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. Dickinson v Chapman [2022] NSWCA 2
2. Grant v Dateline Imports Pty Ltd [2022] NSWPICPD 3
3. Pirie v State of New South Wales (NSW Police Force) [2022] NSWPICPD 4
4. Messent v Comdain Corporate Pty Ltd [2022] NSWPIC 24

Court of Appeal Decisions

Worker & deemed worker under Sch 1 cl 2 WIMA - work was done under contract of employment – non-compliance with procedural requirements for WID claim

Dickinson v Chapman [2022] NSWCA 2 – Basten, Macfarlan & McCallum JJA – 3/02/2022

The respondent completed odd jobs at 2 industrial yards from which the second appellant operated a heavy freight haulage business known as White Heavy Haulage. On 1/09/2014, he suffered a significant crush injury to his left forearm when it was trapped in the closing jaws of a front-end loader, which was being operated by the first appellant (an employee of the business).

On 31/08/2017, the respondent commenced proceedings in the District Court seeking damages in negligence and joined the appellants as defendants. The appellants asserted that the respondent was precluded from seeking common law damages because he was a deemed worker pursuant to Sch 1 cl 2 *WIMA* and they filed a notice of motion seeking to have the District Court resolve this issue as a separate question. On 27/11/2017, the Court dismissed that application.

The respondent then brought proceedings in the WCC, during which the appellants' insurer agreed that he was not a worker under *WIMA* and the Arbitrator found that he was not a worker. However, the appellants' public liability insurer, who was joined to the proceedings, appealed that finding and a Deputy President determined that the WCC had no jurisdiction to determine the matter as no dispute was before it.

On 20/05/2022, the respondent filed a notice of motion in the District Court seeking to strike out the defence (which alleged that he was a worker or deemed worker) on the basis that the appellants were estopped from arguing this due to their "admissions" in the WCC. On 29/05/2020, the District Court dismissed that motion.

In November 2020, the District Court heard the application for damages. The Court noted that the second appellant's diary showed that, at least since 3/03/2014, the first appellant was paying the respondent for his work in the yards. The second appellant told the first appellant the hours that he worked and she paid him $30 per hour.

Judge Taylor held that there was no obligation on the respondent to do anything and he was not employed under a contract. Therefore, he was not precluded from claiming damages for negligence of the second appellant (for which the first appellant was vicariously liable). He found that the appellants owed the respondent a duty of care and that they were negligent by failing to implement a safe system of work. On 18/12/2020, he awarded the respondent damages of $121,844.61.

The Court of Appeal (Basten JA (Macfarlan & McCallum JJA agreeing) upheld the appeal.

The Court identified the primary issues as being:

(1) whether there was a common intention between the respondent and the second appellant to be legally bound by contract; and

(2) whether the respondent was a worker or deemed worker within the meaning of the *WIMA*.

In relation to issue (1), the Court held that whether there is a common intention to be legally bound by contract must be determined objectively. From March 2014, the course of conduct between the respondent and the second appellant satisfied that test. The respondent regularly communicated his hours of work to the second appellant, who consistently paid him $30 per hour for services rendered. The facts that (i) the second appellant had unilaterally set the rate of pay and (ii) the respondent was not obliged to work particular hours, did not preclude the existence of an intention to be contractually bound: [35]-[36].

Australian Woollen Mills Pty Ltd v The Commonwealth (1954) 92 CLR 424; [1954] HCA 20; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95; [2002] HCA 8 applied.

In relation to issue (2), the Court determined that the respondent fell within the definitions of a worker and deemed worker under the *WIMA*. The respondent was a worker because he was a person who worked under a contract of service, and was a deemed worker because he had performed work exceeding $10 in value pursuant to a contract: [36]. ss 4 & 5 & Sch 1, cl 2 *WIMA* applied.

The Court also held that the respondent's entitlement to recover damages was subject to the *WIMA* and the *WCA*, which he had not complied with, and he was thereby precluded from bringing a claim for damages in the District Court: [37].

