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 of decision of a Medical Panel – Summons dismissed

Lancaster v Foxtel Management Pty Ltd [2022] NSWSC 929 – Basten AJ – 12/07/2022

The plaintiff was employed by the first defendant from February to July 2017. After leaving that employment, he claimed compensation for a psychological injury as a result of alleged workplace bullying and harassment. The first defendant disputed the degree of permanent impairment.

On 12/06/2020, Dr Hong issued a MAC which assessed that the plaintiff suffered 9% WPI. This did not entitle him to recover compensation under s 66 WCA.

The plaintiff appealed against the MAC. The MAP declined to re-examine the plaintiff and confirmed the MAC.

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Basten AJ determined the summons and he identified the issues for determination as being whether the MAP: (7a) incorrectly approached the question of whether it would re-examine the plaintiff; (7b) gave inadequate reasons for not re-examining the plaintiff; (7c) failed to consider afresh the question of the plaintiff's impairment, including by failing to re-examine him; (7d) misunderstood and misapplied the decision in *Petrovic v BC Serv No 14 Pty Ltd*; (7e) erred in failing to find error in the assessment of three categories of impairment; (7f) erred in its assessment of the three impairment categories; and (7g) made a factual error in concluding that the plaintiff did not require a support person to leave the house.

His Honour rejected ground (7a) and stated, relevantly:

> 31. The effect of the plaintiff's submission was that, once the Tribunal had accepted "additional evidence" it was bound to undertake a "de novo" or fresh hearing of the whole of the case. This ground was separate from the challenge to the reasons for not conducting a clinical examination. Accepting for present purposes that the Panel considered whether it should conduct a clinical examination, the plaintiff's case was that, having admitted additional evidence, the Panel's power was legally constrained so that it could not as a matter of law decline to conduct the examination.

His Honour stated that this submission was "doubly misconceived." First, it assumed that the additional evidence was relevant to some aspect of the plaintiff's condition which could be further revealed by conducting a clinical examination. Secondly, it denies to the MAP the power to make its own assessment as to the usefulness of a clinical examination in the context of the additional evidence.

There is nothing in the statute which would support that conclusion. On the contrary, the power to conduct the appeal is conferred upon a tribunal comprising two medical specialists and an arbitrator. In the absence of an express requirement as to how they are to conduct their function, the apparent statutory purpose is to allow them to conduct an appeal according to their professional judgment. There may be a need to accord procedural fairness, but the circumstances in which that will arise will be limited given that the review itself is limited to the grounds of appeal raised by the appellant.

> 40. It is not correct to say that the Appeal Panel misunderstood its function in circumstances where it had regard to the additional material provided by the appellant, which it took into account in assessing the correctness of the decision of the medical specialist. The Panel considered whether to conduct a further clinical examination and decided not to. In the absence of any legal obligation to conduct such an examination, ground 7(a) must be rejected.

His Honour rejected grounds (7b) and (7c) and he held that while the MAP had the power to invite the plaintiff to attend for a further clinical examination, there was no obligation to do so. Whether or not the power should be exercised turned on a matter of professional judgment. That judgment was properly to be exercised by reference to the materials available to the MAP in written form, and assessed by them, relying on their professional expertise and experience. The MAP stated that it had conducted a preliminary review and determined that it was not necessary for the plaintiff to undergo a further medical examination because there was sufficient evidence on which to make a determination. That statement is sufficient to indicate that the MAP addressed the question of whether to re-examine the plaintiff, determined that if did not need to do so and gave a reason.

His Honour stated, relevantly:

> 51. Despite the lack of substance underlying this ground, two further observations should be made. First, this case demonstrates the danger in seeking to apply some general standard as to when a claimant should be subjected to a further clinical examination. This was a case where the claim turned almost entirely upon findings concerning the plaintiff's social functioning. Except to the extent that he sought to rely on observations by other persons, the claim turned almost entirely upon self-reporting. Thus, the additional evidence, far from providing the basis for a need for clinical re-examination, provided the very material which he would have wished to adduce in the course of such an examination.
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> 52. Secondly, the adequacy of the reasons for not carrying out the examination must be viewed in the particular context of the case. Thus, when viewed as a whole, the adequacy of the reasons is overwhelmingly established. The Appeal Panel, as will be discussed further shortly, explained precisely and in detail how it took into account the additional information and compared it with and assessed it against the criteria to be applied for the purposes of the medical assessment. In short, the Panel accepted the plaintiff's assertions at face value. No doubt, if it had doubted his truthfulness or reliability, it might well have thought it appropriate to re-examine him, that is to explain his current state of mind and social functioning in circumstances where it would be able to test his statements. As that was not necessary, it is readily understandable that a further re-examination was deemed unnecessary.

His Honour rejected grounds 7(d) and held that this ground was not explained by the plaintiff.

