, was not argued before the Member. By definition, the Member cannot have erred in law in relation to an argument that was not put to him. While the appellant essentially alleged a *House*-type error by the Member, namely a failure to consider the 2019 COD, the Member carefully considered and construed the 2019 consent orders.
- His Honour rejected ground (3).
  - He found that the Member did not rely upon the decision in *Thompson* in terms of the principles it espoused regarding issue estoppel. Rather, he used *Thompson* as an example to make good his point that an injury – whether by way of disease or personal injury – is the underpinning foundation for entitlement to benefits under *WCA*.
  - Reading the decision as a whole, it is abundantly clear that the Member carefully considered the *Anshun* line of authority and applied it in finding that the appellant is estopped from relying upon a disease injury claim to his neck in the 2021 proceedings. This decision, was based on the *Anshun* principles and not principles pertaining to issue estoppel.
- His Honour also rejected ground (4).
  - He noted that the appellant was effectively arguing that different causes of action were pursued in the 2019 proceedings as opposed to the 2021 proceedings. In *Anshun*, the High Court said:

    > By 'conflicting' judgments we include judgments which are contradictory, though they may not be pronounced on the same cause of action. It is enough that they appear to declare rights which are inconsistent in respect of the same transaction.

- The High Court's finding in *Anshun* is entirely relevant to a consideration of this appeal point. The Member made a finding, which is not challenged on appeal, that the two sets of proceedings were "*essentially the same*". He concluded:

> 121. In truth what the appellant was attempting to do in the 2021 proceedings was to pursue rights in relation to the same transaction, albeit by a differently pleaded path. This is exactly what happened in *Anshun* and was an approach which found no favour with the High Court in that matter.

Accordingly, His Honour dismissed the appeal and confirmed the COD.

PIC – Medical Appeal Panel Decisions

Complex Regional Pain Syndrome – MA failed to identify signs of pseudomotor/oedema in contravention of Table 17.1 & assessing WPI for the hand was impermissible - MA failed to apply s 323 deductible and a 10% deduction applied – MAC revoked and worker assessed on range of motion measurements (less the hand) taken by MA.

Leo Burnett Pty Ltd v Odgers [2021] NSWPICMP 237 – Member Wynyard, Dr M Burns & Dr B Stephenson – 14/12/2021

On 28/06/2016, the worker injured her cervical spine, head and right upper extremity at work. The worker commenced proceedings against the appellant (for whom she worked until 14/04/2017) and the second respondent (for whom she worked from 7/08/2017 to 30/11/2017). However, by consent orders dated 6/04/2021, an award for the second respondent was entered and the dispute under s 66 *WPI* was referred to an AMS to assess the right upper extremity (shoulder, elbow & wrist) and complex regional pain syndrome (right upper extremity).

On 27/07/2021, Dr Negus issued a MAC, which assessed 47% WPI with respect to complex regional pain syndrome (including hand impairment) and 0% WPI of the right upper extremity. He stated:

> As the diagnosis of CRPS leads to an impairment calculation where the loss of motion is combined with the sensory disturbance, the impairment from CRPS is going to be higher than that for motion impairment alone. The terms of this referral were to assess her upper limb and also her CRPS for impairment. My calculations will reflect an impairment value for the CRPS and 0% for the upper limb as her impairment of the upper limb is accounted for within the CRPS impairment.

The appellant appealed against the MAC under ss 327(3)(c) & (d) *WIMA* and argued that the MA did not document any signs that fulfil the sign of "Sudomotor/oedema", which is required by Table 17.1 of the Guidelines. It also argued that as impairment of the right hand was not conceded, the assessment for the hand was invalid and the MA also failed to consider s 323 *WIMA* and to apply a deductible, despite the evidence of the onset of symptoms in 2014.

The MAP conducted a preliminary review and determined that a re-examination of the worker was not required as the issue for determination was the interpretation of the relevant guideline by the MA. It referred to Table 17.1 of the Guidelines and set out the relevant criteria for an assessment for CRPS.