Accordingly, the Court set aside the judgment of the District Court dated 18/12/2020, dismissed the Statement of Claim and ordered the respondent to pay the plaintiff's costs of those proceedings. It also ordered the respondent to pay the appellant's costs of the appeal.

PIC - Presidential Decisions

Consequential condition – circumstances in which a diagnosis is relevant – Arquero v Shannons Anti Corrosion Engineers Pty Ltd [2019] NSWWCCPD 3, Kumar v Royal Comfort Bedding Pty Ltd [2012] NSWWCCPD 8, Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan [2016] NSWWCCPD 23 discussed – requirement for expert medical opinion

Grant v Dateline Imports Pty Ltd [2022] NSWPICPD 3 – Deputy President Wood – 24/01/2022

On 31/07/2015, the appellant injured his right upper extremity at work and the insurer accepted liability for this injury. However, he subsequently alleged that he suffered consequential pain in his left upper extremity and a consequential complex regional pain syndrome (CRPS). He claimed compensation under s 66 *WCA* with respect to both upper extremities and CRPS, but the respondent disputed liability for both alleged consequential condition.

Principal Member Bamber issued a COD on 16/04/2021, which determined that she was not satisfied that the appellant suffered a consequential condition in his left upper extremity she held that whether there was a rateable diagnosis of CRPS was a matter for a MA. Accordingly she remitted the matter to the President for referral to a MA to assess the right upper extremity and any CRPS affecting that extremity.

On appeal, the appellant argued that the Principal Member erred in law as follows:

(1) in finding that a "diagnosis" was needed to determine if a consequential injury had occurred; and

(2) in determining that his consequential condition in the left hand bore a higher burden of proof because it was his dominant hand.

Deputy President Wood dismissed the appeal and her reasons are summarised below.

- In relation to ground (1), the appellant argued that the Principal Member misdirected herself by considering that a diagnosis was required, as a finding that a of a consequential condition is not dependent upon a diagnosis: *Arquero v Shannons Anti Corrosion Engineers Pty Ltd* and *Kumar v Royal Comfort Bedding Pty Ltd*. Rather, the basis for finding a consequential condition is the presence of symptoms and not a diagnosis. If a diagnosis is not the test for making a determination of a consequential injury, then rejecting his case on the basis of no diagnosis was wrong. There was ample evidence to support his case and the determination should be set aside.
- The respondent argued that the Principal Member actually found that none of the doctors identified a condition in the left upper extremity that was caused by overuse due to the right arm injury. She carefully considered the evidence from the treating doctors and the appellant's evidence and she was well appraised of the medical history and made her determination based on that evidence. *Arquero* concerned the timing and onset of symptoms, whereas this case turned on the substance of the available evidence. The Principal Member determined that the symptoms in his left upper extremity resulted from CRPS and not a consequential condition arising from overuse of the left arm. She did not misdirect herself, but was simply not satisfied that the appellant had made out his case of a consequential condition.
- In relation to ground (2), the appellant argued that the Principal Member erred by accepting the respondent's proposition that specific tasks needed to be identified because the condition affected the dominant arm. This had no basis in law, and she misdirected herself as to the proper test and the proper test is whether the symptoms in the left arm were due to overusing the left arm.
- The respondent argued that the mere presence of symptoms does not necessarily establish a consequential condition due to overuse as the symptoms may be due to some other cause. This is why there must be an expressed medical opinion regarding causation of the condition in the left upper extremity. The Principal Member found that, while there were opinions expressed by the medical experts that the condition in the left upper extremity resulted from CRPS or central sensitisation, no medical opinion stated that it arose from overuse.
- Wood DP noted that the Principal Member made a factual determination regarding causation of the alleged consequential condition in the left arm. She referred to Roche DP's summary of the principles that apply to disturbing a factual determination in *Raulston v Toll Pty Ltd*. She stated that a useful overview of the principles can also be found in the judgment of Basten JA (with Allsop P agreeing) in *Najdovski v Crnojlovic* as follows (citations omitted):