In relation to grounds (7e), (7f) and (7g), his Honour stated, relevantly:

> 67. In these circumstances, it would be sufficient to state that no error of law has been established with respect to the exercise undertaken by the Appeal Panel. There was no suggestion that par (c) of s 327 was in play: the Appeal Panel applied (as had Dr Hong) the correct criteria. To the extent that additional information was relied upon, the Appeal Panel considered those aspects of the supplementary statement of the plaintiff in relation to the criteria to which they related. That left only the question whether the plaintiff had established any change in the appropriate class resulting from that information and whether he had established failure on the part of the Appeal Panel to apply the correct legal criterion of "demonstrable error". In that respect, the Appeal Panel concluded, in the exercise of its professional expertise, that the additional information did not make any material change to the

circumstances considered by Dr Hong. [44] It further stated that in respect of none of the categories, was error demonstrated. The specific issues raised by the plaintiff may, however, be shortly identified with respect to each category…

71. The plaintiff also sought to obtain assistance from the reasoning of the Court of Appeal in *Ballas v Department of Education*. [46] *Ballas*, as the plaintiff accepted, involved a different exercise, namely a challenge to a "gateway" decision by a delegate of the registrar under s 327(4), refusing to refer a proposed appeal to a medical appeal panel. The contention for the applicant, Ms Ballas, was that the medical specialist had wrongly taken into account, in assessing her "social and recreational activities", a solitary activity which might have been relevant to other areas of impairment but did not bear upon that identified as "social and recreational activities". The Court accepted that submission, concluding that the delegate did not properly consider whether that contention was capable of constituting a "demonstrable error". The Court held that the reasons of the delegate revealed that she had confused the concepts of "scales" and "classes" and had wrongly concluded that the allocation of a function to a particular scale, and then concluding that the appropriate categorisation was a matter of discretion for the medical specialist, revealed legal error which appeared on the face of the record, namely the delegate's reasons. [47] However, the Court then proceeded, in a passage on which the plaintiff relies, making the following observations:

> 94 Even if there may, as a matter of English language, be some overlap between some of the scales or categories of functional impairment, for the purposes of the WPI [whole person impairment] assessment exercise, particular conduct will fit within one or other of the scales. This calls for the correct characterisation of the conduct, ie whether it goes to 'self-care and personal hygiene', 'social and recreational activities', 'travel', 'social functioning (relationships)', 'concentration, persistence and pace' or 'employability'. This does not involve an exercise of discretion. If conduct is wrongly assigned to one scale, when it should have been assigned to another, this will result in the AMS taking into account an irrelevant consideration in the context of assigning a class to each of the distinct scales. This will inevitably bear upon the calculation of the WPI which is critical for an injured worker's entitlement to compensation.

72. The function of the delegate under s 327(4) was to determine whether the appellant had identified a ground which was capable of constituting "demonstrable error" on the part of the medical specialist. That error did not need to be a legal error. Accordingly, the assessment of a particular activity under the wrong "scale" could constitute a factual error. Clearly it was an error which was reviewable by an appeal panel. As the joint reasons in *Ballas* sought to make clear, the exercise being undertaken by the medical specialist was evaluative, not discretionary. The use of the phrase "taking into account an irrelevant consideration" might suggest an error of a kind which would be described as jurisdictional error for the purposes of judicial review, and hence applicable in the present case. However, the Court in *Ballas* did not say that the delegate was required as a matter of law to identify a jurisdictional error on the part of the medical specialist. It was sufficient (as the Court held) that the delegate had failed, through a misunderstanding of her proper function, to accept an argument that was capable of amounting to "demonstrable error" on the part of the medical specialist.

73. The plaintiff's reading of *Ballas* would have surprising consequences. It would mean that every time a medical specialist considered under one scale an activity which a court determined properly fell under another scale, he or she committed jurisdictional error which could be the subject of review in the Supreme Court. The proposition that gambling (or running) may fall within the descriptor "social and recreational activities" if carried out in company (whatever that might imply) but not if carried out alone, and the assessment by a medical specialist whom a court determined had failed to apply that distinction so as to render his or her determination a nullity would be a surprising consequence. It would involve reading down the term "recreational" by reference to the generic and imprecise exemplars in the class descriptions, so as to impose a legal constraint on the valid exercise of power by the medical specialist. A similar exercise would potentially be available for each of the other scale descriptors.

74. Even if such an implausible reading of the joint reasons in *Ballas* were correct, it was not necessary for the determination in *Ballas*. In any event, no similar error is alleged to have occurred in the present case: the question here is whether the Appeal Panel erred in assigning a particular class (that is level of severity) in relation to conduct which concededly fell within the particular scales (or categories).

With respect to the plaintiff's complaint regarding the assessment for "social and recreational activities", his Honour held that the issue raised is simply a factual assessment with which the plaintiff disagreed. There was no attempt to identify any error of law in the MAP's reasons and the suggestion that the MAP erred in law because it used the phrase "no evidence" should not be accepted.

