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.

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Supreme Court of NSW Decisions

Jurisdictional error – MP declined to make a deduction under s 323 WIMA for a disease injury to the hip – whether MP exceeded its jurisdiction by making a liability finding and departed from the findings of an Arbitrator.

Woolstar Pty Ltd v Lando [2022] NSWSC 241 – Simpson AJ – 10/03/2022

On 27/05/2015, the worker tripped and fell onto the right side of her body and suffered pain in her right hip, right wrist and right ankle. She claimed compensation and her claim form indicated a hip injury and eventually underwent a right total hip replacement.

The worker subsequently suffered pain in her left hip, which she attributed to altered gait following her right hip injury. She claimed compensation under s 66 *WCA*, but the insurer disputed liability for the right wrist and ankle injuries and "impairment generally"."

In March 2020, the worker commenced proceedings in the WCC, claiming compensation under ss 60 and 66 *WCA* for frank injuries to her right wrist and right ankle, an aggravation of a disease in the right hip and consequential aggravation of a disease in the left hip due to over-compensation and a secondary psychological injury (deemed date: 27/05/2015).

Arbitrator Sweeney determined the dispute and found that the worker suffered soft tissue injuries to her right wrist and right ankle and an exacerbation of degenerative changes in her left hip by reason of altered gait following right hip surgery. He noted that there was no dispute regarding the right hip. He proposed referring those matters to an AMS for assessment of permanent impairment.

Dr McGroder issued a MAC, in which he noted that the worker had been employed by the appellant for 25 years and that there was no evidence of a pre-existing degenerative condition. He declined to apply a deductible under s 323 *WIMA* and assessed 22% WPI (16% right hip, 4% left hip & 4% right wrist).

The appellant appealed against the MAC under ss 327(3)(c) and (d) *WIMA*. It asserted that there was a calculation error in applying the Guidelines to the right wrist injury (this error was conceded) and that the AMS had failed to make a deduction under s 323 *WIMA* with respect to the right hip.

The MAP dismissed the appeal, on the basis that there was no evidence suggesting that a deduction under s 323 *WIMA* was warranted in respect of the disease injury to the right hip. After correcting the calculation error in the MAC, the MAP issued a MAC that assessed 21% WPI.

The appellant sought judicial review of the MAP's decision on the following grounds: (1) The MAP was ultra vires because it purported to determine a liability issue and failed to make a decision in conformity with the findings of the Arbitrator dated 6/05/2020; (3) The MAP took into account an irrelevant consideration (namely that the injury suffered by the worker was a disease injury); and (3) The MAP failed to take into account a relevant consideration (namely that the said injury was a frank injury).

Acting Justice Simpson dismissed the Summons and her reasons are summarised below.

- The MAP did not exceed its jurisdiction by making a "liability finding" and it did not depart from the Arbitrator's findings. Her Honour stated, relevantly:

  62. As I understand Woolstar's jurisdictional error argument, it is that what was found by the Arbitrator and referred by the Registrar's delegate to the approved medical specialist was, and was only, a "frank injury". That, so the argument went, was the foundation for jurisdiction of the approved medical specialist and therefore the Appeal Panel, and, in approaching its task on the basis that Ms Lando suffered "a disease injury", the Appeal Panel went beyond the findings of the Arbitrator.

  63. The argument is founded on a false premise. It is not correct to say that the Arbitrator found, and found only, "frank injury". What the Arbitrator found (as recorded in the certificate of determination) was that Ms Lando suffered "injury" to (inter alia) her right hip in the fall of 27 May 2015. "Injury", as set out above, can be either "frank injury" or "disease injury". I see nothing in the legislation that excludes a single incident giving rise to both a "frank injury" and a subsequent "disease injury". That, indeed, is precisely what was found to have happened in this case. The "frank injury" suffered on 27 May 2015 resulted in "disease injury" within s 4(b)(ii) of the WC Act.

  64. The next step in Woolstar's argument is that what was referred for medical assessment was, and was only, the "frank injury" said to have been found by the Arbitrator. That, too, can plainly be seen to be incorrect. What was referred for medical assessment is clearly spelled out in the Amended Referral – four questions, all relating to the assessment of permanent impairment resulting from the injury suffered in the fall. There was no confinement of the questions to permanent impairment resulting from the "frank injury" as distinct from a "disease". There is, in fact, no such distinction. The medical evidence accepted by the Appeal Panel established that the aggravation of the pre-existing but asymptomatic disease resulted from the "frank injury".