  > Once primary facts have been found and relevant inferences drawn, the ultimate conclusion may depend upon an evaluative judgment which may not be amenable to precise justification. The constraints which apply to a review of such a judgment recognise that views may reasonably differ as to the appropriate result and that error will not be found if the result is within the appropriate range. It may be that error is demonstrated in failing to reveal a process of reasoning where, although relevant and material facts have been found, the basis for the final conclusion remains impenetrable. There may be occasions in which such a result will demonstrate a failure to fulfil that part of the judicial function which requires revelation of the reasoning process, but more commonly such a case will be resolvable on the basis that the findings of fact are not as they appear or that there is otherwise an unrevealed error of principle.

- Wood DP rejected ground (1) and held that the appellant's argument was misplaced. *Arquero* and *Kumar* were determined on the basis of the available evidence and there was clear evidence and medical opinion that the worker's symptoms were as a consequence of the work-related injury. There was no satisfactory contrary opinion.

- In *Arquero*, the worker suffered a right knee injury in 2000. Many years later, in fact in about 2014, he developed symptoms in his left knee. There was clear evidence that, before the onset of the left knee symptoms, the worker's right knee injury had significantly deteriorated and surgical intervention took place, resulting in leg length discrepancy. Several medical experts observed over time that the worker displayed an altered gait and recorded worsening right knee symptoms, which evidence was consistent with the worker's statement evidence. A medico-legal expert provided the necessary opinion as to the connection between the right knee injury and the consequent left knee symptoms, which opinion was based on a history consistent with the other available medical evidence. That expert did not make a diagnosis of the left knee condition. Accordingly, the Principal Member determined that, on the basis of the available evidence, there was sufficient evidence to support the causal connection and it was not fatal that the medico-legal expert had not provided a diagnosis.
- In *Kumar*, the worker's evidence of experiencing pain in his right shoulder when relying on his arms to lift himself after his back surgery was unchallenged and plausible, with the only competing evidence being evidence from a medico-legal expert that the shoulder pathology was not significant. That opinion did not address the issue for determination. Roche DP's observations about there being no need to identify the pathology of the condition should be considered in the context of the available evidence in that case, where the cause of the condition was clearly apparent from the factual and medical evidence.

- Further, Snell DP reviewed the relevant authorities in *Trustees of the Roman Catholic Church for the Diocese of Parramatta v Brennan* and made the following observations:

  > The above do not suggest any need that a finding of a consequential condition necessarily involves the identification of pathology. It is sufficient to find (***if the evidence supports it***) a condition that results from an employment injury. I accept the respondent's submission that it is sufficient to find a consequential condition, pathology need not necessarily be identified. In Kumar the relevant finding was based on the existence of symptoms. (my emphasis)

- Therefore, the notion that it is not necessary to identify the pathology causing the symptoms is couched in terms of the issues for determination and the available evidence. In this matter, the Principal Member referred to the evidence, but the issue before her was not limited to whether the appellant did or did not overuse his left arm. There was a clear issue as to whether the symptoms in the left arm resulted from overuse (which was the pleaded case) or some other cause, and, given the conflicting medical evidence as to those causes, a diagnosis that might lead to the identification of the cause of the left arm condition was significantly relevant. In other words, there was substantial evidence that there was another cause for the symptoms in the left upper extremity.

- The Principal Member did not apply the wrong test or legal principle, and she did not err in observing that there was no clear diagnosis that would support the allegation that the symptoms in the left upper extremity resulted from the appellant overusing that arm.

