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

Judicial review – parties agreed to terms of referral to AMS – MAP held that the AMS erred by going beyond the terms of the referral – whether referral entitled AMS to assess permanent impairment for body parts not specifically referred – Summons dismissed

Yates v Flavorjen Pty Ltd [2022] NSWSC 388 – Harrison AsJ 5/04/2022

On 11/08/2015, the plaintiff commenced work as a factory process worker. On 13/10/2015, he noticed swelling, weakness and numbness of both hands and wrists at work. He underwent right Carpal Tunnel decompression surgery on 14/03/2016.

On 15/03/2018, the plaintiff was referred to Dr Tisch, neurologist, to investigate a tremor in both hands, but the doctor stated that he could not explain the symptoms based on an identifiable neurological lesion.

On 25/11/2019, Dr Bodel diagnosed a very complex set of injuries which include aggravated degenerative change in the cervical spine; a complex regional pain syndrome ("CRPS") involving both upper limbs, mainly the right arm, probable carpal tunnel syndrome in both wrists and rotator cuff pathology in the region of both shoulders. He assessed combined 23% WPI, comprising 15% (right upper extremity), 2% WPI (left upper extremity) and 7% WPI (cervical spine).

The plaintiff claimed lump sum compensation under s 66 WCA based on Dr Bodel's assessments. The employer qualified Dr Rimmer, who opined that the worker suffered 0% WPI as a result of work-related injuries and he felt that the current symptoms were likely due to Parkinson's disease. The employer disputed the claim based on this opinion.

On 21/07/2020, Dr Mellick examined the plaintiff on behalf of the employer. He diagnosed bilateral CTS and a functional tremor, but that the latter obstructed testing on motor and sensory function in the right hand and he could not make a valid assessment of WPI. However, he ultimately expressed the view that WPI was not more than 10%.

The plaintiff commenced WCC proceedings and on 13/10/2020, the parties' solicitors agreed on the terms of a referral to an AMS. As a result, the assessment for the right upper extremity was to be confined to an assessment for CRPS and the assessment for the left upper extremity was to be confined to the shoulder. The cervical spine was also to be assessed.

On 16/11/2020, Dr Assem issued a MAC, which certified that the plaintiff did not satisfy the diagnostic criteria for CRPS in the right upper extremity. He stated, relevantly:

> He has prominent tremors involving his entire right arm as a complication of sympathetic dysfunction developing following the surgical procedure to both wrists. Although there may be a functional component, the tremors have been present for several years are now a permanent manifestation of his condition. He also has a global loss of sensation in both hands that probably occurred as a complication of sympathetic dysfunction, but the symptoms are more prominent in the median nerve distribution. I have therefore considered it was reasonable to provide an impairment rating for loss of motion, tremors involving his dominant right upper extremity and residual symptoms of carpel tunnel syndrome following surgical decompression.

Dr Assem assessed 0% WPI (cervical spine) and 24% WPI (combined) for the upper extremities.

The employer appealed against the MAC and alleged that: (1) the assessment for the left upper extremity, in particular the left elbow, wrist and nerves, were not available to the MA based on the terms of the amended 'Referral for Assessment of Permanent Impairment;' and (2) the assessment for impairment for CRPS (right arm) was based on incorrect criteria and a demonstrable error given the MA's diagnostic findings that the plaintiff did not meet the diagnostic criteria for CRPS under Ch 17.

On 23/02/2021, the MAP upheld the appeal and found that the MAC contained a demonstrable error and the assessment was made based on incorrect criteria regarding the assessment of the right upper extremity. Having found that the worker did not satisfy the diagnostic criteria for CRPS, the AMS was not at liberty to go beyond the terms of his referral and determine permanent impairment by way of analogy in accordance with para 1.6 of the Guidelines. Accordingly, it revoked the MAC and issued a fresh MAC, which assessed 2% WPI.