- The issues that were before and dealt with by the MAP were the same as those that were before the AMS, namely: (i) the degree of permanent impairment resulting from the injury suffered on 27/05/2015; (ii) whether any proportion of that impairment was due to any previous injury or pre-existing condition or abnormality and, if so, the extent of that proportion; (iii) whether the impairment was permanent; and (iv) whether the degree of permanent impairment was fully ascertainable.

- Issue (ii) was the salient issue and the appellant argued that the AMS erred by approaching the questions as though the worker's claim was that her condition was attributable to the nature and conditions of her work. That was never her case, and it is not how it was treated by the AMS and the MAP was not misled by the mischaracterisation of what the AMS found.

- The appellant also argued for a s 323(1) deduction because "significant right hip osteoarthritis" was shown in the MRI of June 2015 (less than one month after the fall at work). That argument was open to the appellant, but it was not supported by the medical evidence and the AMS determined it adversely to the appellant. The MAP declined to make any deduction under s 323(1) *WIMA*.

- The medical evidence indicated that the right hip was asymptomatic before May 2015 and she stated, relevantly:

  68. It has been accepted that:

> … to establish a pre-existing condition for the purposes of s 323(1) there must, at the relevant date, be an actual condition although it may be asymptomatic. A mere predisposition or even a susceptibility is not sufficient to constitute a condition.: *Cullen v Woodbrae Holdings Pty Ltd* [2015] NSWSC 1416 at [46] per Beech-Jones J (as he then was);
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> See also *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 per Schmidt J. Schmidt J held that, to apply a deduction under s323, a conclusion that "the pre-existing injury, pre-existing condition or abnormality caused or contributed to that impairment" is required. There was no such evidence in the present case.

- There was no jurisdictional error constituted by the MAP's failure "*to make a decision in conformity with the findings of [the] Arbitrator*" and there was no error of law on the face of the record.
- Grounds (2) and (3) were also rejected, on the basis that they are effectively, different versions of Ground (1). Each ground proposed, erroneously, that the MAP was obliged to proceed on the basis that the only injury suffered by the worker to her right hip in the fall was a "frank injury" or a "personal injury" within s 4(a) *WCA*. However, that it wrong.

Judicial Review – MACA – Failure to provide reasons – Finding not based on evidence – Failure to respond to substantial and clearly articulated argument – Psychiatric injury secondary to pain – Resolution of physical injury – Decision of Appeal Panel set aside

Insurance Australia Limited t/a NRMA Insurance Limited v Mustafa Al-Tabaibeh [2022] NSWSC 324 – Harrison AsJ – 23/03/2022

On 25/02/2013, the defendant was injured in a MVA. He has not worked since then. He was a passenger in the vehicle driven by the party at fault. He claimed damages for physical and psychiatric injuries arising from the MVA, including an annular tear in the lumbar spine, a soft tissue injury to the cervical spine, subacromial bursitis with moderate AC joint arthropathy and an adjustment disorder with depressed mood and anxiety.

On 4/03/2021, Member Cowley assessed damages at $2,234,765 plus costs, for reasons that are summarised below:

- The defendant is exaggerating or feigning his limitations and disabilities when he first enters the foyer of Dr McClure's building and it is totally conceivable that by 9.23 am, if not 9.20 am, that he has formed the view that he is no longer under possible surveillance and that he is now able to walk freely and not artificially restrict his movements.
- The defendant may well have taken medications prior to the assessment, but this is not the explanation why after 30 minutes, or indeed 1 ½ hours (as arose from cross examination) the medication is finally working by 9.20 am.
- I also accept the defendant's explanation that his brother Abdel is mocking the exaggerated way that he first walked into Dr McClure's foyer and that only reinforces my view that he was well aware that prior to that he was being observed and should feign his disabilities.
- Assessor Samuels spends considerable time not only reviewing all other opinions but also considering the surveillance which he obviously takes time to consider. He also notes the Insurer's considerable submissions with respect to the video surveillance. In his conclusions, he notes that this is a relatively minor accident and that he developed pain from a depression and anxiety as a consequence and it seems that this has worsened over time. He agreed that the defendant has developed quite a severe psychiatric response to this accident and, in terms of a DSM-5 diagnosis he certainly meets criteria for major depression and PTSD. He then assessed 15% WPI.
- Assessor Samuels did engage with the surveillance videos and paid them the proper respect in coming to his Determination.

