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.

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Decisions reported in this issue

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Supreme Court of NSW Decisions

Judicial review - Deduction under s 323 WIMA – Jurisdictional error – Error of law – Matters that were not raised at first instance

Fardell v Clinton Industries Pty Ltd [2022] NSWSC 111 – Associate Justice Harrison – 15/02/2022

On 30/03/1999, the plaintiff injured his back at work. In 2007, Dr Bosanquet (insurer's IME) assessed 24% WPI, but applied a deduction of 2/3 under s 323 *WIMA*. In 2017, the doctor re-examined him and again assessed 24% WPI, but not applied deductible of 1/10. However, the respondent queried the reduced deductible, after which the doctor reverted to his previous deductible and assessed 8% WPI due to the work injury.

In 2018, Dr Negus stated that MMI had not been reached, but provided an estimate of 22% WPI.

In 2020, the plaintiff commenced WCC proceedings seeking an assessment of permanent impairment for the purposes of satisfying the s 39 *WCA* threshold. The dispute was referred to an AMS for assessment and on 27/10/2020, Dr Anderson issued a MAC, which assessed 24% WPI, but he applied a deduction of 1/3 under s 323 *WIMA*.

The plaintiff appealed against the s 323 deductible and the respondent opposed the appeal.

On 19/04/2021, the MAP referred to the decision in *Bojko v ICM Property Service Pty Ltd* [2009] NSWCA 175, Handley AJA said (at [39]) that the worker's argument:

> ...involved a hyper-critical approach to the reasons of the Panel which is contrary to authority and ignores the presumption of regularity which attends administrative action. The correct approach Is that mandated by the joint judgment In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6,185 CLR 259,272 which approved the following statement of principle in a decision of the full Federal Court:
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> > ...a court should not be concerned with looseness in the language nor with unhappy phrasing of the reasons of an administrative decision-maker..,, the reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error,

The MAP held that the Guidelines provide in para 4.38 that the impairment from disc replacement surgery is equated to a spinal fusion, Assessment in DRE Lumbar Category IV was appropriate. Based on the history provided and the observations on the day made by the AMS, the assessment of 24% WPI was appropriate as was the deduction of 1/3. As the AMS said, disc replacement surgery is a more substantial intervention and the pre-existing condition was extensive.

The plaintiff applied to the Supreme Court for judicial review of the MAP's decision and he asserted that the MAP erred in law or committed jurisdictional error: (1) when it held that the AMS had given reasons why the previous injury had resulted in a greater impairment than would otherwise had been the case; (2) when it held that the deduction the AMS had correctly applied the law when considering a s 323 deduction; (3) when it considered that the appropriateness of a deduction pursuant to s 323 of the Workplace Injury Act can be illustrated by calculating the pre-existing impairment and assuming this equated to the extent of a deduction; (4) when it failed to properly consider whether the pre-existing condition in fact contributed to the matters relevant to an assessment of whole person impairment; (5) when it considered that it was relevant that it was unlikely that disc replacement surgery would have been offered in the absence of the pre-existing condition when this had not been submitted by Clinton Industries and for which there was no evidence; and (6) when it failed to afford him procedural fairness by considering that disc replacement surgery would not have been offered in the absence of the previous surgery when this had not been submitted by the respondent and without giving him an opportunity to be heard.

Harrison AsJ held that grounds (1) to (4) failed to distinguish between error on the face of the record and jurisdictional error. These distinctions were recently emphasised by Leeming JA (Gleeson and Payne JJA agreeing) in *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236, where His Honour stated:

> [20] It may assist other litigants invoking this Court's supervisory jurisdiction to observe the following:
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> > (1) The principal bases of review of administrative decision-making in this Court's supervisory jurisdiction are jurisdictional error and error of law on the face of the record.
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> > (2) Jurisdictional error cannot be defined with complete precision, but a useful summary may be found in the joint judgment of Basten, Ward and McCallum JJA in *Bangura v Director of Public Prosecutions (NSW)* [2020] NSWCA 138 at [13]:
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> > > Jurisdictional error arises where the decision-maker has misunderstood the limits of his or her legal authority or has otherwise acted outside the scope of that authority, or failed to exercise the powers conferred by that authority. A failure to accord a party procedural fairness in a material respect will constitute jurisdictional error, because procedural fairness is an essential characteristic of the exercise of judicial power, being the power exercised by the District Court judge in the present case.
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> > (3) Error of law may be more familiar, but it shares with jurisdictional error a similar definitional challenge. Distinguishing between questions of law and questions of fact may not be easy, because "*no satisfactory test of universal application has yet been formulated*": *Director of Public Prosecutions (Cth) v JM* (2013) 250 CLR 135; [2013] HCA 30 at [39]. The absence of novelty in that statement may be seen from a passage in Holdsworth's History of English Law, first published precisely one century ago, to "*the debatable boundary line between law and fact*" (see now W Holdsworth, A History of English Law (7th ed, 1956) Vol 1, p 298). Nonetheless, decisions which turn on the construction of legislation, or that are made on a basis for which there is no evidence, are common examples of errors of law.
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> > (4) Not only do the two bases of judicial review differ in their substance, but the material which may be deployed to establish them differs. The only practical restriction upon the evidence able to be deployed to establish jurisdictional error is likely to be relevance, in accordance with s 56 of the Evidence Act 1995 (NSW). In contrast, any alleged error of law must be apparent on the face of the "*record*". The term "record" is narrowly circumscribed, although in the case of a decision by the court or tribunal includes its reasons: Supreme Court Act 1970 (NSW), s 69(4), overturning the result reached in *Craig v State of South Australia* (1995) 184 CLR 163; [1995] HCA 58, the background may be seen in *Kriticos v State of New South Wales* (1996) 40 NSWLR 297 at 299-301 and in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [62]-[78].

Her Honour considered grounds (1) to (4) together and upheld them. She determined that the AMS and MAP failed to correctly apply the test outlined by Schmidt J in *Cole* (at [38]) with regards to s 323 deductions and therefore committed an error of law on the face of the record.

Her Honour set aside the MAP's decision and it was not necessary to consider grounds (5) and (6). She remitted the matter to the PIC for determination according to law.

PIC – Medical Appeal Panel Decisions

Workers Compensation - psychological injury in July 2014 (deemed) – COD issued in 2018 – Further IME assessment in 2021 relied on to seek reconsideration of the previous COD – At TC, parties agreed to rescind the COD to permit an appeal to be lodged under ss 327(3)(a) & (b) WIMA for the limited purpose of a threshold dispute

<u>Durant v Healthe Care Australia Pty Ltd</u> [2022] NSWPICMP 10 – Member Dalley, Dr D Andrews & Dr J Parmegiani – 18/01/2022

In 2017, the appellant claimed compensation for 17% WPI for a psychological injury. On 25/08/2017, Prof. Glozier issued a MAC, which assessed 9% WPI. This did not satisfy the required threshold.

On 22/04/2021, Dr Samuel Lim assessed 22% WPI and stated that the appellant "*presented with a deterioration of her injuries and associated disabilities following the AMS decision and appeal*".

On 6/07/2021, the appellant sought a reconsideration of the MAC, based upon a deterioration of her condition and the availability of additional evidence. The respondent opposed the application.

During a TC, the parties agreed to rescind the COD dated 21/03/2018 for the sole purpose of the appellant filing an appeal under ss 327(3)(a) and (b) *WIMA* for the purposes of obtaining a threshold assessment. The appellant lodged the appeal and it was referred to a MAP.

Following a preliminary review, the MAP determined that the appellant should undergo a further medical examination as a prima facie case of deterioration was established.

The appellant sought to adduce fresh evidence on the appeal, but s 328(3) *WIMA* requires that the fresh evidence was not available to the party before the MA and could not reasonably have been obtained by them before the assessment appealed against. She sought to admit the following evidence: (1) her further statement dated October 2019; (b) report by Dr Pilsky dated 27/05/2019; (c) report by Dr Pilsky dated 14/11/2019; (d) report by Malcolm Desland dated 24/04/2019; (e) report by Malcolm Desland dated 3/11/2020; (f) 2 reports by Dr Lim dated 30/04/2021, and (g) letters from her solicitor to the respondent's solicitors.

The appellant argued that this evidence is relevant to establish that her condition has deteriorated, resulting in an increase in the degree of permanent impairment, and that it was not available and could not reasonably have been obtained because it post-dates the AMS' examination.