- Wood DP also rejected ground (2) and she stated, relevantly:

  > 93. The Principal Member concluded, after a careful review of the evidence, that there was no medical support for the proposition brought by the appellant that the condition in his left arm resulted from overuse. The Principal Member did not simply accept the respondent's submission that specific tasks needed to be identified. She accepted the "general tenor" of the submission, which was that there needed to be evidence of the tasks the appellant was performing, together with expert medical opinion to support the notion that the condition in the appellant's left arm was caused by performing those tasks. That is a straight-forward proposition which is consistent with the observations expressed in the various authorities discussed above.

94. The Principal Member did not place a higher burden on the appellant because the appellant's left upper limb was his dominant arm. She assessed the evidence and reviewed the medical opinions before reaching the conclusion that the appellant's case was not made out, primarily because of the absence of medical opinion to support the case put forward by the appellant.

Accordingly, Wood DP confirmed the COD.

Leave to appeal an interlocutory decision refused – Reg 44 of the Workers Compensation Regulation 2016 – Employer relied on reports from 2 orthopaedic surgeons - Worker refused to attend a re-examination by the first expert and he agreed to be examined by the second medical expert

Pirie v State of New South Wales (NSW Police Force) [2022] NSWPICPD 4 – Acting Deputy President Parker SC – 31/01/2022

The appellant was employed by the respondent as a Manager of the Canobolas LAC, based at Orange Police Station and suffered a number of injuries to both knees. . He was not an attested Police Officer.

The appellant claimed compensation under s 66 *WCA* for 20% WPI, based upon an assessment from Dr Anderson dated 19/05/2020 (date of injury: 17/07/2015).

However, on 21/09/2020, the respondent placed a settlement offer for 14% WPI, based upon an assessment from Dr Panjratan dated 28/07/2020.

On 5/11/2020, the appellant's solicitor sent an email to the respondent's solicitors, which stated:

> I am instructed to provide notice of a claim for Whole Person Impairment compensation and refer you to the Permanent Impairment Claim Form served on 4 June 2020. The claim is brought on the basis that the Applicant sustained injury to his right knee as a result of several incidents that occurred in the course of his employment with the New South Wales Police Force in 2007 through to July 2015. The Applicant relies on a deemed date of injury of July 2015.

The respondent interpreted this as notice of a claim for compensation due to the nature and conditions of employment.

On 12/11/2020, the respondent's solicitors advised the appellant's solicitor that a re-examination would be arranged with Dr Panjratan, but the appellant's solicitor re3plied that the appellant "*does not recognise any asserted right for a medical re-examination by Dr Panjratan and will object to Dr Panjratan conducting a further examination*." On 30/11/2020, the appellant's solicitor advised that the appellant objected to being re-examined by Dr Panjratan, but that he would attend an IME with a different doctor, preferably in Dubbo or Orange and he subsequently chose to be examined by Dr Doig.

Dr Doig examined the appellant on 19/12/2020 and on 29/12/2020, he issued a report that also assessed 14% WPI.

On 16/02/2021, the respondent's solicitors placed a settlement offer for 14% WPI.

Member Young conducted a teleconference on 8/04/2021, during which the parties agreed that the matter should be referred to a MA to determine the degree of WPI of the right lower extremity (deemed date of injury: 17/07/2015, but there was a dispute about the evidence that should accompany the referral.

The Member made an ex-tempore decision, which remitted the matter to the President for referral to a MA and ordered the President's delegate to place copies of the ARD and Reply before the MA. He stated, relevantly:

> In the circumstances, given that the reports are, and the examinations, I should say, are six months apart I believe that it would be a denial of natural justice to the respondent to strictly apply clause 44 in these circumstances and to the extent that it's necessary I rely upon Part 15, Rule 15 of the Workers Compensation Commission Rule and Procedural Tables and I'm inclined to allow the Medical Assessor to receive the report of Dr Doig as well as the reports of Dr

> Panjratan. I'll make an additional request that the medical assessment not occur, not be arranged to occur until the expiration of 28 days from today so that Mr Tancred has an opportunity to obtain instructions as to whether my direction should be challenged.