- Dr McClure comments that after reviewing the video surveillance in detail:

  > This is not the kind of behaviour I would expect to see in a severely depressed individual with psychomotor slowing, increased response latency, poverty of thought and anhedonia. Clearly Mr Al-Tabaibeh's psychiatric condition has improved markedly within an hour of seeing me.
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  > On the other hand psychiatric assessment of this gentleman has been relatively consistent over time. He has a chronic psychiatric disorder. He has provided a plausible explanation of his difference in presentation in his undated statement. He was in considerable pain when he saw me on 13 September 2018.... certainly there was considerable behaviour on the Claimant's part with a response to pain on both occasions when I had seen him. He was preoccupied with his physical symptoms.
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  > The Claimant has secondary major depression and some features of Post Traumatic Stress Disorder (PTSD). His depression is secondary to pain, reduced functioning, guilt, and shame. He feels a "burden" on his brother and his brother's family.
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  > Certainly pain is contributing to Mr Al-Tabaibeh's measured impairment; however I suspect Dr Samuels has made appropriate allowance for the effects of pain (which is not able to be rated) in estimating WPI. The Claimant's level of depression (as observed at interview) is also contributing significantly.

- The Member accepted the opinions of Assessor Samuels and Dr McClure, stated Assessor Samuels was of the view the defendant was exaggerating or feigning his physical disabilities, and concluded that the defendant's physical injuries caused by the accident had resolved in accordance with the determination of Assessor Maloney.
- With respect to his physical injuries, the Member accepted the assessment of Assessor Gliksman, that the defendant suffered soft tissue injuries to his cervical and lumbar spines, but those injuries had resolved by the time of Assessor Maloney's Certificate on 17/11/2016.

The plaintiff filed an amended summons seeking judicial review of the Member's decision.

Associate Justice Harrison noted that the plaintiff sought judicial review based on the following errors, which are allegedly errors of law on the face of the record and/or jurisdictional errors and/or constructive failure to exercise statutory power:

> (1) In making the assessment, the Tribunal Member was required to provide reasons pursuant to s 94(5) of the *MACA*. However the Tribunal Member failed to provide lawful reasons.
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> (2) The finding that Assessor Samuels was of the view that "*the Claimant is exaggerating or feigning his physical disabilities*" is based on no evidence. Assessor Samuels did not express any such view.
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> (3) In making his determination, the Tribunal Member was required to respond to the substance of substantial and clearly articulated arguments advanced by the parties.

Her Honour noted that the defendant had undergone 18 different MAS assessments and 18 IME consultations since the MVA, which she summarised in her judgment, and she stated, relevantly:

> The fundamental conflict between the parties has been the veracity of the defendant's claimed injuries and ongoing physical and psychiatric impairment. The insurer's case is that the defendant was feigning the existence and/or severity of his impairment. In support of this contention the insurer provided surveillance footage that it submitted, illustrated that the defendant was behaving inconsistently with his presentation in clinical assessment, was therefore feigning symptoms and accordingly should not be believed. The insurer further submitted that there should be no award of damages at all. The defendant's contention is that he is not feigning or exaggerating his physical and psychiatric conditions and the difference in his presentation can be explained by his taking pain medication.

Her Honour stated that in *Rodger v De Gelder* (2015) 71 MVR 514 ("*De Gelder*") the Court of Appeal said, (at [95] per Gleeson JA, (Macfarlan and Leeming JJA agreeing)):

> [95] … Jurisdictional error includes a constructive failure to exercise jurisdiction A constructive failure to exercise jurisdiction arises when a decision-maker misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided, or misunderstands the nature of the opinion it is to form.