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision and asserted that the MAP erred in law and made a jurisdictional error, as follows: (1) when it held that the AMS had erred by assessing impairment of the right upper extremity based on loss of range of motion; (2) when it held that the AMS had erred by assessing impairment in the left elbow and left wrist; (3) when it held that the AMS was restricted by the referral to only assessing the left shoulder and CRPS in the right arm; (4) when it held that the AMS could not assess the impairment resulting from CRPS when the AMS was required to accept that the injury was CRPS, and he was required to assess the degree of impairment resulting from that injury; and (5) when it held that the AMS was confined to assessing the body parts mentioned in the Referral and not the degree of impairment resulting from the injuries as agreed between the parties being the neck, right and left shoulder and right and left arms, wrists and hands as set out in the ARD and not disputed in the Reply.

Harrison AsJ dismissed the summons for reasons that are summarised below.

Her Honour rejected grounds (1), (2) and (3), which relate to the scope of the medical dispute. She held that while the Court of Appeal's decision in *Skates* provides guidance on this subject, the facts of this matter provide a significant point of difference.

In *Skates,* McCallum JA found that the scope of the dispute between the parties was crystallised by the correspondence attached to the ARD which set out each side's claim (at [46]). However, in this matter, the plaintiff's solicitor agreed that the 'body parts' listed on the referral form should read: "Cervical Spine, Chronic Regional Pain Syndrome (right arm), Left Upper extremity (shoulder)." In other words, by consent, the scope of the dispute had been narrowed.

In assessing the plaintiff with respect to Ch 17 of the Guidelines, the AMS found that he "did not satisfy the diagnostic criteria for CRPS". That resolved the aspect of the medical dispute that related to the right upper extremity. The AMS then provided an impairment rating for loss of range of motion to the right upper extremity, a consideration outside of Ch 17 of the Guidelines and therefore outside of the scope of the dispute as per the consent agreement of the parties: see Ex A(2), 498. With regards to the left upper extremity, the AMS made an assessment by reference to loss of range of motion in the left elbow and left wrist, and for sensory symptoms, when the referral was confined to an assessment of the left shoulder only.

Her Honour stated that while it is true that one must look beyond the referral form to be informed as to the true nature of the medical dispute, one also cannot ignore the terms set out in the referral form: See *Skates* at [82] as per McCallum JA. Furthermore, the importance of the referral form is exacerbated where, such as in the present case, the parties had agreed to the terms of the referral. As Basten and Leeming JJA stated in *Skates*, the MAP was correct to state the AMS should have been constrained to an assessment within the scope of the referral.

Her Honour rejected grounds (4) and (5), which relate to the nature of the dispute.

In relation to ground (5), her Honour stated:

> 123. For the following reasons, I do not accept these submissions. The starting point is McCallum JA's decision in *Skates* where at [82] Her Honour states "*I do not mean to suggest that that an approved medical specialist is free to ignore the terms of the referral. However, the medical dispute referred must be the medical dispute the parties have sought to have resolved*." By extension, this can be taken to mean that while the AMS may be informed as to the nature of the dispute from the ARD and other correspondence between the parties, they cannot ignore the referral form. As stated above, in my view, the importance of the referral form is amplified when the parties have expressly agreed to its construction as is the case here…
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> 125. The amended referral form sets out s 319(c) of the *Workplace Injury Act* as one of the 'matters' of the medical dispute to be assessment by the AMS. Section s 319(c) involves a consideration of the degree of permanent impairment of the worker as a result of the injury. It was therefore the task of the AMS to assess the permanent impairment resulting from the plaintiff's injuries in accordance with the corresponding chapter, page or paragraph number of the Guidelines and AMA5 Guides that correspond with the 'body parts/systems' set out in referral form as agreed by the parties: See *Skates* at [33] as per Basten JA.
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> 126. In relation to CRPS, the task of the AMS was to assess the plaintiff in accordance with Ch 17 of the SIRA guidelines, as specified in the agreed referral form which stated "Chronic Regional pain syndrome (right arm)" (Ex A(2), 414). The AMS made an assessment that the plaintiff did not satisfy the diagnostic criteria for CRPS (Ex A(2), 420). Put differently, the AMS assessed the plaintiff to have 0% WPI in relation to CRPS in the right upper extremity. The AMS was not required to make any further assessments and in doing so, fell into error. In my view the Appeal Panel was correct in making this finding.
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> 127. In relation to the left upper extremity, the task of the AMS was to assess permanent impairment resulting from the plaintiff's injury in an assessment that was to be confined to a consideration of the shoulder region. This is articulated in the referral form to which the parties agreed which states "Left upper extremity (shoulder)" (Ex A(2), 414). The AMS' assessment included the plaintiff's right wrist and elbow, areas outside of the agreed scope of the dispute (Ex A(1) 422). The Appeal Panel correctly found that in doing so, the AMS fell into error, and concluded that the correct WPI for the left upper extremity was 2%.