The appellant's solicitor advised the Member that the WCC Rules were repealed by the PIC Rules 2021. In response, the respondent's solicitor argued that the PIC Rules were "essentially the same" and the Member stated that he understood that they "*were basically replicated*". The Member stated, relevantly:

> There was a decision of the Court of Appeal in *Sydney Area Health Service v Edmonds* back in 2007 that talked about admissibility and the appropriate evidence to be considered. Roche, Deputy President, in a matter of *Paul Segaert Pty Limited v Narayan*, which is a 2006 decision, made the point that [section] 354 doesn't give an Arbitrator carte blanche to consider any material that should be referred or adopted in the matter but the general point is that they do have a duty to comply with the rules of natural justice and procedural fairness and to give each party a reasonable opportunity to consider material. And it was on that basis that I took the view that in circumstances where the applicant refused to or declined to attend a re-examination with a certain doctor it was fair for the respondent to arrange another doctor and would be, it follows it would, in my view, be unfair for the respondent then to be denied the opportunity of having that evidence before the Medical Assessor. Anyway, Mr Tancred, I think if you want to pursue that point then I've given you the twenty eight days to deal with it.

The appellant appealed against the second order and asserted that the Member erred in law:

(1) by incorrectly construing cl 44 of the 2016 Regulation;

(2) by referring to repealed Rules; and

(3) by his denial of procedural fairness.

Acting Deputy President Parker SC determined the appeal on the papers. He held that as the appealed decision was interlocutory, the appellant required leave to appeal. He refused to grant leave and I have summarised his reasons below.

- The appellant argued that s 352(3) *WIMA* is satisfied because he seeks compensation for 20% WPI, being $30,250 and the respondent offered 14% WPI, being $20,350. However, the respondent disputed that the threshold issues were satisfied as the appealed decision did not involve the award of any monetary sum and leave must be granted under s 352(3A) *WIMA*.
- ADP Parker SC stated that in *Fletchers International Exports Pty Limited v Regan* Fleming DP held at [27]:

  > While the decision of an Arbitrator may not concern an '*award' of compensation (as in Mawson), the appeal must nonetheless affect an 'amount of compensation at issue on appeal*' to pass the threshold test in s 352(2)(b). Purely procedural decisions, such as a decision to adjourn a telephone conference … a decision in relation to costs only … and a decision to schedule a further telephone conference … do not meet this threshold criterion. The decision must have a real capacity to put the amount of compensation, determined by reference to the decision or the claim (*Sheridan v Coles Supermarkets Australia Pty Limited* [2003] NSWWCCPD 3), in issue in the appeal (as in the case of filing a 'Reply') (*ADCO Constructions Pty Limited v Ferguson* [2003] NSWWCCPD 21)." (Emphasis in original, unnecessary citations omitted.)

- Further, in *O'Callaghan v Energy World Corporation Limited*, Roche AP at [47] quoted that passage from *Regan* and said at [48]:

  > It follows that where, as in the present matter, the Commission has made no order for the payment of compensation, the amount of 'compensation at issue on appeal' must be determined by reference to the amount of compensation at issue in the proceedings before the Arbitrator.

- The appellant's argument is unconvincing because:
    - the function of the MA is to form their own independent view of the WPI whatever may have been the position of the appellant and the respondent. The MA's function is not arbitral nor is the MA required to choose between competing assessments, and
    - It assumes the result of the assessment will be between the assessments provided by the parties' medical referees.
- The dispute between the parties is what medical reports are to go before the MA and where that is the issue on the appeal, satisfying the financial burden imposed by s 352(3) is problematic. He stated, relevantly:

    62. In my view, leave to appeal should not be granted for the following reasons:

    (a) Leave is not to be granted unless it is "necessary or desirable" for the proper determination of the parties' dispute. The "dispute" relevant to the Member's determination and to the appeal is as to what documents should go before the Medical Assessor. But it is plain that the present "dispute" is peripheral to the real issue in the proceedings, namely what is the appropriate assessment as determined by the Medical Assessor. An objective of the scheme is the timely disposition of disputes. In my view further agitation of the present peripheral dispute is neither necessary nor desirable from the point of view of the true issues between the parties.