With respect to the plaintiff's complaint regarding the assessment for "self-care and personal hygiene", his Honour stated, relevantly:

77. If this submission sought to identify error in a failure to apply the guidelines and the "exemplars" given in the guidelines, it is patently false. The Appeal Panel identified the relevant parts of the guidelines and discussed factors which were undoubtedly relevant to that exercise.

78. If the submission required that the reasons demonstrate a particular level of scrutiny and degree of specificity with which the facts were scrutinised, that proposition must also be rejected. If it is to be derived from the authorities referred to, those authorities should not be followed: they predate Wingfoot and do not reflect its reasoning. This kind of exercise invites a merit review of factual findings with no attempt to identify an error of law on the face of the record. Grounds 7 (e), (f) and (g) must be rejected.

Accordingly, his Honour dismissed the summons with costs.

Judicial Review – MACA - Treatment dispute – Damages for future care and domestic assistance – Whether Certificate is conclusive evidence of the matters certified within it? – Whether the first defendant was totally or partially incapacitated? – Whether the Tribunal provided adequate reasons? – Decision set aside

Insurance Australia Limited t/as NRMA Insurance v Rababeh [2022] NSWSC 942 – Harrison AsJ– 15/07/2022

On 7/02/2017, the first defendant was involved in a MVA , as a result of which she alleged that she suffered physical and psychiatric injuries. She claimed damages under the MACA and the insurer wholly admitted liability, but disputed that she suffered a greater than 10% WPI as a result of the injuries and the allegation that since the MVA, she has required, and will require in the future, domestic assistance as a result of her injuries.

Both the impairment and treatment disputes were originally assessed by the Medical Assessment Service ("MAS"), a division of the Dispute Resolution Service ("DRS") of SIRA, but the MAS became the Personal Injury Commission of NSW on 1/03/2021. In each dispute there were separate assessments relating to the first defendant's alleged physical and psychiatric injuries and the parties agreed that she was not entitled to damages for non-economic loss.

On 15/10/2019, Dr Reutens, psychiatrist, assessed impairment with respect to the alleged psychiatric injuries. On 3/11/2019, she issued a MAC which assessed 6% WPI.

On 23/10/2019, Dr Gorman assessed impairment with respect to the alleged physical injuries. On 10/12/2019, he issued a MAC which assessed 10% WPI.

Assessor Rosenthal recorded the treatment dispute as follows:

Domestic assistance – causation – the physical injuries give rise to a need for domestic assistance MVA to the date of the MAS Assessment,

Domestic assistance – causation – the physical injuries give rise to a need for domestic assistance from the date of the MAS Assessment for a period of 12 months.

However, the insurer argued that only the first of these paragraphs is correct.

On 17/02/2021, Assessor Rosenthal assessed the worker with respect to the treatment dispute under s 58(1)(a) and (b) of the MACA, to determine whether the proposed domestic assistance was reasonable and necessary and/or causally related to the MVA. On 19/02/2021, he issued a MAC and certified that the physical injuries caused by the MVA gave rise to a need for domestic assistance from the date of the MVA to 17/02/2021 and that domestic assistance would be required for a further period of 12 months (until 17/02/2022).

On 19/03/2021, Dr Jones, psychiatrist, assessed the first defendant with respect to the treatment dispute. On 19/03/2021, he issued a MAC and determined that the fist defendant did not require past domestic assistance and would not require future domestic assistance as a result of psychiatric injury.

The claim was referred to Member Castagnet for assessment of damages.

On 5/05/2021, the first defendant lodged further submissions, which the plaintiff replied to on 17/05/2021, and an assessment conference took place on 20/05/2021. On 23/08/2021, he issued a Certificate and reasons for decision under s 94(5) of the MACA, in which he stated, relevantly:

> [117] I am satisfied that the claimant's evidence, the above medical evidence, the clinical records of the treating doctors, establish that the claimant has suffered significant injuries to the neck, shoulders, and the lower back, resulting in persistent pain and restrictions in the neck, shoulders, and lower back.
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> [118] In coming to that conclusion, I preferred the evidence of Dr Alameddin, Dr McKechnie, Assessor Gorman, and Dr Davis. Dr Keller did not disagree with their views.
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> [119] Considering the claimant's evidence and the evidence of Assessor Reutens, I am satisfied that the ongoing physical disabilities have created a significant adverse psychiatric reaction.
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> [120] I do not accept Dr Pierides' opinion to the extent that he believed that the claimant's injuries to her cervical spine, right shoulder, and lumbar spine were a mere possibility, mild in nature and lasting for about four weeks. His opinion is inconsistent with the opinions of Dr Alameddin, Dr McKechnie, Assessor Gorman, and Dr Davis, and with the claimant's evidence of continuing disability.
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> [121] I am satisfied that the physical and psychiatric injuries and ongoing disabilities have created a need for past and future medical treatment and care.
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> [122] I am satisfied that those disabilities have impacted on her past ability to work and will continue to impact on her future earning capacity.
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> [123] I am satisfied that the claimant will in future be restricted to carrying out work that does not involve prolonged standing or repetitive movements and that she will not be able to pursue a career in hairdressing.
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> [124] I am satisfied that there are no pre-existing injuries or ailments that have had an impact on the claimant's impairments and disabilities caused by the accident…
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> [141] I have already made a finding that the claimant's disabilities and impairments arising from her injuries have impacted on her past ability to work. I am satisfied that but for the accident; the claimant would have commenced employment as a full-time hairdresser at Jocelyne Chidiac Hair sometime in late February 2017:
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> [142] I calculate working 40 hours full-time per week at $25 per hour equates to $1,000 gross per week. That in turn equates to about $817 net per week.:
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> [143] I therefore propose to allow the claimant past economic loss from 27 February 2017 to the date of the assessment conference at the rate of $800 net per week. The period is 220 weeks, and the total loss equates to $176,000. ·
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> [144] I make an award of $176,000 for the claimant's past economic loss…

[146] In her updated submissions and schedule of damages, the claimant makes a claim for future economic loss in the amount of $250 per week until age 67 to a total of $166,387. Alternatively, the claimant seeks a buffer of $100,000. For reasons set out below, I do not believe this amount would adequately compensate the claimant.

[147] In cases such as *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 and *Husher v Husher* (1999) 197 CLR 138, the High Court confirmed that the issue to be determined is whether the claimant has sustained a loss or diminution in her earning capacity and, if so, whether that loss or diminution will result in economic loss. In calculating any such loss, I must have regard to the provisions of s 126 of the Act.

[148] The insurer concedes that there has been a modest diminution of earning capacity.

[148] I find that the claimant's most likely future circumstances, but for the accident, would be that she would have continued her career path as a hairdresser and beauty therapist, and may have established her own business.

[149] I have already made a finding, based on the totality of the evidence, that the claimant's disabilities and impairments arising from her injuries have impacted on her past ability to work and will continue to impact on her future earning capacity.

[151] I have not been assisted by a vocational assessment, but it appears to me that the claimant's employment prospects will be hampered not only by her injuries but also her English language difficulties. It is difficult to conceive of an occupation that the claimant would be fit to perform on a regular and reliable basis.

[152] In all the circumstances and taking into account additional vicissitudes of running her own business, I consider that the claimant has sustained a diminution in her earning capacity of at least 50%. Based on earnings of $800 net week that she would have earned shortly after the accident as a base level hairdresser, that equates to a loss of $400.00 net week until retirement.

[153] The claimant will be 40 years old in November 2021. Assuming that she would work until age 67, the 5% multiplier for 27 years is 783. $400 net per week x 783 x .85 (considering vicissitudes at 15%) = $266,220.

[154] Based on my findings, I make an award of future economic loss of $266,220.

[155] I also allow superannuation contributions on half of that amount, on the basis that the claimant intended to conduct her own business. I make an award for the future loss of superannuation entitlements of $266,220 x 11.5% x 50%=$15,307.65.

The Member awarded damages of $619,052.55 plus costs to the first defendant, comprising: (1) $61,116 for future care, on the basis that that she has a need for domestic assistance of 6 hours per week which will continue for 5 years from the date of the assessment, and which will be provided commercially; (2) $176,000 for past loss of earnings; and (3) $266,220 for future loss of earnings.

The plaintiff applied to the Supreme Court of NSW for judicial review of the Member's decision on 4 grounds, namely:

(1) In relation to damages for future care and domestic assistance, the Member erred in law in awarding damages for future care and domestic assistance after 17/02/2022. He awarded damages for future care for 5 years from the date of his award, that is, to 23/08/2026 and assessed damages for future domestic assistance based on a need of 6 hours per week at a commercial cost of $44 per hour ($264 per week), which totalled $61,116. Had he limited his award for future care to a period from 23/08/2021 to 17/02/2022, as he was bound to do, the award would have been for 25 weeks at $264 per week or $6,600. His error in awarding damages for future assistance beyond 17/02/2022 resulted in an over award of damages under this head of $54,516. The error is not de minimus.

(2) In relation to past loss of earnings, the Member erred in law in assessing damages from the date of the MVA (7/02/2017) to the date of his assessment on the basis that the first defendant was totally incapacitated for all forms of work throughout that period, when there was no medical evidence to support that finding, and the medical evidence accepted by him is to the contrary. It is an error of law to assess damages on the basis of total incapacity if there is no medical evidence to support such a finding: *Kallouf v Middis* [2008] NSWCA 61 ("*Kallouf*").

(3) – In relation to partial incapacity, the Member erred in law in failing to consider whether the first defendant was only partially incapacitated for work for some or all of the period from the date of the MVA to the date of the Assessment Conference, despite that matter being in issue between the parties.