In relation to ground (6), her Honour rejected the appellant's argument that the MAP erred and made a jurisdictional error when it held that the AMS was confined to assessing the body parts mentioned in the Referral.

Her Honour ordered the plaintiff to pay the first defendant's costs on an ordinary basis.

PIC - Presidential Decisions

Sections 59 and 60 WCA - 'reasonably necessary', 'curative apparatus' – evidence in the PIC – weight of evidence – factual error

Honarvar v Professional Painting AU Pty Ltd [2022] NSWPICPD 12 – Deputy President Snell – 31/03/2022

The decision under appeal was reported in Bulletin 102, but the following summary is provided.

The worker injured his right ankle and lumbar spine. He underwent several surgeries on his ankle and extensive conservative treatment for his lumbar spines and psychological treatment. He sought approval for lumbar fusion surgery and a mattress & bed. The insurer disputed these claims.

Member Wynyard entered an award for the respondent.

With respect to the proposed surgery, the Member applied the test in *Diab* and found that:

- the worker based his case on the assumption that all he had to prove is that alternative treatment was not effective, but this is only one of the factors that he must satisfy and this requires more proof than his own subjective view;
- the treating doctors' reports were not helpful because they supported the need for the proposed treatment on the basis that nothing else had worked;
- the failure of the alternative treatments raised a question about whether the worker's mental state was preventing his recovery. He had been under psychiatric care for many years, but there was no evidence about this; and
- the proposed surgery was unlikely to result in any significant improvement or associated functional gains.

With respect to the claim for curative apparatus, the Member held that:

- the treating specialist recommended these items to assist in recovery from the proposed surgery and for pain management, but while a firm mattress may assist in minimising pain, this does not impose an obligation on the respondent to supply one;
- there are no particular therapeutic or curative qualities in the purchase of a mattress of a type that is commonly used by members of the public; and
- there was no explanation about the exorbitant cost of the claimed items.

The appellant appealed on 12 grounds.

Deputy President Snell upheld the appeal and found that the proposed surgery was reasonably necessary and that the bed and mattress were curative apparatus under s 59(e) *WCA*. He applied the decisions in *Diab* and *Rose* and made a declaration under s 60(5) *WCA*. His findings are summarised below:

- The Member failed to provide sufficient reasons about why he was not assisted by the appellant's self-assessment regarding the effectiveness of the alternative treatment.
- The Member erred by making factual findings that were not open to him, including that: the evidence about the effectiveness of alternative treatment principally came from the appellant; the treating doctors recommended surgery because nothing else had worked; and there was no evidence from the practitioners who provided the alternative treatment.
- The finding that the proposed surgery would not result in any significant improvement or associated functional gains was infected by erroneous fact finding.
- The amount claimed for the mattress and base was clearly an error (this was reduced by $30,000 on appeal).

- The mattress and base are '*curative apparatus*' as defined in s 59(e) *WCA* as they:
    - could be fairly described as a '*mechanical contrivance*';
    - have '*therapeutic qualities*'; and
    - are used to achieve a particular medical purpose, as the treating surgeon made clear.
- The Member effectively ignored the treating practitioners' evidence.