The distinctions between jurisdiction error and error on the face of the record were recently emphasised by Leeming JA (with whom Gleeson and Payne JJA agreed) in *Sleiman v Gadalla Pty Ltd* [2021] NSWCA 236, where His Honour stated at [20]:

> "[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*". 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 a 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 upheld ground (1) and found that the Member's findings contain an internal inconsistency. She found that the definitive conclusion of Dr McClure is that the psychiatric injuries are secondary to the physical injuries and that the Member's explicit acceptance of that opinion, his conclusion that the defendant was exaggerating or feigning his physical disabilities, and his contention that the physical injuries had resolved by November 2016, cannot be reconciled with each other. Therefore, the Member erred by failing to expose his actual path of reasoning.

Her Honour upheld ground (2) and stated that because Assessor Samuels did not express an opinion that the defendant exaggerated or was feigning his physical disabilities, what the Member meant by stating that he accepts the assessor's view to that effect is indeterminable. He Member could not accept a view that the Assessor did not express.

Her Honour rejected ground (3) and found that the Member responded to the plaintiff's substantial and clearly articulated argument.

Accordingly, her Honour set aside the Member's decision and remitted the matter to the PIC for determination according to law.

Jurisdictional error – MACA – Erroneous or wrong understanding of statutory task by MRP – Failure to perform statutory task – Failure to exercise jurisdiction – Error of law on the face of the record

Briggs v IAG Limited t/a NRMA Insurance [2022] NSWSC 372 – Wright J – 31/03/2022

The plaintiff alleged that he injured his right leg, cervical spine and lumbar spine, including an annular tear at the L4/5 level, as a result of a MVA on 22/05/2018. The defendant accepted the claim and made statutory payments for 26 weeks, but then disputed the ongoing claim on the basis that the injuries were minor in nature. If the injuries are minor injuries, there is no entitlement to damages or statutory benefits after 26 weeks.

That dispute was referred for medical assessment and on 14/12/2018, the MA issued a certificate, which stated that the injuries (including a disc bulge at L4/5) were a minor injury for the purposes of the *MACA*. He stated that on examination, there was no evidence of any injury to a spinal nerve root that manifested in neurological signs.

The plaintiff applied for a review by a MRP and on 7/11/2018, the MRP revoked the initial certificate and issued a fresh certificate, which diagnosed soft tissue injuries to the cervical and lumbar spines, which are a minor injury for the purposes of the Act. The MRP commented on an MRI scan dated 14/08/2018 and an article – "Spine Journal", and concluded that the L4/5 disc findings and annular fissure were not acute traumatic injuries sustained in the MVA.

The plaintiff applied for judicial review of the MRP's decision.

On 29/09/2020, ***Harrison AsJ*** set aside that decision and remitted the matter to SIRA for determination according to law.

The matter was referred to a second MRP and on 20/02/2021, the second MRP confirmed the certificate that Harrison AsJ had revoked.

On 20/05/2021, the plaintiff sought judicial review of the decision of the second MRP on the following grounds: (1) It failed to conduct the assessment afresh as required by section 7.26(6) of the Act and thereby failed to perform its statutory task and constructively failed to exercise its jurisdiction; (2) In relation to the finding as to the causation of the injury to the lumbar spine, it asked itself the wrong question and applied the wrong test. It failed to lawfully deal with the issue of causation, and in doing so, constructively failed to exercise its jurisdiction; (3) It failed to take into account all relevant evidence as required by clause 5.6 of the Motor Accident Guidelines 2017; (4) It failed to respond to a substantial and clearly articulated argument made by the Plaintiff. This constitutes a constructive failure to exercise jurisdiction, and a denial of procedural fairness; and (5) It erred in law on the face of the record in failing to give proper and lawful reasons for its decision in breach of section 7.23(7) of the Act.

Ultimately, the defendant filed a submitting appearance.

Wright J upheld the summons, set aside the second MRP's certificate and remitted the matter to the President of PIC for referral to a MRP to be determined according to law. His Honour's reasons are summarised below.