(4) – In relation to the adequacy of reasons, the Member erred in law in awarding damages for future loss of earnings of almost $100,000 more than the amount claimed by the first defendant without providing adequate reasons for making such an award.

Associate Justice Harrison determined the summons and decided to deal with the Grounds in chronological order, but with grounds (2) and (3) being dealt with together.

In relation to ground (1), her Honour noted that the plaintiff argued, in essence, that under s 61(1) of the MACA, Dr Rosenthal's certificate is conclusive evidence of the matters certified within it and one of those matters is that the first defendant's injuries caused by the MVA gave rise to a need for domestic assistance only until 17/02/2022. Therefore, the Member's award of damages after that date is an error of the kind that is reviewable by the Court.

Her Honour noted that the first defendant argued that while the Rosenthal Certificate is conclusive evidence of the matters certified within it, what is certified is no more than the words on the certificate and that does not include the accompanying reasons. Therefore, the Member was entitled to award damages beyond 17/02/2022.

Her Honour upheld ground (1) and stated, relevantly:

96. The critical issue of this dispute is whether Assessor Rosenthal meant to say, as the insurer contends, that the first defendant is only entitled to damages for domestic assistance for the next 12 months, or was he intending, as the first defendant contends, to limit his assessment of damages to that period and say nothing about whether assistance after that period has elapsed is required? In my opinion, are several pieces of evidence which show that the insurer's reading is to be preferred…

98. As is evident from the emphasised passages, Assessor Rosenthal appears to be of the opinion that the first defendant's injuries will have completely resolved by 17 February 2022 and appears to have acknowledged rewording the question referred to him. I agree with the insurer's oral submission that given the ambiguity in the Rosenthal Certificate on its terms, regard should be had to the reasons to interpret exactly what Assessor Rosenthal certified, and the reasons support the insurer's submission that the first defendant's injuries occasioned in the accident gave rise to a need for domestic assistance only until 17 February 2022: T16.10.

99. This is bolstered by reference to the Jones Certificate, as Assessor Jones was referred the same question as Assessor Rosenthal save that Assessor Jones was assessing psychiatric not physical injuries, and in the reasons accompanying the Jones Certificate, Assessor Jones cites the relevant questions referred by DRS as being (Annexure U to the Joukhador Aff 9 December 21 at p2):

> [2] The following treatment and/or care disputes were referred by DRS for assessment:
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> … Whether the psychiatric injuries give rise to a need for domestic assistance from the date of the MAS assessment, **and ongoing for the remainder of the claimant's life expectancy**, and whether this assistance is causally related to the injuries sustained in the subject accident

Whether 0 to 14 hours per week (and any frequency and duration in between) of domestic assistance arising from the psychiatric injuries caused by the motor vehicle accident and relating to assistance, from the date of the MAS assessment, **and ongoing for the remainder of the claimant's life expectanc**y is reasonable and necessary in relation to the injuries sustained in the subject accident." (Her Honour's emphasis)

100. Finally, and crucially, the Member states the following at [164] of his reasons (Ex A, 51):

[164] On 19 February 2021, MAS Assessor Rosenthal issued a certificate making a determination that the claimant's physical injuries gave rise to a need for domestic assistance for a period of 12 months from the date of his assessment. His determination was made in response to a specific question framed within that parameter.

101. In this paragraph the Member appears to indicate that his understanding is that Assessor Rosenthal made an assessment of the likelihood that the first defendant required attendant care services for 12 months from the date of his assessment only, as that was the question referred to him. As has been shown above, this is not the case. Rather Assessor Rosenthal appears to have altered the words of the question referred to him to reflect his opinion on the resolution of the first defendant's injuries.

102. Given both parties accept that the Rosenthal Certificate is conclusive evidence of the matters certified within it, and given my opinion that one of those matters is that the first defendant's injuries occasioned in the accident gave rise to a need for domestic assistance only until 17 February 2022, the Member has made an error in awarding damages for future care and domestic assistance after that date. On this basis, the decision of the Member should be set aside as he misconstrued his statutory duty.

Her Honour rejected ground (2) and (3). She noted that the insurer asserted that had the Member turned his mind to whether alternative employment was available he may have found that the first defendant was fit for a range of commonly available modes of employment. However, she was satisfied that the Member did turn his mind to that possibility and he was not satisfied that such alternatives were available for the first defendant.

Her Honour found that the plaintiff misconstrued the onus of proof. The first defendant discharged her duty to show that she was incapable of performing her former role and the onus was then on the plaintiff to establish that she retained a residual earning capacity and that she was able to pursue other means of employment. It cannot point to what it says are commonly available modes of employment without ever explaining how the first defendant was suitable for those modes of employment despite her injuries, or even stating what they are. Her Honour stated, relevantly:

140. In the situation where there is a dispute as to the residual earning capacity of a claimant as there was here, a vocational report is a prudent step towards evidencing the claimant's capacity. Here there was not one. The evidence before the Member was limited and those limits noted by him. He was required only to do his best on the available evidence: Pham v NRMA at [14].