The MAP held that the reports of Dr Pilsky, Dr Desland & Dr Lim and annexure "B" to the appellant's statement should be admitted on the appeal, but that the appellant's statement and the letters from her solicitors to the respondent's solicitors should not be admitted into evidence.

Dr Andrews re-assessed the appellant on behalf of the MAP and he assessed 19% WPI. The MAP adopted that assessment, revoked the MAC and issued a fresh MAC that assessed 19% WPI.

PIC – Member Decisions

Workers Compensation

PIC has power to award weekly payments under s 38 WCA

<u>Dickson v Zurich Financial Services Australia Limited</u> [2022] NSWPIC 22 – Senior Member Haddock – 18/01/2022

On 19/04/2004 (deemed) he worker suffered a psychological injury at work. In 2015, he commenced WCC proceedings against the respondent and David Jones Limited, but on 9/07/2015, he consented to an award in favour of David Jones Limited at a conciliation conference.

On 9/07/2015, Prof. Glozier issued a MAC, which assessed 7% WPI and on 15/01/2016, ***Arbitrator Douglas*** issued a COD, which determined that the claim under s 60 *WCA* was discontinued and that there were awards for the respondent with respect to the claim under s 66 *WCA* and the claim for weekly payments from 20/05/2005 to 18/04/2007 and from 4/08/2008 to 7/11/2008. He awarded the worker weekly for various periods, and at various rates, from 19/04/2007 to 31/12/2012 under s 37 *WCA* (note: the weekly payments claim closed on 31/12/2012).

The respondent appealed.

On 6/05/2016, ***President Keating*** determined the appeal and confirmed the COD.

On 16/10/2019, the worker's solicitors wrote to the insurer, stating that a finding had been made that the worker suffered a work-related psychological injury and that he was entitled to be paid for various periods of incapacity up to "*his entry into the 3rd entitlement period under the 2012 amendments (section 38)*". They stated that the worker was now "*completely unfit for work and unlikely to regain capacity for work*" and they requested that it consider his eligibility to receive payments beyond 130 weeks, relying on an independent medical assessment by Dr Gertler.

However, on 18/02/2020, the insurer disputed that the worker was entitled to weekly payments and s 60 expenses because he did not have total or partial incapacity for work resulting from an injury (s 33 *WCA*), and no medical or related treatment was reasonably necessary as a result of an injury (ss 59 & 60 *WCA*).

The worker filed an ARD and claimed weekly benefits under s 38 *WCA* from 1/08/2016 to 26/04/2021, based on PIAWE of $820 per week. He claimed s 60 expenses of $10,135.45, based on a Medicare Notice of Charge.

Senior Member Haddock determined the dispute.

With respect to the PIC's jurisdiction to award weekly payments under s 38 *WCA*, the Senior Member noted that both parties relied upon the decision in *Oliver Roberts v University of Sydney [2021] NSWWCC 25 (Roberts)*, in which Arbitrator Harris held that the PIC had jurisdiction, although in that matter the worker had satisfied the necessary conditions of s 38(3) *WCA*. The Arbitrator referred to the Court of Appeal's decision in *Sabanayagam v St George Bank Ltd* [2016] NSWCA 145, in which the court held that the insurer had not made a WCD and remitted the matter back to the WCC to determine the s 38 claim. Sackville AJA (Beazley P, as her Honour then was, agreeing) stated:

> (a) Pursuant to section 105(1) of the 1998 Act, the Commission has jurisdiction over matters that arise under either the 1987 Act or the 1998 Act. A matter arises under a law of the Parliament "if the right or duty in question owes its existence to the law or depends on the law for its enforcement", at [125];
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> (b) The worker was entitled to weekly compensation after the second entitlement period "if she satisfied the requirements of s 38(2) or s 38(3)"of the 1987 Act at [127]; and
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> (c) "It follows that if s 43(1) and (3) are put to one side, the Commission would have jurisdiction to settle the controversy between the Worker and the Insurer (representing the Bank). For example, the Commission would have jurisdiction to evaluate the medical evidence relied on by the Insurer in order to determine whether the Worker was capable of returning to her pre-injury employment. Similarly, the Commission would have jurisdiction to determine whether the insurer had misconstrued the legislation, thereby causing it to make an erroneous decision", at [128].