The MAP allowed the appeal and stated that the MA apparently assumed that it was sufficient compliance with the required criteria to simply refer to Table 17.1 and this was a demonstrable error. However, he also had an obligation to give adequate reasons and he did not explain the absence of the pseudomotor/oedema sign. Therefore, it revoked the assessment for CRPS.

The MAP was satisfied that based on the range of motion findings set out by the MA, excluding the right hand measurements, the worker was entitled to an assessment of 20% WPI with respect to the right upper extremity. However, it applied a deductible of 10% under s 323 *WIMA* and issued a fresh MAC, which assessed 18% WPI.

PIC – Member Decisions

Workers Compensation

Section 11A WCA – Reasonable action with respect to dismissal

Van Vliet v Landscape Enterprises Pty Ltd [2022] NSWPIC 14 – Member Sweeney – 10/01/22

The worker commenced employment with the respondent in 2018. Shortly afterwards, he was appointed as a team leader responsible for the gardening/ landscaping at a number of commercial and industrial sites in Sydney. On 31/01/2020, he was required to attend a meeting with Paul Quinn, the proprietor of the respondent company. During the meeting his employment was terminated by Mr Quinn. He has not worked since then and there was no dispute that he had developed a psychological condition that precluded him from working.

The worker alleged that his psychological condition was caused by bullying and harassment and exposure to unsafe work practices. However, the respondent argued that this was wholly or predominantly caused by reasonable action taken with respect to his dismissal. It also argued that the worker has current capacity for selected employment on reduced hours.

Member Sweeney conducted an arbitration, which concluded over 2 days. He issued a COD, which entered an award for the respondent, for reasons which are summarised below.

- The respondent argued that aspects of the worker's evidence, in particular the histories recorded by several psychiatrists, were untrue and there was a significant issue as to the accuracy and reliability of his evidence. Thus, the worker's medical case was founded on erroneous assumptions of fact and it did not establish psychological injury other than that which the respondent conceded on 31/01/2020. That was a dismissal as that word is used in s 11A(1) *WCA* and as the dismissal was reasonable, in the circumstances of the case, the respondent was not liable to pay compensation to the worker.
- Mr worker argued that the entirety of the evidence, including the reports of Dr Bisht (the respondent's qualified psychiatrist), established that his applicant's dismissal was not the whole or predominant cause of the psychological injury. The respondent also failed to establish that its conduct in dismissing him was reasonable. In summarily dismissing him without warning on 31/01/2020, the respondent had not provided him procedural fairness and as he had not previously been subjected to disciplinary proceedings, the penalty of dismissal was oppressive and unreasonable. He referred to the information provided to employers by the Fair Work Ombudsman in respect of managing performance of employees and to the reasoning of Roche DP in *Bluescope Steel v Markovski* [2013] NSWWCCPD 69 (*Markovski*).
- The Member noted that each of the 3 psychiatrists who examined the worker concluded that he is incapacitated as a result of a work injury, but there is a dispute as to which aspects of his employment caused or materially contributed to his injury.
    - Dr St George (treating psychiatrist) took a history that within the first month of his employment, the worker was assisting in repairing a lawnmower, which fell on him while he was underneath it. He later found out that there were specific safety instruments to prevent it falling on people and he was surprised that towards it and he was lucky to be extracted by the foreman and another worker. He said that he felt intimidated into not reporting the incident and that he had difficulties with malfunctioning equipment and the absence of adequate OH&S, which he attempted to raise without success. This caused him to be further targeted y the foreman and business owner, which caused his mental state to significantly deteriorate and his alcohol consumption significantly increased in an attempt to cope with systemic harassment. He was later verbally harassed by a colleague and he attempted to make a bullying and harassment complaint against her, which was refused. He was then approached and told that he was being aggressive. He kept trying to escalate his concerns and pursue the grievance, which caused the employer to lose his temper and ruminations with themes of helplessness, hopelessness and insomnia. The doctor diagnosed an adjustment disorder with disturbance of mood and conduct.