- His Honour upheld ground (1). He found that the second MRP failed to conduct their assessment of the correct matter and failed to conduct their assessment afresh as required by s 7.26(6) of the Guidelines and therefore failed to perform their statutory task. This is jurisdictional error and an error of law on the face of the record.
- His Honour upheld ground (2). He stated that the substance of the MRP's reasoning was that since there could be no scientific certainty that the annular tear was caused by the MVA based on medical imaging and there was a possibility that the injury was not a tear and may not have been what led to the pain and disability, causation was not established. He stated, relevantly:

70 This reasoning does not accord with the relevant legal test in relation to causation, which does not require scientific certainty. In *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11, the Court of Appeal said, in relation to causation in a similar context, as follows at [138] (White JA, Macfarlan and Payne JJA agreeing):

> 138 Whether the Hospital's negligence in not responding to the induced seizures in a timely manner materially contributed to Ms Pierce's worsened condition is not to be determined on the basis of scientific certainty, but on the balance of probabilities. As Spigelman CJ said in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262; [2000] NSWCA 29 at [143]:
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> > An inference of causation for purposes of the tort of negligence may well be drawn when a scientist, including an epidemiologist, would not draw such an inference.

71 The relevant principles were stated by Herron CJ, with whom Asprey and Holmes JJA agreed, in *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238 as follows, at 242:

> … it is not incumbent upon the applicant, upon whom the onus rests, to produce evidence from medical witnesses which proves to demonstration that the applicant's contention is correct. Medical science may say in individual cases that there is no possible connexion between the events and the death, in which case, of course, if the facts stand outside an area in which common experience can be the touchstone, then the judge cannot act as if there were a connexion. But if medical science is prepared to say that it is a possible view, then, in my opinion, the judge after examining the lay evidence may decide that it is probable. It is only when medical science denies that there is any such connexion that the judge is not entitled in such a case to act on his own intuitive reasoning. It may be, and probably is, the case that medical science will find a possibility not good enough on which to base a scientific deduction, but courts are always concerned to reach a decision on probability and it is no answer, it seems to me that no medical witness states with certainty the very issue which the judge himself has to try.

72 Furthermore, a finding of causal connection may be open without any medical evidence at all to support it, or when the expert evidence does not rise above the opinion that a causal connection is possible: *Fernandez v Tubemakers of Australia Ltd* [1975] 2 NSWLR 190 at 197 (Glass JA); *Metro North Hospital* at [140].

73 The second review panel did not address the question of whether on the balance of probabilities the motor vehicle accident caused the annular tear even though there might be no scientific certainty. Furthermore, the second review panel's reasoning did not reflect the approach to determining causation in cll 6.6 and 6.7 of the Guidelines, which in my view is consistent with the legal principles I have outlined.

74 The present case is not one where medical science established that there was no possible connexion between the motor accident and Mr Brigg's relevant injuries. From the material available, the second review panel accepted that the motor accident in this case could have caused or contributed to Mr Brigg's L4/5 left posterolateral annular tear. Indeed, the panel expressly accepted that:

> the plaintiff was involved in relatively severe front-end collision. The medical and biomechanical literature supports the conclusion that spinal injuries with resulting pain and disability can arise from this type of trauma.

75 This being so, it was necessary for the panel to consider whether the motor accident did cause or contribute to Mr Brigg's condition. This required, not a consideration of material derived as a result of an internet search for "all past and recent high-quality research articles pertaining to MRI imaging of the lumbar spine, with a focus on injury, degeneration and pain", but rather a consideration of the material referred to in cl 5.6 of

the Guidelines, namely all the evidence available to the panel including all relevant findings derived from:

> (1) a comprehensive, accurate history, including pre-accident history and pre-existing conditions;
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> (2) a review of all relevant records available at the assessment;
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> (3) a comprehensive description of the injured person's current symptoms;
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> (4) a careful and thorough physical examination; and
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> (5) diagnostic tests available at the assessment, noting that imaging findings that are used to support the assessment should correspond with symptoms and findings on examination.

His Honour held that the second MRP failed to apply the correct test of causation and, in effect, asked itself the wrong question. It failed to perform its statutory task, which was both a jurisdictional error and an error of law on the face of the record.

His Honour concluded that it was not necessary to determine grounds (3), (4) and (5).

PIC - Presidential Decisions

Principles applicable to disturbing a primary decision maker's factual determination – causation – whether injury materially contributed to the need for surgery

Usher v Coffs Harbour City Council [2022] NSWPICPD 9 – Deputy President Wood – 10/03/2022

The appellant was employed by the respondent as an operations supervisor.

On 9/04/2020, the appellant received a flu vaccination in her right shoulder (which was offered by the Respondent), after which she went directly home. Within an hour of the vaccination, the appellant complained of severe right shoulder pain.