Accordingly, there is binding Court of Appeal authority that the PIC has jurisdiction to determine whether the worker is entitled to weekly payments under s 38 *WCA*. In *Roberts*, the Arbitrator rejected the respondent's objection to jurisdiction and referred to the principles of statutory construction stated in *Military Rehabilitation Commission v May* [2016] HCA 19 at [10], where the plurality held that the "*question of construction is determined by reference to the text, context and purpose of the Act*", citing *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28 at [69] – [71] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41.

The Senior Member stated, relevantly:

> 199. The 1987 Act and the 1998 Act were amended by Workers Compensation Legislation Amendment Act 2018 (the 2018 Act). The jurisdiction of the Commission was enlarged by the repeal of sections 43(1) and 43(3) of the 1987 Act, to which Sackville AJA referred in *Sabanayagam*; by the repeal of the note to section 105 of the 1998 Act that restricted the Commission's jurisdiction to determine a dispute about a WCD; by the repeal of various sections relating to review of WCDs (the former sections 44BA to 44BF of the 1987 Act); and by the insertion of section 289B of the 1998 Act, which provides that a "*referral of a dispute for determination by the Commission*" of a WCD operates to stay the decision.
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> 200. As Arbitrator Harris held, and with which I respectfully agree, contextually, the amendments made by the 2018 Act only served to reinforce the broad jurisdiction of the Commission. Section 289B clearly contemplates that the Commission will determine a dispute about a WCD. There appears to be no logical reason for the Commission to have jurisdiction in the first and second entitlement periods, pursuant to sections 36 and 37 of the 1987 Act, but not in the third entitlement period, pursuant to section 38 of the Act.
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> 201. Despite the reference in section 38 to matters arising under that section being decided by the insurer, I agree with Arbitrator Harris that the broad jurisdiction under section 105 for the Commission to hear and determine all matters arising under the 1987 and 1998 Acts includes jurisdiction to determine disputes regarding workers' entitlements pursuant to section 38 of the 1987 Act.
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> 202. In *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15 at [45] the plurality of the High Court, citing *Legal Services Board v Gillespie-Jones* [2013] HCA 35 at [48] held that "*a construction that 'appears irrational and unjust' is to be avoided where the statutory text does not require that construction*". As Arbitrator Harris observed in *Roberts,* it would be an absurd construction that, following the 2018 amendments, workers would have no right to contest an insurer's decision concerning their entitlements to weekly compensation pursuant to section 38 of the 1987 Act.
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> 203. The Commission's jurisdiction to award weekly compensation after the third entitlement period was confirmed by the Court of Appeal in *Hochbaum v RSM Building Services Pty Ltd* [2020] NSWCA 113. It would indeed appear "*irrational and unjust*" that the Commission would have jurisdiction to award weekly compensation after the expiry of five years, but not to award it during the section 38 period.
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> 204. I respectfully agree with the decision of Arbitrator Harris in *Roberts*. I reject the respondent's submission that the decision may be distinguished because it related to a claim pursuant to section 38(3)(b) of the 1987 Act. Arbitrator Harris held that the Commission could make a preliminary finding that it is satisfied that a worker falls within either section 38(2) or section 38(3) of the Act, and, if the latter, that he or she satisfies the conditions of section 38(3)(a), (b) and (c). The factual position in Roberts was that the applicant fell within the provisions of section 38(3) of the 1987 Act. Sackville AJA referred to both sections 38(2) and 38(3) in *Sabanayagam*.
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> 205. There is nothing in *Roberts* that would justify distinguishing it from this matter; and nothing in the decisions referred to by Arbitrator Harris that would do so. If the Commission has jurisdiction to award weekly compensation pursuant to section 38(3) of the 1987 Act, as determined by Arbitrator Harris, then it has jurisdiction to award it pursuant to section 38(2) of the Act. I determine that the Commission has jurisdiction to make an award of weekly compensation pursuant to section 38 of the 1987 Act.