    (b) The necessity for the further report from Dr Doig arose from the request by the appellant that he not be re-examined by Dr Panjratan. In my view it would be unfair ("not desirable") for the respondent to be deprived of an up to date medical review of the appellant for reasons generated by the appellant.

    (c) The appeal was inherently likely to and inevitably has delayed the assessment by the Medical Assessor.

    (d) Dr Doig's report is by way of an "update" and expresses the same conclusion as to the WPI as Dr Panjratan.

    (e) It is doubtless of assistance to the Medical Assessor to have available material which suggests that the appellant's impairment has remained constant from the examination in July of 2020 to the examination in December of 2020. It enhances the conclusion that the appellant's condition is stable and that the assessment should proceed.

    (f) The proper and effective determination of the real dispute between the parties will depend upon the Medical Assessor's independent conclusion as to the WPI. A properly instructed Medical Assessor is unlikely to be overly or improperly influenced by the fact that the employer has had the appellant examined by two orthopaedic specialists.

    (g) The purpose of cl 44 is to prevent the Commission from being overwhelmed by large numbers of medical reports from different referees of the same speciality and to discourage "doctor shopping" whereby a party seeks to obtain a favourable opinion from a doctor when confronted with less favourable opinions from other referees. In my view, that is not the situation prevailing in the present matter.

    (h) Finally and perhaps most importantly it is a matter of procedure. It is undesirable because of the inevitable delay and the fact that reasonable minds can differ for such matters of procedure to be agitated on several occasions.

PIC – Member Decisions

Workers Compensation

Worker's solicitors withdrew from proceedings - claim ill-conceived and matter not ready to proceed to a conciliation conference/arbitration due to absence of crucial evidence - worker had insufficient knowledge and capacity to act as an unrepresented litigant - worker's conduct inappropriate - proceedings dismissed for want of due dispatch.

Messent v Comdain Corporate Pty Ltd [2022] NSWPIC 24 – Senior Member Capel – 18/01/2022

The worker injured his back at work on 28/090/2019. The insurer accepted liability for the back injury, but disputed liability for claims for dental and medicinal cannabis treatment.

On 3/11/2020, the insurer issued a dispute notice under s 78 *WIMA*, disputing liability for the cost of lawn maintenance under ss 59 and 60 *WCA*. It stated that it had already paid for those services for a period of 3 months under s 60AA *WCA* and the worker had no further entitlement unless his degree of WPI was assessed as exceeding 15%.

On/about 23/09/2020, the insurer agreed to pay for one further service, but on 23/10/2020, the provider declined to mow the lawns due to their poor state. On 30/10/2020, another provider stated that because of the type of weed that was present, the only option was to poison the lawn and returf it. The former was not an option because the worker has a dog. The insurer stated that returfing was not a medical or related treatment under s 59 *WCA*.

On 29/09/2021, the worker commenced proceedings in PIC, claiming costs of lawn returfing ($500).

Member Scarcella conducted a telephone conference on 28/10/2021, at which the worker sought to amend the application to claim future treatment, care or expenses in the sum of $18,326. He listed the matter for an AV hearing on 17/11/2021.