Her Honour also rejected ground (4) and held that the Member's task was to consider the evidence before him and to arrive at a conclusion as to the appropriate amount of damages to be awarded. He was only required to give brief reasons explaining his reasoning and he had discharged both these duties.

Accordingly, her Honour set aside the Member's Certificate dated 23/08/2021 and remitted the matter to the President of the PIC for determination according to law. She ordered the first defendant to pay the plaintiff's costs on an ordinary basis.

PIC - Presidential Decisions

Application to amend the ARD - whether leave should have been refused – exercise of discretion on the leave application – taking into account irrelevant factors – error found – COD revoked & matter remitted to another Member for re-determination

Haddad v The GEO Group Australia Pty Ltd [2022] NSWPICPD 23 – Acting Deputy Parker SC – 28/06/2022

The appellant was employed by the respondent from 3/08/1998 to 31/01/2001. She claimed weekly payments from 17/02/2017 and s 60 expenses.

The appellant filed an ARD which pleaded a psychological injury (PTSD and major depression) as a result of her employment at Villawood Detention Centre from 3/08/1998 to 31/01/2001.

However, at the hearing before ***Member McDonald,*** the appellant sought leave to amend the ARD as follows: (1) to delete the claim for weekly compensation; and (2) to amend the particulars of injury. The respondent disputed the latter amendment and the Member refused to grant leave.

The appellant appealed against the Member's interlocutory decision and asserted that the Member erred as follows: (1) in law and/or discretion by failing to allow the appellant to amend his claim; (2) in law and discretion by indicating that there were 2 possible consequences of having a deemed date of injury and that the respondent may not be in a position to meet the case sought by way of the amendment; (3) in law by failing to provide the appellant with procedural fairness by not dealing with submissions made on his behalf; (4) in discretion by finding the appellant was not prejudiced if the amendment application was not allowed; (5) of discretion by failing to take into account or give sufficient weight to the medical evidence in the matter: and (6) of discretion by deciding that to permit the amendment sought would expose the respondent to "unacceptable prejudice".

Acting Deputy President Parker SC determined the appeal on the papers. He granted the appellant leave to appeal against the interlocutory decision and allowed the appeal. His reasons are summarised below.

- He did not accept that there was any prejudice to the respondent in circumstances where it concedes that the appellant could discontinue the claim and bring the amended claim.
- The interlocutory decision in this matter is not futile or pointless. If leave is granted and the appeal succeeds, the amended proceedings before the Commission would remain on foot and the appellant would be permitted to advance his case on the basis of the amended ARD.
- The appellant and respondent are both disadvantaged in the sense that they are both put to expense and inconvenience in having to prepare a fresh ARD and reply.
- He upheld ground (1) and stated that he considered that the appellant's challenges are: (a) to an incorrect conclusion by the Member that the appellant had failed to make clear that the injury pleaded was a disease injury at any time before the application to amend was made; and (b) the Member erred in her conclusion that having ticked the deemed date of injury box the consequence was that "the injury was a nature and conditions type of injury or a disease injury".
- He held that the appellant had established error by the Member with respect to her incorrect conclusion regarding the significance of the deemed date of injury.
- He held that the Member took into account an irrelevant matter when she directed her attention to the fact that a deemed date of injury had two possible consequences bearing upon the relevant test. This was an error for 2 reasons:

  (a) The appellant is correct that ss 15 and 16 are premised and preconditioned on the notion of disease as determined by reference to s 4 of the 1987 Act. In other words, by identifying a deemed date of injury for the purpose of s 15 the premise was that there was a disease injury as defined by s 4, and

  (b) what the deemed date of injury could not do was generate an injury in the form of traumata or personal injury within the meaning of s 4(a). Contrary to the Member's

statement, the effect of identifying a deemed date of injury in the present matter was not to have two possible legal consequences. The proposed amendment did not generate the ambiguity with which the Member seems to have been concerned.

- The proposed amendment did not generate the ambiguity which concerned the Member and she misdirected herself when she relied on that conclusion to refuse the proposed amendment. The consequence is that the discretion to refuse the amendment miscarried.
- He upheld ground (2) and stated that the Member erred in her conclusion regarding the effect of the proposed amendment. He stated:

  > 103. There was simply no basis upon which to conclude that the proposed amendment should not have been allowed because the respondent had not had an opportunity to investigate the consequence of the amendment. The appellant could not have resisted an application by the respondent to adjourn the proceedings to enable the respondent to put itself in a position to meet the claim. There was no convincing argument advanced as to why that obvious remedy to any prejudice the respondent might have sustained could not have been adopted as a consequence of the amendment being allowed.