- Dr Khan (qualified by the worker's solicitors) took a history consistent with that noted by Dr St George and noted that on 30/01/2020, the worker was verbally attacked by a client at work and that when he raised his concerns about the incident he was not supported. "Paul" proceeded to verbally and physically intimidate him and eventually terminated his employment. The doctor diagnosed PTSD as a direct result of an incident at work in late 2018, which was perpetuated by ongoing work-related psychological trauma, and stated that the worker had no residual earning capacity.
- Dr Bisht (qualified by the insurer) examined the worker in May 2020. He diagnosed an adjustment disorder and, based on the worker's history, performance management or disciplinary actions were not the whole or predominant cause of the psychological condition. He stated that the worker was totally incapacitated and felt that a period of three months was the appropriate recovery timeframe.
- Dr Bisht re-examined the worker on 12/04/2021. The worker said that his symptoms had worsened in the last few months and that he would "get anxious on minor provocation" and experienced suicidal ideation and nightmares about the incident on the lawnmower. He was unable to concentrate and, apart from gym, did not go out by himself. He continued to have fortnightly appointments with his psychiatrist. The doctor noted the factual investigation report and he stated, relevantly:

  > Markus reported that there were various hazards at work, such as being forced to drive vehicles that were overweight and working with faulty equipment. He said that he was told not to tag them, because the boss would blame him for the faulty equipment. He said he would constantly ask the boss and the foreman to fix the equipment but they would ignore him. But at the same time, he applied to become a team leader in August 2019. That indicates that the stress of working with faulty equipment was not a major stress.
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  > He said that in late 2018, there was an incident at work where he ended up getting trapped under a ride on mower. He didn't seek any treatment for any psychological symptoms arising out of that incident till his employment was terminated in February 2020, about a year and half later. Although Markus today reported symptoms suggestive of post traumatic stress disorder, in relation the incident when he was stuck under the lawn mower in October 2018, as per his version, PTSD symptoms reportedly had an onset around mid 2020, which was about a year and half after the initial incident. Such a delayed onset in very unlikely.
  >
  > The factual investigation didn't find substantial evidence of bullying/ Markus' psychological injury was predominantly as a result of performance management or disciplinary actions undertaken by the employer in January 2020.

- The Member stated that he was unable to reconcile the conflicting evidence between the worker and the respondent's witnesses and he found that he had considerable doubts about the reliability of the worker's evidence as much of his evidence about bullying and harassment and the onset of psychological symptoms is "extremely vague". He therefore preferred the evidence of the respondent's witnesses.
- The Member found that the worker did not suffer a psychological injury before the incidents on 30/01/2020 and 31/01/2020 as there was no objective evidence of psychological injury or illness during that time. He preferred the opinion of Dr Bisht regarding causation and held as to whether the injury was wholly or predominantly caused by the respondent's actions in respect of discipline or dismissal, as it was based upon the entirety of the evidence. He found that the respondent's actions on 30/01/2020 and 31/01/2020 were the whole cause.
- As to whether the respondent's actions were reasonable, the Member stated:

  > 108. Section 11A(1) of the 1987 Act requires a determination of whether the employers actions are reasonable both in form and in substance. The concept of reasonableness must depend on all the circumstances of the case. It cannot be given a rigid and unvaried

content. To adopt the language of Gageler J in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; [2015] HCA 1 at [367] "*Procedural fairness as implied in some contexts can have a flexible, chameleon-like, content*". His Honour was dealing with a case involving the detaining of a person on the high seas and removing him to India. Thus, the source and content of the duty to provide procedural fairness is quite different. However, the language demonstrates the flexibility of the content of the obligation.