Injury in the course of or arising out of employment – failure to respond to a substantial, clearly articulated argument relying upon established facts

Mooney v White [2022] NSWPICPD 13 – Deputy President Snell – 7/04/2022

The decision under appeal was reported in Bulletin 104, but following summary is provided. On 10/01/2007, the appellant fell off the veranda of a house on a property owned by the respondent and injured his right leg. He alleged that he was engaged by the respondent as a live-in caretaker/house sitter and that he was a worker at the time of his injury. He claimed compensation under s 66 *WCA* for 45% WPI.

The Respondent disputed that the appellant was a worker and asserted that the arrangement between them was an informal one, under which the appellant was expected to perform some work around the property and small chores for approximately 4 hpd 5 dpw in return for permission to live rent-free in the house. In the alternative, he asserted that if there was a contract of service, the injury was not received in the course of employment.

Member entered an award for the respondent. He expressed concern about the reliability of the appellant's evidence, and the fact that his theory as to why he was on the balcony just before his fall on 10/01/2007 emerged so long after the event. It appears that it was first mentioned by him on 9/11/2009, which is 2 years & 10 months after his injury. He stated that the appellant speculated as to the reason he was there. The appellant was a heavy smoker and the Member suspected that he went out to have a cigarette. He was not required to make a finding as to why the appellant was on the veranda at the time, but did not accept that he has discharged the onus of proof on him to show that it was to do with cattle on the property. He stated:

> 73. In *Onassis and Calogeropoulos v Vergottis* Lord Pearce said of documentary evidence:
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> > It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.
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> 74. The same observation can be made of the theory first put forward by the applicant in November 2009, as to the reason he was on the balcony immediately before he fell on 10 January 2007. Whilst contemporary documents are of the utmost importance, similarly what the applicant recalled, or was not able to recall, contemporaneously after the fall on 10 January 2007 as to why he was on the balcony, is of the utmost importance. Brian Mooney said to Colin Freeman, when he visited him in Taree (which is where Manning Base Hospital is situated) with Robert Allport, that he did not know what happened about the circumstances of the fall. The applicant freely acknowledges this. What he thereafter postulates as the reason for him being on the balcony is no more than speculation.
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> 75. The decision-maker of the Commission must, pursuant to rule 73 of the Rules, have regard to evidence that is logical and probative and not accept evidence based on speculation or unsubstantiated assumptions. In my view the applicant's evidence as to why he was on the balcony on 10 January 2007 immediately before he fell is speculation. It is also based on an unsubstantiated assumption that there were cattle attempting to enter the area around the dwelling on the property at around 10.00 pm on 10 January 2007.

> 76. I accept the respondent's submission that the injury sustained by the applicant when he fell from the balcony sometime after 10.00 pm on 10 January 2007 was not an injury arising out of or in the course of his employment with the respondent.

The appellant appealed and alleged that the Member erred in law: (1) in determining the issue of whether the injury arose out of or in the course of employment without firstly determining the cause of the injury and secondly determining the scope of the employment contract; (2) by failing to determine that as a live-in caretaker the appellant was in the course of his employment while ever he was present on the property; (3) in finding that at the time of sustaining the injury the appellant was not engaged in an activity incidental to the course of his employment; and (4) by failing to draw an inference in accordance with *Jones v Dunkel* and also by drawing an impermissible inference.

Snell DP allowed the appeal and remitted the issue of whether the injury arose out of or in the course of the appellant's employment to another Member for redetermination consistent with his reasons, which are summarised below:

- He upheld ground (1). He noted that while it was common ground that the appellant fell, it was not common ground that the cause of the fall was the failure of the veranda railing. The appellant gave 2 possible reasons for his presence on the veranda before his fall, namely: (1) to observe cattle on the property; and (2) to smoke. The Member rejected the argument that smoking (if that was the relevant activity) would place the appellant in the course of his employment as this was not an activity that was "reasonably required, expected or authorised" in order for him to carry out his duties.
- The Member stated that he suspected that the appellant was on the veranda to smoke. He did not make a positive finding to that effect but said that he accepted the appellant was party to a conversation with the respondent in which it was said that his reason for boing on the veranda was to have a cigarette. He found that he did not accept that the appellant had discharged his onus of proving that his reason for being there was to do with cattle on the property.
- The Member's findings regarding what the appellant was doing before he fell were restricted by the appellant's lack of recall. In the absence of direct evidence of the circumstances of the fall, a finding on the cause of that event would likely involve the drawing of inferences, for example, from evidence such as the damaged woodwork at the scene and the appellant's location on the ground following his fall. An event can, of course, have multiple causes.
- The Member's reasons did not deal with the appellant's arguments regarding the cause of the fall, namely that the veranda railing was defective. In *Dranichnikov v Minister for Immigration and Multicultural Affairs* the plurality said that *"[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice*". In *Wang v State of New South Wales* it was said of the decision in *Dranichnikov*:

  > The decision is not authority for the proposition that any failure to refer to any argument put to a trial judge amounts to error. It is necessary to engage with the nature and materiality of the argument in the context of the issues in the proceedings."

- The relevant submission went to the fundamental issue of whether the appellant could establish injury in the course of or arising out of employment. This was in circumstances where proof of such matters was made more than usually difficult by his lack of recollection and the lack of direct evidence dealing with how he came to fall. The submission had the capacity, if accepted, to change the result. The principles in *Dranichnikov* are engaged. The Member erred in failing to deal with the submission (quoted at [40] of the decision) and this raises principles of natural justice and should be corrected unless it could not have affected the result: *Stead v State Government Insurance Commission*, *Toll Pty Limited v Morrissey*. As the identified failure had the capacity to affect the result, it is appealable error.
- He upheld grounds (2) and (3), in relation to which the appellant argued that his contract of employment placed him in the course of employment "24/7". Alternatively, he argued that he was injured during an interval between periods of employment.

- The appellant relied upon the decision of Neilson CCJ in *Harris* at first instance. That case involved a worker who was engaged as a live-in caretaker at a gliding club. Under his contract of employment, he was allowed to live without charge in premises on the club's land. His Honour, dealing with the scope of employment as a live-in caretaker, said:

> However, there is one further consideration which is extremely relevant to this case. A caretaker's job is to live on site and keep an eye on things. His mere presence is a deterrent to the thief and to the vandal. His job is to keep his eyes and his ears open - to respond to an unusual activity, any suspicious noise, to act in an emergency.
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> Whilst ever he is on site, he can so act. It appears to me that, absent misconduct or a frolic of his own, he would be in the course of his employment whenever he was on site.

- The matter went to the Court of Appeal, where the Court upheld Neilson CCJ's decision on a different basis: *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92 (per Sheller JA, Cole JA agreeing).

- Snell DP stated, relevantly:

> 55. There can be circumstances where a worker's employment can place him or her in the course of employment on a 'round the clock' basis (see for example *Favelle Mort Ltd v Murray*). It was arguable that the appellant fell into that category.
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> 56. The appellant submits that, as a live-in caretaker, his duties involved residing on the property and keeping an eye on it, he was effectively in the course of his employment "24/7". It was to the respondent's advantage to have the appellant living on the property full-time. The finding at [72] of the reasons was that the appellant could not discharge his onus, to show that his presence on the veranda when he fell was "*to do with cattle on the property*". It is submitted this failed to address the appellant's duties as a live-in caretaker.
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> 57. The appellant's statement dated 5 May 2010 indicated a broad range of tasks that he was obliged to attend to. This included the respondent suggesting to the appellant that he should occupy a specific bedroom, as the respondent "*and his family would also be there from time to time*". The Member found that the contract permitted the appellant to live on the property rent free. The Member inferred that it was to the respondent's advantage "*to have someone residing permanently on the property to keep an eye on it, look after the stock and maintain the grounds and fences thereon*." The Member made a finding that the contract required the appellant "*to live full time on the property and to carry out those allotted tasks*". The appellant addressed the Member on the basis that his employment:
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>> … started from the time he was there and it continues on. There's no break, he's in the course of his employment throughout that period of time.
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>> … he's resident at the property as part of his job, he's there 24 hours a day and that's the course of employment. Now, he doesn't clock on, he doesn't clock off, he has no other employment, he's just working there on the site.
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> 58. The appellant submits the finding at [72] of the reasons dealt with the scope of his duties on the basis they were limited to "*chores pertaining to cattle*". He submits the Member failed to address the scope of the appellant's duties as a live-in caretaker. I accept that the Member failed to address the submission that the course of the appellant's employment, while he was present on the relevant property, potentially ran over 24 hours per day, and included the time when the appellant fell from the veranda. The submission is referred to in the reasons at [41], but the reasons do not give reasons for its rejection or otherwise deal with its substance. This also constitutes error on the basis of the decision in *Dranichnikov*.