- He rejected ground (3) and stated that it is not correct to assert, as the appellant asserts, that the Member failed to understand that the prejudice he claimed was the inability to articulate the claim he wished to make on the basis of the evidence. He stated, relevantly:

  > 111. Furthermore, to describe the non-allowance of the proposed amendment as "punishment" of the appellant is, with respect, inapt and inappropriate. The Member was correct to reject the suggestion that in not allowing the proposed amendment Mr Haddad was being punished. The Member was required to exercise the jurisdiction given by the Commission on the merits of the case as she saw them. It was not a question of punishing the appellant or, for that matter, the respondent.

- He upheld ground (4) and stated that the fact that the proceedings could be discontinued and recommenced without penalty is an irrelevant consideration with respect to the proposed amendment. Furthermore, if proceedings incorporating the amendment can after the discontinuance be re-commenced then, with respect, what purpose is served by not allowing the amendment and making consequential directions in favour of the respondent? The only outcome is, as the appellant submits, to make the appellant discontinue and recommence or compel the appellant to proceed to a hearing in which the true issues between the parties cannot be ventilated because of the state of the pleadings. That conclusion, with respect, is directly contrary to ss 42 and 43 of the 2020 Act.
- He rejected ground (5) and stated that the appellant had not established any basis for challenging the Member's statement that she took the evidence into account.
- He upheld ground (6) and stated that any prejudice to the respondent caused by the amendment could have been readily ameliorated by an adjournment.
- He held that the Member's exercise of the discretion miscarried because of the following errors:

  > (1) the legal consequence of the amendment in terms of the deemed date of injury was not correctly understood;
  >
  > (2) the prospect that the appellant could commence fresh proceedings was not a relevant consideration for the determination of whether to allow or disallow the amendment, and
  >
  > (3) the consideration given to the conclusion that the amendment presented the respondent with "unacceptable prejudice", failed to include a consideration as to whether such prejudice could be remedied by an adjournment of the proceedings to enable the respondent to investigate the amended claim.

- Accordingly, the discretion must be re-exercised and he allowed the amendment for the following reasons:

  (1) section 42 of the 2020 Act identifies the guiding principle as to "facilitate the just, quick and cost effective resolution of the real issues in the proceedings";

  (2) the real issue in these proceedings on the appellant's case is whether he has sustained an injury within the meaning of s 4(b) of the 1987 Act, with the consequence that s 15 of the 1987 Act is engaged. That is the issue which should be litigated on its merits.

  (3) furthermore, proceedings before the Commission are to be conducted with as little formality and technicality as the proper consideration of the matter permits:

  > The Commission is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

  (4) it is not appropriate to refuse the amendment on the basis that the proceedings can be discontinued and recommenced pleaded in an appropriate manner because that course unnecessarily inconveniences the appellant, the respondent and the Commission. Nothing is achieved by such a course, and

  (5) any prejudice to the respondent occasioned by the amendment can be readily overcome by the granting of an adjournment to enable investigations to be undertaken.

Parker ADP revoked the COD and ordered the ARD to be amended in accordance with the proposed amendment. He remitted the matter for determination by another Member.

Section 11A (1) WCA – reasonable action with respect to proposed transfer – the test of reasonableness is objective

Bunnings Group Limited v Collins [2022] NSWPICPD 24 – President Phillips DCJ – 30/06/2022

The worker commenced employment with the appellant on 20/10/2007, initially at the Norwest store before being transferred to the Rouse Hill store. On 28/10/2019, she commenced in a position as a team member of SSA (stock shortage allowance), which involved travelling to multiple stores.

The worker claimed compensation for a psychological injury arising from a number of interpersonal work-related difficulties with her supervisor, culminating in a telephone call on 3/11/2020, during which the suggestion of a transfer was made. The appellant disputed the claim on multiple grounds, which included reliance on s 11A (1) WCA.

Senior Member Capel identified the sole issue as being the application of s 11A (1). He held that the action taken by the appellant with respect of a proposed transfer was not reasonable and entered an award for the worker.

The appellant appealed and asserted that the Senior Member erred as follows: (1) in law in failing to observe that the test of reasonableness is objective, not subjective, from the point of view of the injured worker; (2) in fact in concluding there was evidence permitting him to find the employer's representative, Ms Jana Da Silva, was aware or ought to have been aware prior to making the suggestion, that for her to suggest a transfer would cause the worker emotional distress; and (3) in considering the reasonableness of the employer's action, neither identified nor restricted himself to the facts giving rise to the transfer.

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

His Honour dismissed ground (1) and stated, relevantly:

> 48. It is the unchallenged evidence of Ms Da Silva that she was aware of the difficulties that the respondent had been contending with during the year, and that when she called on 3 November 2020 "she wasn't in a good state at all".[30] It was within this context that the Senior Member then proceeded to make the finding that he did at reasons [252] that "a reasonable employer would not have even raised, let alone pressed, the option of a transfer ...". The fact that as a result of this the respondent decompensated has in no way affected the objective task of assessing the reasonableness of the appellant employer's actions.