At the hearing, the worker's legal representatives stated that they could no longer represent him and they sought leave to withdraw. The Member granted the application and referred the matter to the Division Head for allocation to another Member. The Member provided details of his conversations with the worker and his legal representatives, including:

> 1. I was connected to the telephone conciliation/arbitration proceedings and announced by the operator at about 10:00 am.
>
> 2. I advised the participants that I would start with a roll call. I commenced by saying good morning to the applicant, Mr Messent. Mr Messent responded with a good morning and then said, "Do you want to know why it's not going ahead, because my lawyers …" At that point, I interrupted Mr Messent and advised that I was just doing a roll call and that I would be speaking to his lawyers." I tried to explain the process to him, but he would not permit me to. He kept talking and I endeavoured to let him know that I would come back to him. It was difficult to understand what he was saying.
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> 3. I repeatedly requested Mr Messent to stop. He ignored me. I raised my voice to get his attention and forcefully repeated a number of times, "Mr Messent, please stop." Mr Messent then directed a tirade of abuse at me. He said, "How dare you raise your voice at me you fucken cunt! Who do you think you are? You wouldn't raise your voice to me if you were near me. You grey haired cunt!" He continued with the abuse with slight variations. I asked him if he had finished, so that I could continue the proceedings. He answered in the affirmative and then directed further abuse at me of the same general nature. I warned him that I would disconnect him from the teleconference if he continued so that I could speak with the other participants. He ignored me and continued his abuse.
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> 4. It was impossible to conduct a conversation with the other participants so, I requested the operator to disconnect Mr Messent from the teleconference.
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> 5. Once Mr Messent was disconnected, Mr Ryan Brown of counsel advised that, in conferences with him yesterday and this morning, he had informed Mr Messent that he and Turner Freeman Lawyers were no longer able to act on his behalf.

Mr Brown sought leave to withdraw and suggested that the matter be listed for a further teleconference to allow Mr Messent time to instruct another lawyer. There was no objection by the respondent…

Senior Member Capel conducted a teleconference on 14/01/2022. The worker was joined to it, but said that he was at a medical appointment and that he was told about it by IRO. He said that he had tried to contact solicitors for 1.5 weeks, but they were all on leave., but his claim was ready to proceed and he would run his own case. He also said that his focus was on the damage caused by the lawn mower service providers, rather than any claim for compensation. The Senior Member advised him of the limitation imposed in s 60AA *WCA,* which caused the worker to question his knowledge and dismiss that as being irrelevant.

The Senior Member stated:

17. During the course of the telephone conference that lasted approximately 50 minutes, I was abused, sworn at, ridiculed and criticised by the applicant. He was particularly aggressive, and he threatened me. He challenged things that I said and persistently talked over me.

18. Upon review of the evidence filed in the Commission, particularly in the absence of any evidence quantifying the cost of the returfing, or any evidence regarding any entitlement pursuant to s 60 of the 1987 Act, I was not satisfied that there was any merit in the applicant's claim that lawn mowing services were a form of medical or related treatment expenses.

19. Accordingly I indicated that I proposed to strike out the matter, but I would provide written reasons for my decision.

On 14/01/2022, the Senior Member issued a COD, which dismissed the application. He stated, relevantly:

26. I raised my concerns about the merit of the claim and the lack of a properly detailed quote for the returfing. The notice of claim was not in evidence, and the applicant seemed confused about the precise nature of his claim.

27. The applicant indicated that he did not want any further lawn mowing services, and he only wanted the insurer to pay for the cost of rectifying the damage caused to the lawn. Given the provisions in ss 59, 60 and 60AA of the 1987 Act, I was not satisfied that there was any merit in the application based on the evidence currently before the Commission.

28. A further matter of concern was the applicant's conduct during the course of the telephone conference. Provisions in the PIC Act and procedural directions are of relevance.

29. Section 21 of the PIC Act authorises the President to issue procedural directions in proceedings in the Commission. It provides:

21 Procedural directions

(1) The President may give directions (procedural directions) relating to the practice and procedures to be followed in proceedings before—

(a) the Commission, or

(b) medical assessors or merit reviewers.

(2) The procedural directions must be—

(a) publicly available, and

(b) consistent with this Act and enabling legislation.

(3) Without limiting subsection (2)(a), it is sufficient compliance with that paragraph if procedural directions are published on the website of the Commission.