On 16/06/2020, the appellant underwent a right rotator cuff repaid and she resumed work on/about 27/07/2020. She claimed weekly compensation and s 60 expenses, but the respondent disputed liability.

On 21/06/2020, ***Member Rimmer*** issued a COD, which found that the need for surgery did not result from the injury and that there was no entitlement to weekly payments or costs of the surgery.

The worker appealed and asserted that the Member erred in fact and law by failing to find that the evidence established a commonsense causal connection between the injury on 4/04/2020 and the need for surgery – i.e. that the injury materially contributed to the need for surgery.

Deputy President Wood determined the appeal. After setting out the principles that apply to an appeal against factual findings, Wood DP stated that for the appellant to succeed, she must show that the Member overlooked material facts, or gave undue or to little weight to the evidence, or that the available inference in the opposite sense to that chosen by the Member is so preponderant that it establishes that the decision is wrong.

The appellant focussed on the contemporaneity of the onset of shoulder symptoms, but Wood DP stated that this is not always determinative of whether a worker suffered an injury. As Kirby P stated in *Kooragang*:

> 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 ... 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.

Wood DP stated that the Member reviewed the appellant's evidence and took into account the factual matters recorded in the treating GP's clinical notes, a COC from Dr Platt and a referral to Dr Jovanovic, as well as the expert opinions on causation. She provided reasons for preferring the opinions of Dr Jovanovic and Dr Clayton to that of Dr Doig and, applying the principles stated by Barwick CJ in *Whiteley Muir,* that evidence was not so outweighed by other probabilities, or so contrary to the facts that the Member's acceptance of those opinions and her conclusions reached in respect of the available evidence could be said to be wrong.

At its highest, the appellant's contention is that based on the onset of symptoms within an hour of the vaccination, the Member ought to have come to a different view. However, that is not sufficient to establish prob able error by the Member. As Allsop J stated in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833, it is not sufficient to disturb the Member's finding merely because an appeal court may have a preference of view for some fact or facts contrary to that reached by the trial judge. Or, as the respondent argued, "minds might differ."

Wood DP stated, relevantly:

> 76. Ms Usher asserts that because she had been experiencing symptoms since the injury, it could not be said that the injury played no role in the need for surgery. In the face of the accepted medical evidence, that proposition cannot be accepted. Dr Jovanovic was of the firm view that the injury played no role in the presentation of "classic" symptoms of a rotator cuff tear. The onus was on Ms Usher to establish that the injury materially contributed to the need for surgery, which she failed to achieve.
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> 77. Ms Usher also contends that the Member fell into error by focussing on the pathology that was to be addressed by the surgery. In the context of the surgery being necessary to address the rotator cuff pathology and that Dr Jovanovic described Ms Usher's symptoms as "classic" symptoms of a rotator cuff tear, it is not at all surprising that the Member focussed her attention on whether those symptoms sought to be addressed by the surgery were referrable to the injury.

Accordingly, Wood DP confirmed the COD.

Weight of the evidence – evidence of clinical notes – Mason v Demasi [2009] NSWCA 227 considered and applied

Yang v Industrie Clothing Pty Limited [2022] NSWPICPD 10 – Acting Deputy President Parker SC – 16/03/2022

On 29/03/2017, the appellant fell on stairs leading to the respondent's shop, while using a hand trolley laden with 4 individual boxes. He claimed lump sum compensation for alleged injuries to his right upper extremity and cervical spine. The respondent accepted injury to the right shoulder but disputed injury to the neck.

On 7/06/2021, ***Member Sweeney*** delivered an oral decision, which found that he was not persuaded on the balance of probabilities that the appellant injured his neck as a result of the incident on 29/03/2017. Further, as the assessment relied upon for the right upper extremity did not satisfy the s 66(1) threshold, the ARD was dismissed.

The appellant appealed and alleged that the Member erred as follows: (1) in law, as he misapplied authority on the correct approach to clinical notes and misdirected himself to the evidence accordingly; (2) in fact as he failed to place appropriate weight as to his circumstances; and (3) in law, as he failed to decide the case at hand.

Acting Deputy President Parker SC determined the appeal on the papers. He referred to the decision in *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34, in which Mason P (Beazley & Tobias JJA agreeing) stated:

> 32. This was a case in which credibility was vital and in which the appellant's failure to persuade the trial judge that he had given an accurate and reliable account of the mechanics of the accidents formed a substantial plank in the ultimate determination.