- He held that it was not necessary to deal with Ground No. (4).

PIC – Medical Panel/Medical Review Panel Decisions

MAI Act 2017 - MRP has no power to determine a claim for medical expenses not incurred and not provided

Obeid v AAI Ltd t/as AAMI [2022] NSWPICMP 76 – Principal Member Harris, Dr D Dixon & Dr G Stubbs – 5/04/2022

On 20/03/2017, the claimant was injured in a MVA. A dispute arose as to whether a MA, and on review a MRP, can determine whether treatment not yet provided or incurred is "*reasonable or necessary in the circumstances*" and/or "*relates to the injury caused by the motor accident*".

The insurer accepted that the claimant had suffered a non-minor injury and that its liability to make statutory payments extended beyond the 26-week period.

On 14/10/2020, Prof. Murrell recommended an arthroscopy and rotator cuff repair of the right shoulder and requested the insurer's approval. On 26/11/2020, the insurer declined to cover the cost of this treatment.

On 14/12/2020, Dr Ho sought approval for a pain management program, which included a diagnostic lumbar facet joint block and caudal epidural block. On 25/01/2021, declined to cover the cost of this treatment.

> Medical Assessor Woo issued a MAC on 7/02/2021, which concluded that the claimant aggravated a pre-existing degenerative rotator cuff tear and suffered a soft tissue injury to his lumbar spine in the MVA. He concluded that neither of the proposed treatments relate to the injury caused by the MVA or were reasonable and necessary in the circumstances.

The claimant sought referral to a MRP and the President's delegate referred the matter to a MRP. It raised an issue with the parties, namely whether there is power by a MA, and on review by a MRP, to determine a claim for medical expenses that have not been incurred under the *MAIA 2017*.

The MRP held that the ordinary meaning of "*a medical assessment matter*" in cl 2(b) of the *MAIA 2017* is that the treatment or care has been provided and does not extend to treatment "*to be provided*". The MRP stated, relevantly (citations excluded):

> 58. The claimant referred to the issues of causation and "*reasonable and necessary*" as matters of jurisdiction in the Commission but failed to address the past tense in clause 2(b). Reference was otherwise made to the meaning of "*incurred*", a word that appears in s 3.24 of the *MAI Act*.
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> 59. It is difficult to read words into clause 2(b) when the words "*to be provided*" were included in the MAC Act and seemingly intentionally left out of the relevant provision in the *MAI Act*. That can be contrasted with various provisions that have been copied over from the *MAC Act* to the *MAI Act*.
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> 61. The test for reading words into a statutory provision is articulated in *Taylor v The Owners-Strata Plan No 11564* where the plurality stated:

The MRP stated that the question of whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision. It is answered against a construction that fills '*gaps disclosed in legislation*' or makes an insertion which is '*too big, or too much at variance with the language in fact used by the legislature*'. Consideration must be given to the context of the provision. This is emphasised in clause 2(b) because it expressly refers to s 3.24 of the MAI Act.