(4) Each of the following must comply with any applicable procedural directions—

(a) members,

(b) medical assessors,

(c) merit reviewers,

(d) the parties to proceedings and their representatives and agents.

30. Section 42 of the PIC Act refers to the guiding principle that applies to practice and procedure in the Commission. It provides:

42 Guiding principle to be applied to practice and procedure

(1) The guiding principle for this Act and the Commission rules, in their application to proceedings in the Commission, is to facilitate the just, quick and cost effective resolution of the real issues in the proceedings.

(2) The Commission must seek to give effect to the guiding principle when it—

(a) exercises any power given to it by this Act or the Commission rules, or

(b) interprets any provision of this Act or the Commission rules.

(3) Each of the following persons is under a duty to co-operate with the Commission to give effect to the guiding principle and, for that purpose, to participate in the processes of the Commission and to comply with directions and orders of the Commission—

(a) a party to proceedings in the Commission,

(b) an Australian legal practitioner or other person who is representing a party in proceedings in the Commission….

31. Clauses 1 and 9 of Procedural Direction PIC1-Conduct of parties during proceedings are also of relevance:

1. Parties to proceedings in the Commission are expected to abide by certain behavioural and conduct standards during the course of their proceedings. This Procedural Direction sets standards for parties as well as additional expectations of representatives., and

9. Parties to proceedings, and representatives of parties, must cooperate with the Commission to give effect to the guiding principle, and in so doing, comply with the PIC Act, the PIC Rules, any Procedural Directions, and any direction given by the Commission.

32. The Commission expects that certain standards of conduct are maintained during proceedings. There is an expectation that representatives or their agents appearing before the Commission should, amongst other things, behave courteously and respectfully to the opposing party, and his or her representative, to any witnesses called during the proceedings, to the Member, and to Commission staff. They are not to engage in behaviour that could reasonably be perceived to be inappropriate, unprofessional, or an abuse of process. Such general principles not only apply to legal representatives, but equally apply to parties.

33. It is apparent from the evidence that the applicant has used inappropriate language and has been aggressive in his dealings with the insurer and the rehabilitation providers, IPAR. By letter dated 17 August 2021, the insurer directed the applicant to refrain from calling its staff and highlighted eight separate telephone calls. This was on a background of similar conduct in 2020. It directed that all contact be via email. It is apparent from the evidence that Turner Freeman was not the first firm of solicitors to cease acting on his behalf.

34. According to Member Scarcella's summary referred to above, the applicant conducted himself in a similar aggressive fashion at the conciliation conference before him, so the inappropriate conduct exhibited by the applicant at the telephone conference before me on 14 January 2022 was not an isolated event.

35. I formed the view that in light of his unacceptable conduct and lack of any appreciation of the principles that were relevant to the issues in dispute, he did not have the requisite knowledge or capacity to act as an unrepresented litigant. He was also reluctant to seek legal assistance.

36. In my opinion, there is little prospect of the matter being advanced within a reasonable time in accordance with the normal practice in the Commission. Any further delay would be prejudicial to the respondent and it would incur unnecessary costs. I am also mindful that the respondent has already incurred costs associated with the prior telephone conference and conciliation conference.

37. There is nothing to prevent the applicant from lodging a further Application in the Commission, provided I dismiss these proceedings for want of due despatch, which is a prerequisite for dismissing or striking out any proceedings in accordance with the principles in *Morgan v Hacken Pty Limited previously known as Jennifer McGregor Enterprise Limited*. Hopefully, if the applicant recommences proceedings, he will take heed of the principles that apply to a party in the Commission and conduct himself appropriately.

38. It is the objective of the Commission to provide a timely, fair and cost-effective system for the resolution of disputes. Section 354 (3) of the 1998 Act provides that the Commission is to act according to "equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".

Accordingly, the Senior Member dismissed the proceedings for want of due despatch.