33. The trial judge acknowledged that a significant aspect of his credibility assessment turned upon the inconsistencies that he identified in the passages set out above.

34. In my view it was not fairly open for these matters to be taken into account in the way they were. A challenge of this significance ought to have been taken to the witness by cross-examination, yet he was never confronted with a suggestion that he had held back the S-hook scenario until he saw Dr Middleton. Nor was it put to him that he had given inconsistent histories and that this was indicative of a lack of credibility casting doubt upon the critical question whether his clothing got caught on a partially-opened S hook.

35. Experience teaches that busy doctors sometimes misunderstand or mis record histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury. It is possible, and not merely speculatively so, that Dr Middleton misunderstood the precise mechanics of the immediate antecedent of the fall.

36. One can also envisage several reasons why the early hospital records make no mention of the mechanics of the fall. They had little to do with the diagnosis and treatment of an obviously serious injury. The plaintiff ought in fairness to have been given the opportunity to explain the entries if (which I doubt) they were inconsistent with his later testimony.

Parker SDP also noted that in *Mason v Demasi*, Basten JA stated that discounting the appellant's oral testimony on the basis of accounts given to various health professionals "*which appeared inconsistent either with each other, or with her oral testimony or both*" needed to be approached with caution for a number of reasons, namely:

(a) the health professionals who took the history had not been cross-examined;

(b) the fact that the history was probably taken in furtherance of a purpose which differed from the forensic exercise in the course of which it was being deployed in the proceedings;

(c) the record did not identify any questions which may have elucidated replies;

(d) the record is likely to be a summary prepared by a health professional, rather than a verbatim recording, and

(e) a range of factors, including fluency in English, the professional's knowledge of the background circumstances of the incident and the patient's understanding of the purpose of the questioning will each affect the content of the history.

In both *Mason* and *Davis* importance was attached to the fact that the medical professionals were not cross-examined and it was important that the evidence against which the medical history was said to show inconsistency derived from the plaintiff's oral evidence.

Parker ADP dismissed ground (1). He stated that the Member found that apart from Dr Bodel, there was no record of a complaint of neck injury and he regarded Dr Bodel's opinion as being "…quite ambiguous" in addressing the question of whether the neck restrictions were caused by referred pain from the shoulder. He stated that this may or not be consistent with an injury to the neck in the context of workers compensation and it is not evidence from the doctor's reports that the worker suffered either an injury or an aggravation of a disease.

Parker ADP noted the appellant's evidence was that he did not tell Dr Abeydeera of the neck. The explanation of why he failed to tell Dr Abeydeera is not really to the point. The absence of a complaint of injury to the neck in the notes and reports meant that these did support an affirmative finding of injury. The Member said:

> It is true that caution must be exercised in drawing inferences from clinical notes. That has been said in a series of cases, the most prominent of which is *Mason v Demasi* [2009] NSWCA 227, *Wagga Wagga Council v Davies* and *Fitzgibbons v Waterways Authority* [2003] NSWCA 294 (3 December 2003). However, multiple entries from multiple doctors over a long period of time, in the absence of explanation, must be given some weight.

Parker ADP stated that the Member was correctly directed to the explication of the relevant principle and had the cases in which the principle was applied in mind when he made his determination. It was open to the Member to prefer the view of Dr Kleinman and to reject the appellant's belated assertion of neck injury.

Parker ADP also dismissed ground (2). He found that it was open to the Member to draw the inference that he did concerning the alleged injury to the neck. He stated:

> 81. The fact that another trier of fact may have been persuaded by the statement and prepared to draw an inference in favour of the appellant is insufficient. There was a choice between conclusions equally open and balanced as to whether or not the inference of injury to the neck should or should not be drawn. The conclusion of error is not arrived at merely because of the preference of a view of the appeal court for some fact or facts contrary to that reached by the trial judge. (This is not to suggest that I would have drawn a different inference.)

Parker ADP also rejected ground (3) and held that the Member engaged with the evidence, the appellant's submissions and exercised the jurisdiction provided by s 105 in making a determination adverse to the appellant that there was no injury to the neck. No error was demonstrated.

Accordingly, Parker ADP confirmed the COD.