The wording of s 3.24 is to expenses "*incurred in connection with providing treatment and care*". The word "*incurred*" is used in the context of the present tense of "*providing*" treatment and care. The phrase is best described as being in the past tense because the word "*incurred*" describes the balance of the relevant passage.

While it is arguable that the context of "*incurred*" in s 3.24 is not limited to a past tense, the preferred construction suggests that expenses have already been incurred. This interpretation is consistent with s 3.27 of the *MAI Act*. Section 3.24 does not provide an entitlement to enforce a claim for future expenses and this interpretation is consistent with the unambiguous mandatory requirement in s 3.27 that no statutory benefits are payable unless the expenses are verified.

There is an indication that the *MAI Act* contemplates some treatment and care that may be enforced as a future entitlement. Treatment or care that will "*improve the recovery of the injured person*" in s 3.28(3), as an exception to the 26-week limitation set out in s 3.28(1), is suggestive of future treatment and/or a continuum of treatment. However, this is the only provision within the Division that appears to provide for a future expense.

There is a rule of construction that the same words appearing in different parts of a statute have the same meaning "*unless there is reason to do otherwise*": *Registrar of Titles (W.A.) v Franzon*. The claimant argued that the medical certificate is binding pursuant to s 7.23 of the *MAI Act*. The section provides that the certificate is "*conclusive evidence of any other matter certified*": s 7.23 (2)(b). However, that section does not enable the scope of the medical dispute to be widened by "*implication*" because a medical dispute is defined in s 7.17 to be a dispute about a medical assessment matter. Therefore, the certificate is constrained to the "*matters referred for assessment*".

The MRP stated, relevantly:

> 73. There is a tendency in Schedule 2 to imprecisely define the matter with the corresponding entitlement/issue in the sections of the MAI Act. One example is the definition of medical assessment matters concerning recovery in clause 2(c), which is worded differently from s 3.28(3). The relevant wording in clause 2(c) is "*whether...treatment or care provided to an injured person will improve the recovery of an injured person*" whereas the wording of s 3.28(3) is that the "*treatment or care will improve the recovery of the injured person*" and anticipates that the treatment for recovery can occur in the future.
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> 74. The wording of Schedule 2 clause 2(b) does not precisely reflect the liability provision in s 3.24. The section refers to "expenses incurred in connection with providing treatment" whilst clause 2(b) refers to "*treatment and care provided to the injured person...for the purposes of s 3.24*". In our view the clause is probably a slightly shorthand version of the ambit of the liability provision in s 3.24 because it refers to the section. However, reading clause 2(b) in context to encompass the ambit of s 3.24 does not mean that expenses not yet incurred are an enforceable statutory entitlement.
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> 75. As the claimant correctly submitted, the purpose of the legislation is a consideration relevant to construction. It was submitted that the objects of the MAI Act include the encouragement of "*early and appropriate treatment and care*". However, another object, somewhat restrictive to an injured person's rights, is the object to keep premiums affordable.

While the claimant argued that the *MAI Act* should be read "*beneficially*", the MRP held that it is difficult to accept this as a general proposition, in circumstances where the *MAI Act* significantly reduced entitlements to common law damages that exist under the *MAC Act.* It stated:

> 83. Whether the provision of future treatment and care expenses payable as statutory benefits under the MAI Act are justiciable before the Commission must be based on the relevant provisions of the legislation. Given the clear meaning of clause 2(b) and s 3.24, we do not accept the submission that this interpretation is contrary to the objects of the *MAI Act*.
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> 84. The claimant correctly identified that an insurer could agree to pay for treatment. That is recognised by various clauses of the Guidelines including clause 4.101 and referred to in *AFD v Allianz Ltd*. Indeed s 3.31 of the MAI Act states that the Guidelines may make provision for approving particular care and treatment. Clauses 4.76 – 4.77 of the Guidelines concern how an insurer should manage a claim for treatment expenses.