109. One of the factors which was relevant to the determination of Roche DP in *Markovski* was that the worker had been employed for some 30 years at the time of the employer's action in respect of transfer which led to his psychiatric decompensation. Prior to his psychiatric injury, he had suffered a physical injury in the course of his employment. It was not argued that he was culpable of misconduct. These factors are not present in this case However, I accept unreservedly that the test of reasonableness is one of fairness and that generally the enquiry will involve the weighing up of the objectives of the employer against the rights of the worker…

112. In my opinion, the evidence establishes that the decision to terminate to the applicant's employment was reasonable in the circumstances of the case. There is considerable force in the submission of the respondent that the applicant's behaviour was so egregious as to bring termination of employment within the scope of reasonable action by the employer.

113. The manner in which termination was conveyed to the applicant was imperfect. Mr Quinn's evidence concedes this point. However, in the circumstances, there would appear little point in telling the applicant he was to attend a disciplinary meeting at which his employment was to be terminated on his return to the yard on the afternoon of 31 January 2020. In this case the procedural flaws do not detract from a conclusion that the employer's actions were reasonable. As the respondent has proven that the applicant's psychological injury was caused by reasonable action with respect to discipline and dismissal, there will be an award for the respondent.

Worker was arrested at work on terrorist charges and was remanded in custody for a month before it was found that he was set up by a co-worker – Held: the worker did not sustain an injury arising out of or in the course of his employment

Nizamdeen v University of New South Wales [2022] NSWPIC 17 – Member Isaksen – 12/02/2022

The worker was employed by the respondent as a business systems analyst. He alleged that he suffered a psychological injury on 30/08/2018, when he was arrested at work by the Australian Federal Police for having set out details in a notebook of a planned terrorist attack. He was detained at Goulburn Correctional Centre from 30/08/2018 to 28/09/2018, in solitary confinement, and was subjected to long hours of interrogation. He was released on conditional bail on 28/09/2018 and all charges were dropped when it was established that the notebook entries had been created by a co-worker. He claimed weekly payments from 28/09/2018 to 29/09/2018 and compensation under s 66 *WCA* for 19% WPI.

The respondent disputed the claim.

Member Isaksen conducted an Arbitration.

The worker alleged that a co-worker framed him, by taking his notebook away from his desk and writing terrorist threats in it. That co-worker then "found" the notebook and produced it to senior UNSW staff and police were then contacted. He said that he suffered anxiety, depression and PTSD, which prevented him from working after his release from prison, and he lost trust and confidence in his employer and work colleagues and returned to Sri Lanka for peace of mind.

The worker argued that his employment was a substantial contributing factor to the injury because it was a co-worker that framed him, his arrest occurred during work hours and he suffered humiliation and disgrace at his workplace.

However, the respondent argued that any psychological injury developed as a disease and that the worker had not suffered an injury under s 4(a) *WCA*. Rather, the evidence indicated that the condition developed while he was in custody, subjected to interrogation and became aware that he was the subject of acute media scrutiny and employment cannot be the main contributing factor to its contraction as there are several contributing factors that have no relationship to employment.

The Member was not satisfied on the evidence that the worker suffered a s 4(a) injury on 30/08/2018, although he would have experienced shock and distress when he was surrounded by police and security staff at work that day and was taken to Maroubra Police Station for questioning. Rather, he stated that the evidence supported a finding that the worker sustained a disease over the month following his arrest. He stated, relevantly:

> 66. In this dispute there are several causal factors identified by the applicant and in the medical evidence in the contraction of the psychological disease injury which are not related to the applicant's work. There is the imprisonment for a month in a maximum security prison, the lengthy interrogations while in prison, the attitude of the police in response his protests of innocence, the attacks by the media, and his allegations of racial profiling.
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> 67. Even if it is accepted that other factors such as the arrest at work on 30 August 2018 occurred in the course of the applicant's employment (which I have yet to address), the evidence which I have reviewed does not support a finding that the applicant's employment was the main contributing factor to the contraction of a disease injury.
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> 68. I am therefore not satisfied that the applicant has discharged his onus of proof in establishing that he did sustain an injury within the meaning of section 4 of the 1987 Act.
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> 69. If I am wrong on the determination of the type of injury sustained by the applicant, I am also not satisfied that the psychological injury the applicant has sustained has arisen out of or in the course of his employment with the respondent…
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> 78. In *Mercer v ANZ Banking Group Limited* [2000] NSWCA 138; 48 NSWLR 740; 20 NSWCCR 70 (*Mercer*), Mason P said at [13]:
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> > It is common ground between the parties and well established by earlier authority that, when s9A(1) speaks of "*the employment concerned*" being a substantial contributing factor to the injury, the legislation is not referring to the fact of being employed, but to what the worker in fact does in the employment (see *Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at 632-3, 641). In other words, one starts with the actual and not the hypothetical, with what (if anything) the worker was in fact doing in his or her employment that caused or contributed to the "*injury*" as defined in s4.
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> 79. The evidence provided in this dispute does not reveal what the applicant was doing in his employment as a business analyst with the respondent which led Mr Khawaja to betray him and thereby, at least in the opinion of Dr Kumar, cause injury to the applicant. That the applicant and co-worker merely happened to work for the same employer does not establish that the applicant's employment was a substantial contributing factor to his injury, even if Dr Kumar's opinion on the cause of injury were to be accepted.
>
> 80. The betrayal by Mr Khawaja co-worker was made by the tampering of the applicant's notebook. Perhaps if there was some evidence that the notebook was an integral or necessary part of the applicant's duties as a business analyst, then an argument could be made that the applicant's injury had arisen out of or in the course of his employment with the respondent and his employment was a substantial factor to that injury. However, there is no evidence in regard to this.
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> 81. Nor is there any evidence of any unique working relationship between the applicant and Mr Khawaja that would allow for a connection to be made between the work being performed by them and the injury sustained by the applicant. The evidence from the applicant goes no further than to state that Mr Khawaja was a co-worker.

82. *Fire and Rescue New South Wales (formerly NSW Fire Brigades) v Guymer* [2011] NSWWCCPD 38 (*Guymer*) is a decision with some similarities to this dispute, and where the worker was successful in establishing that there was a causal connection between his psychiatric injury and his employment, and that his injury had arisen out of his employment.

83. Mr Guymer sustained a psychological injury as a result of a radio presenter identifying Mr Guymer in a broadcast as having committed credit card fraud and an assault. DP O'Grady listed several matters which linked those allegations to the performance of Mr Guymer's duties, and then said at [89]:

> The matters I have summarised above each concern Mr Guymer and the performance of his duties as well as allegations of improper conduct on his part as an officer of the appellant. In the circumstances it is plain that the injury received following the broadcasts was one, as found by the Arbitrator after a commonsense evaluation of the evidence, that arose out of his employment in terms of s 4.

84. In this dispute I have not found, and have not been referred to, any evidence which connects the applicant's work duties or tasks he was to perform for the respondent to the actions taken by Mr Khawaja to betray the applicant.

85. DP O'Grady said in *Guymer* at [93]:

> … In my view no error by the Arbitrator is demonstrated in his finding that the happenings in July 2009 were related to Mr Guymer's employment. His employment was performance of duties as an officer of the appellant. It was his employment, on the evidence, that required him to hazard or to suffer the broadcasts which caused the injury.

86. In this dispute there is no evidence that the applicant's performance of his duties as a business analyst for the respondent "required him to hazard or to suffer" the betrayal instigated by Mr Khawaja.

87. What Mr Nizamdeen had to endure on 30 August 2018 and for the month that followed was terrible and shocking. I do not wish to downplay or be dismissive of the distressing circumstances he found himself in during that time. I note that Mr Saul at the commencement of his submissions on behalf of the respondent acknowledged the gravity of what occurred to Mr Nizamdeen.

88. However, I am required to determine if University of New South Wales is liable for workers compensation to be paid to Mr Nizamdeen, and I have provided my reasons as to why I am not satisfied that Mr Nizamdeen sustained a psychological injury which arose out of or in the course of his employment with his employer as provided for by section 4 of the 1987 Act.