The Senior Member noted that the respondent argued that the worker had been diagnosed with a new condition, namely a somatoform disorder, and that this is an endogenous condition. However, she rejected that argument and she stated, relevantly:

211. It is not unusual, especially in the case of psychological conditions, for diagnoses to alter over time, or for differential diagnoses to be made. Indeed, Prof Glozier diagnosed Generalised Anxiety Disorder, while opining that the applicant also met the criteria for a subordinate Somatoform Disorder. Dr Montanari was not entirely comfortable with a diagnosis of MDD, but he thought the applicant's GP had good reasons for treating the condition as such. He noted that the diagnosis was not straightforward…

213. Dr Montanari conceded that his profession can only speculate as to whether the applicant's symptoms and disability are direct ramifications of the injury, or whether they are likely to have occurred regardless. However, he concluded that the work-related injury, as described by the applicant (whose evidence was accepted by Senior Arbitrator Douglas, and which I also accept) appeared to have precipitated a psychological illness. This was especially the case, given his premorbid personality vulnerabilities.

214. Dr Samuell diagnosed a Somatic Symptom Disorder and referred to the continuous nature of the applicant's symptoms. He believed there was sufficient evidence that the applicant's symptoms had been continuous since his employment with Zurich. He opined that the initial difficulties at Zurich remained the substantial cause of the applicant's current problems.

I agree with both conclusions.

215. Dr Samuell altered his opinion in his second report. The respondent submitted that this was on the basis of additional material provided to him. The applicant submitted that his conclusions are fundamentally inconsistent with his first report and with the prior award.

I would add that it is also inconsistent with the MAC.

216. Having first opined that the applicant's Somatic Symptom Disorder was related to his employment with Zurich, Dr Samuell opined in his second report that Somatic Symptom Disorders are not considered to be trauma related. He reported that "the passage of time has shown us that [the applicant's symptoms] has had nothing to do with his employment".

217. In my view, the provision of additional documents to Dr Samuell does not adequately explain his change of opinion. He initially accepted that a Somatic Symptom Disorder may be related to external events, and then opined that the condition is not considered to be related to trauma. The conclusions cannot stand together. Dr Samuell has not explained his conclusion that the nature of the applicant's ongoing symptoms and "diagnostic clarification" point to a condition that is not work related

218. All the practitioners who have examined the applicant were aware that he was vulnerable to psychological injury. Prof Glozier referred to his "eggshell skull". Dr Montanari noted his family history, as did Prof Brown. Dr Gertler recorded his vulnerability, which he opined was under control until the episode at Zurich. Dr Samuell had access to the MAC when he provided his first report. I do not accept the conclusions he reached in his second report.

219. I do not accept the respondent's submission that Dr Montanari had difficulty attributing the applicant's incapacity to his employment with the respondent. He concluded that the work-related injury appeared to have precipitated a psychological illness, and he was convinced that the work experiences were a substantial contributing factor to the applicant's existing illness. The illness was chronically disabling.

The Senior Member held that s 4(b)(ii) *WCA* did not apply to this injury as it occurred before 19/06/2012, and the worker did not have to prove that work was the main contributing factor.

The Senior Member held that the worker has had no current work capacity since 1/08/2016 and she awarded weekly compensation under s 38(6) *WCA* from 1/08/2016 to 26/04/2021 at the rate of $656 per week. She made a general order for payment of s 60 expenses.

Section 66 claim - issues regarding injury & thresholds under s 65(2) WCA & s 322(3) WIMA – Amalgamation - Held: injuries to thoracic spine & right upper extremity (shoulder) arose from the same incident and could be assessed together, but the claims for other injuries do not result from the same incident and cannot be referred to a MA as the s 66(1) threshold is not satisfied

<u>Ghilagabar v Kmart Australia Pty Ltd</u> [2022] NSWPIC 25 – Principal Member Bamber – 19/01/2022

The worker alleged that he suffered disease injuries to his right shoulder, thoracic spine, both ankles and sub-talar joints and bilateral plantar fasciitis, as a result of the nature and conditions of employment (deemed date: 1/02/2017). In the alternative, he alleged consequential injuries to each ankle. He claimed compensation under s 66 *WCA* for 22% WPI, comprising 7% WPI thoracic spine, 14% WPI right shoulder & elbow and 1% WPI for each foot.

The respondent conceded injury to the right shoulder on 31/06/2006, which was aggravated in 2014, and bilateral plantar fasciitis that occurred in November 2012, but disputed liability for a disease in the right shoulder and injuries to the thoracic spine and ankles. It also disputed that impairment arising from the alleged injuries could be aggregated because the cause of the injuries was different.