85. However, recognising that an insurer can agree to pay for treatment in accordance with s 3.31 is not the same as a claimant having a statutory right to enforce an entitlement for future treatment not otherwise provided by the legislation…

87. The claimant submitted that if the claim was not a medical assessment matter, then it could be determined as "*either as a merit review matter, or in another jurisdiction*".

88. The Panel is not required to determine this issue. For the reasons expressed, we have concluded that the dispute raised before Medical Assessor Woo and on review before us, is not a medical assessment matter.

89. We observe that there is a "*catch all*" under miscellaneous claims assessment matters for any other issue of liability for statutory benefits in clause 3(n). However, our view is that clause 2(b) refers back to s 3.24 and probably encompasses the totality of any liability dispute under that provision. This interpretation of the relevant provisions would mean that clause 3(n) would have no operation with respect to any liability under s 3.24.

PIC – Member Decisions

Workers Compensation

WCD – Whether worker could work as a school crossing supervisor – No evidence that he would not pass checks by NSW Police and Working with Children – No medical evidence to support alleged lethargy and lack of concentration –Interim Payment Direction refused

Konza v Burkes Transport (Services) Pty Limited [2022] NSWPIC 133

The worker injured his left shoulder and arm at work. On 30/11/2021, the insurer made a WCD and reduced weekly payments to $681.40 per week under s 37 *WCA* on the basis that the worker could work as a school crossing supervisor for 20 hpw. However, the worker disputed the WCD.

Delegate McAdam refused to issue an IPD for weekly payments. His reasons are summarised below.

- The evidence concerning incapacity largely supports the WCD. While the COC remains important evidence, the totality of the medical evidence must be considered when determining suitable employment.
- The IME's support, at least to some extent, the worker's capacity for employment as a crossing supervisor. Dr Anderson says "*technically, he probably could*", but noted concerns about the worker's tolerance of poorly behaved children. The delegate did not consider this to be a medical issue or part of "*the nature of the incapacity*" based on the statutory definition. He stated:

> 47. … Although in one sense it might be arguable that having a short temper is a medical condition relevant to the question of incapacity. Interestingly, Dr Anderson supports a return to light delivery work, although this was not approved by the treating general practitioner…
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> 50. Dr Whitmill approved the role "*as long as no heavy lifting [is] required*". He does, however, provide some commentary around the role in his most recent certificate of capacity where he notes that he will not be able to work as a traffic controller as he is unable to move signs, and unable to stand in one spot for any length of time. Those restrictions were first noted in the certificate for the period 1 December 2021 to 31 December 2021. I find this somewhat concerning as it is not explained particularly, there is no report explaining the downgrade, and it comes one day after the section 78 notice was issued. The timing is circumspect, and without any explanation (or other change in restrictions listed) I will treat that downgrade with caution. It appears the change may have been in response to the work capacity decision and the effect of that decision.

- One of the worker's contentions for challenging the WCD, or having it amended to reflect a lower capacity for work, concerned those secondary restrictions that are not particularly related to the injury but rather appear to be congenital. In particular, he made submissions concerning his obesity and inability to stand for long periods. Prima facie, those are matters that come within "*the details provided in medical information*", but the issue about accepting that argument is that they are not explained or supported in "*medical information*".
- He did not place great weight on Dr Whitmill's concerns regarding concentration and do not find the worker's submissions around that point particularly persuasive. The role identified is a split shift role for a maximum of two-hour shifts. True, he would need to concentrate and be safety conscious in the role, but it is not a skilled role and the evidence did not persuade him that the worker would be unable to do the role safely due to lethargy or an inability to concentrate.
- The vocational assessment report supports a conclusion that the worker has sufficient transferrable skills to allow him to work as a crossing supervisor. There are no specific qualifications required.
- The crux of the worker's case concerned the requirement that any potential employee successfully pass a Police check and Working with Children check, as well as a health check. He alluded that he may have had previous interactions with Police that would mean he would not be able to pass those checks and argued that it was incumbent upon the respondent to ensure that he would pass those checks in order for the roles identified to be considered suitable.
- The worker failed to meet the fundamental evidentiary hurdle to accepting his case.