Accordingly, the Member entered an award for the respondent.

Motor Accidents

Assessment of damages and liability under Part 4 of MAIA 2017 – Insured driver breached duty of care and no finding of contributory negligence made against claimant – Damages awarded and costs penalty of 25% applied for unreasonable denial of liability.

Peel v AAMI [2021] NSWPIC 495 – Member Medland – 25/11/2021

The claimant was injured while riding her pushbike and she was involved in a collision with the insured vehicle. The insurer admitted liability for statutory benefits for the initial 26 weeks, but it refused to admit liability after that due to outstanding investigations, which included a statement from its driver. The claimant later applied for common law damages, but the insurer replied that the claim was deemed denied because particulars were not exchanged and there was insufficient information to determine whether the driver involved was the insured driver and whether they breached their duty of care. The insurer ultimately obtained a statement from the insured driver dated 6/05/2021, but it denied that the insured driver breached his duty of care.

Member Medland determined on the evidence that the claimant had right of way to travel across the intersection and that the insured driver was required to give way to vehicles and bicycles. While there was no give way sign, there was a sign warning to watch out for bikes and the accident involved a T intersection with the insured driver wishing to enter the priority roadway. The insured driver was therefore required to give way and she rejected a suggestion that the insured driver would not have seen the claimant if he had been keeping a proper lookout.

The Member found that there was no contributory negligence on the part of the claimant and that it was reasonable that a person in the claimant's position would assume that a stationary vehicle that wawas obliged to give way to her on a bicycle would was obliged to give way to her on a bicycle would look and see her. It was therefore reasonable for the claimant to continue on her path based on that assumption and she did not fail to keep a proper lookout.

Accordingly, the Member found that the insured driver breached his duty of care and was wholly at fault for the accident. She awarded the claimant $250,000 for non-economic loss, $63,500 for past economic loss and $200,000 for future economic loss on a buffer basis. She also made an award under *Fox v Wood* and imposed a 25% costs penalty on the insurer under s 6.21 of the *MAIA* on the basis that there was no reasonable basis for the denial of liability.

Claims Assessment – Claim for damages submitted to the insurer on the same day as the claim was referred to the PIC under Div 7.6 of the MAIA for assessment -No particulars or evidence provided when claim was lodged – No offer of settlement made or invitation to engage in settlement discussions – Held: Claimant did not use her best endeavours to settle the claim before referring it for assessment – Proceedings dismissed under s 54 of the PIC Act .

Mammone v Insurance Australia Limited t/as NRMA [2021] NSWPIC 501 – Member Williams – 6/12/2021

On 8/08/2018, the claimant was a pedestrian crossing a street in Lakemba. She alleges that an unidentified vehicle reversed into her and caused her injury. On 8/02/2019, she lodged a claim for statutory benefits and the insurer initially accepted the claim, but subsequently denied it on 13/10/2020 on the basis that the claimant suffered only minor injuries as a result of the MVA.

On 5/08/2021, the claimant made a claim for damages and commenced the PIC proceedings that same day. The insurer argued that the application for assessment should be dismissed because the claimant did not use her best endeavours to settle the claim before referring it for assessment.

Member Williams determined the dispute on the papers. He held that s 7.32(3) of *MAIA* is in clear and unambiguous terms and provides that the parties to a claim must use their best endeavours to settle the claim before referring it for assessment. However, he noted that the term "best endeavours" had not been judicially considered in this context. While the insurer referred to a number of authorities that address its meaning in terms of contract law, the Member held that these should be treated with a degree of caution as they do not address the term in the context in which it arises in the *MAIA*.

The insurer argue that "best endeavours" clauses are now judged by standards of reasonableness and the obligation is measured by what is reasonable in the circumstances and in consideration of the nature, capacity, qualifications and responsibilities of the person who owes the obligation. The Member stated that notions of reasonableness and context are the critical considerations that emerge from these authorities and they should be applied when determining what the term "best endeavours" means for the purposes of s 7.32(3).