On 10/12/2019, the respondent placed an offer of 12% WPI for the right shoulder and plantar fasciitis, but disputed the claims under s 66 *WCA* for the other alleged injuries.

On 23/11/2020, the worker gave notice of claims under s 66 *WCA* for 19% PWI, comprising 8% WPI (right shoulder), 5% WPI (thoracic spine), 4% WPI (left ankle & sub-talar joint), 3% WPI (right ankle), 1% WPI (left plantar fasciitis) & 1% WPI (right plantar fasciitis). On 3/02/2021, he provided particulars as follows:

> (1) On/around 31/05/2006, he developed symptoms in his right shoulder, elbow & wrist as a result of the nature and conditions of employment;
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> (2) On/around 21/03/2019, he suffered further injury to his fees and middle back and aggravation of his right shoulder, elbow & wrist injuries as a result of the nature and conditions of employment.

On 18/02/2021, the respondent accepted liability for the right shoulder, bilateral plantar fasciitis and the thoracic spine, but disputed liability for injury to the right elbow, right wrist & both ankles under s 4(b)(ii) *WC* and asserted that the accepted injuries satisfied the s 66(1) threshold.

However, on 14/07/2021, the respondent disputed liability for the alleged injury to the thoracic spine. It also disputed that impairment of the accepted injuries can be aggregated under s 322 *WIMA* because there are different dates and mechanisms of injury. Otherwise, it maintained its disputed under s 4(b)(ii) *WCA* with respect to the thoracic spine, right elbow, right wrist and both ankles.

On 19/01/2022, ***Principal Member Bamber*** held that the worker injured his thoracic spine & right shoulder (s 4(b)(ii) *WCA*) and as those injuries arise from the same incident, they should be assessed together: (s 66(2) *WCA* & s 322(3) *WIMA*) and that the deemed date of injury is the date of the claim (23/11/2020). She remitted those claims to the President for referral to a MA. However, she held that the bilateral plantar fasciitis & injuries to both ankles & sub-talar regions arise from a different incident and these claims cannot be referred to an MA because the threshold in s 66(2) *WCA* is not satisfied.

I have summarised the SOR as follows:

- The legislation does not provide that a worker can obtain lump sum compensation by aggregating all injuries involving different body parts received over a working life with an employer regardless of how they were sustained.
- Section 66(2) *WCA* provides if a worker receives more than one injury arising out of the same incident, those injuries are to be treated as one injury. Section 322(3) *WIMA* has the same effect.

- So, the central question is whether the injuries to the different body parts arose out of the "same incident". Because of the threshold of greater than 10% in s 66 *WCA*, in some cases there has developed a tendency for workers to frame their injuries as having the "*same incident*" by claiming they all arise out of the nature of the work with an employer, a so-called "*nature and conditions of employment*" type argument.
- The worker's relied on Dr Dixon's opinion that the conditions "*are causally related to the injuries sustained in the workplace over a period of 13 years... using both a forklift and picking and packing as well as palletising*".
- The legal test of causation was discussed by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates,* in which Kirby P (as his Honour then was) said (at [461G]) (Sheller and Powell JJA agreeing) that *"[f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate". After referring to earlier English authorities, his Honour added (at [462E])*:

  > Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act.

  His Honour said at [463]-[464]:

  > The result of the cases is that each case where causation is in issue in a workers' compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase 'results from', is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned.

- Regarding the onus of proof, in *Nguyen v Cosmopolitan Homes (NSW) Pty Limited*, McDougall J stated at [44]:

  > A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712.

- The Principal Member held that work was the main contributing factor to an aggravation of a disease in the thoracic spine. She found that is appropriate to regard the right shoulder injury as encompassing the presentation in 2006, 2014 and thereafter as part of the "*same incident*" and that s 4(b)(ii) *WCA* was satisfied. Based on Dr Dixon's assessments, the s 66(2) threshold is satisfied, and those claims can be assessed together under s 322(3) *WIMA*.

- With respect to plantar fasciitis & the ankles, the Principal Member found that Dr Dixon's approach was not sufficiently reasoned and these injuries did not arise from the same incident as the right shoulder & thoracic spine injuries and they cannot assessed with those injuries. Neither of those injuries resulted from the other: *Ozcan v Macarthur Disability Services Ltd.* As the s 66(2) threshold is not satisfied, the claims cannot be referred to a MA for assessment.