The Member accepted the insurer's argument that the claimant made no endeavours at all to settle the claim before referring it for assessment he found that the fact that the 3-year anniversary of the accident was approaching when she commenced the proceedings did not expressly or impliedly excuse her from compliance with s 7.32(3).

The Member found that the proceedings are misconceived and lacking in substance for the purposes of s 54(b) of *the PIC Act* and he dismissed them.

Damages claim - claimant witnessed death of colleague run down by bus driven by fellow trainee bus driver - claimant developed PTSD and alcohol misuse disorder - claim made under pure mental harm provisions of Civil Liability Act 2002 – No dispute as to liability

Wiegold v Allianz Australia Insurance Limited [2021] NSWPIC 512 – Member Cassidy – 8/12/2021

On 28/05/2018, the claimant commenced employment with Transit (NSW) Services Pty Limited as a trainee bus driver. On 7/06/2018, after training that included driving a bus on streets, the trainees were taken for more practical training – driving a bus around a car park in Strathfield. He completed his circuit of the car park and moved to the sidelines to allow another trainee to take the wheel of the bus. During their circuit, that trainee lost control of the bus, mounted the gutter and slammed into a fence and hit an embankment. The trainer, who had been standing in front of the bus, was killed.

The claimant witnessed the accident and ran to provide first aid but was confronted by the sight of his trainer who was clearly dead and 'unrecognisable' due to his head injuries. He developed mental health issues as a result and claimed (and was paid) workers compensation benefits.

On 20/04/2020, the claimant claimed damages under the Mental Harm provisions of Div 7, Pt 3 of the Civil Liability Act 2002 against the insurer. The Insurer admitted liability, but the amount of damages could not be resolved and the claim was referred to the DRS for assessment.

Member Cassidy noted that the medical evidence indicated that the claimant had developed PTSD and an alcohol misuse disorder. The insurer conceded the claimant's entitlement to non-economic loss and entitlement to the other heads of damage, namely past and future loss of earnings and earning capacity in accordance with s 4.5(1)(a) of the MAIA and damages under s 4.5(1)(d). The only significant dispute was the extent of the claimant's residual earning capacity and whether he was ever likely to exercise it.

The Member found that the accident was the sole cause of the claimant's psychiatric injuries. She also accepted that the claimant has an ongoing impairment to his earning capacity, and while this impairment is not total, it will produce a financial loss because he has been unable to return to work as a trainee bus driver and had attempted other returns to work – some of which in jobs that ended due to his mental state.

The Member stated that the current maximum amount for non-economic loss damages is $595,000. The claimant argued that he should be awarded $325,0000 and the Insurer argued that this should be $220,000. The MAIA defines non-economic loss as: (a) pain and suffering, and (b) loss of amenities of life, and (c) loss of expectation of life, and (d) disfigurement. She found that the claimant suffers from mental anguish, anxiety and depression and that there evidence of significant loss of the amenities and enjoyment of life. His condition is chronic and there is no cheery prognosis. He is 62 years old and on the medium life tables he has 23 years to live with the after-effects. Therefore, she awarded the claimant $250,000.

The Member found that the claimant's PIAWE was $1,070 per week and that his net earnings were $837 per week. She allowed past economic loss in the sum of $150,000.

With respect to future economic loss, the Member held that but for the accident, the claimant would most-likely have continued his training and obtained work as a bus driver or worker in some other job involving transport or landscaping on a full time basis earning about $1,000 net per week. She found that most-likely, the claimant would have retired at or before he was 70 years old. She found that he has a residual earning capacity of 12 hours per week, which is not theoretical, although she adjusted the award upwards to reflect the additional circumstances that the claimant is likely to face. She awarded $225,000 (8 years x $667 per week to age 70 (multiplier 345.6) - 15% for vicissitudes = $196,000, which was rounded-up).

The Member also awarded the claimant $16,500 for past superannuation benefits, $24,750 for future superannuation benefits and $17,185 under *Fox v Wood*.