> 49. At reasons [206] the Senior Member extracted a quote *from Attorney General's Department v K*, a decision of Deputy President Roche which deals with workers' perceptions of real events at work. On the appellant's evidence, there is no doubt about what transpired during the telephone call of 3 November 2020. They were real events and a psychological injury resulted. This however is not to be confused with the task undertaken by the Senior Member in assessing the reasonableness of that action. The findings of fact made by the Senior Member regarding the reasonableness of the appellant employer's actions are not under challenge on this appeal, and these considerations were not infected by the respondent's reaction to the proposal that her employment be transferred.

His Honour dismissed ground (2) and he stated, relevantly:

> 69. Returning to reasons [247], which is the subject of challenge on appeal, it is to be noted that it comprises of three sentences. In relation to the first sentence, Ms Da Silva's evidence confirms that this was the case. Additionally, the evidence was that there were no performance issues with respect to the respondent worker. With regards to the second sentence of reasons [247], this was the respondent's evidence and it was not challenged. In relation to the final sentence, I do not consider that this constitutes a factual finding, rather it was an inference available to the Senior Member to draw based upon the facts as found. Contrary to the appellant's submission, there was "foundational material" for this conclusion to be drawn. The problem with this appeal point is clear. Ms Da Silva on her own evidence was well aware of the respondent's problems with her recent bereavement. Indeed Ms Da Silva had offered the respondent counselling on 4 or 5 occasions, which in itself evidences an awareness of the respondent's fragility. However Ms Da Silva is then given further information in the telephone call of 3 November 2020 (outlined at [61] above) which in Ms Da Silva's mind was a significant escalation of the respondent's plight describing it thus: "She was just in a really bad state."

His Honour held that this inference or conclusion was available to be drawn. He stated that the Senior Member was not wrong in reaching the conclusion that he did, which was that the worker would not be prepared to move back into a store. Ms Da Silva had knowledge, which I have set out above, with respect to the respondent's fragility at the time the conversation on 3 November 2020 started. Tellingly, Ms Da Silva recounts the escalation in the severity of the respondent's condition during the course of that call (see [61] above, extract from reply pp 42–43). Ms Da Silva's evidence was that the respondent was "in a really bad state". He stated:

> 73. This conclusion is asserted to be an error of fact. It is not. Rather, it is a conclusion which the Senior Member has drawn from established facts and as a consequence it had the necessary basis. The Senior Member was not wrong and as a consequence the alternative basis advanced in reliance upon *Branir* is not established.
>
> 74. I would remark that the real difficulty for the appellant on this appeal is the finding at reasons, which strikes at the heart of a defence to the s 11A claim, and which is subject to no challenge on this appeal.

His Honour rejected ground (3) and he stated, relevantly:

> 97. The appellant makes a very specific allegation that the Senior Member failed to reference three specific factual circumstances. These are the three factual scenarios said to give rise to the proposal of the transfer, and that the Senior Member's failure to reference them is an error. As can be seen from the extracts above, the specific complaint raised in Ground Three has not only failed, it is incorrect. The Senior Member was clearly aware of these matters at the time that he made his finding that the appellant's conduct, through its servant Ms Da Silva, was unreasonable. All three factual scenarios were specifically addressed by the Senior Member.

His Honour concluded that the Senior Member made objective findings about the telephone conversation on 3/11/2020 and found that it was not reasonable. This was an available, almost compelling, factual finding and involved the Senior member in any error of lar, discretion or fact.

Accordingly, his Honour confirmed the COD.

Submissions made after the time period for doing so was closed – Member's duty to provide reasons – Failure to consider submissions made – COD revoked & matter remitted for re-determination

Midcoast Council v Cheers [2022] NSWPICPD 26 – Deputy President Wood – 5/07/2022

The worker was employed by the appellant for a period of 15 years, and, for 5 of those years, he worked as a team leader in Roads and Construction. The worker alleged that, following a co-worker's promotion to roads supervisor (alternately referred to as "works supervisor") in about March 2019, he began to be unfairly treated, including being moved from the Roads and Construction team to the Parks and Gardens team, where he performed work in a lesser role. He attributed that treatment to the fact that he had discovered and reported allegedly corrupt and inappropriate business activities undertaken by the new roads supervisor.

The worker sought psychological assistance from about June 2019. He consulted his GP on 4/12/2020 and was provided with an mental health program. On 3/12/2020, he ceased work with the appellant because of his psychological condition and claimed compensation.

However, the appellant denied liability and asserted that the injury was wholly or predominantly caused by reasonable actions taken during 2019 and 2020 with respect to discipline, performance appraisal and/or transfer. It also disputed that the worker had no current work capacity.

Member Snell determined the ARD and she issued a COD which determined that she was not satisfied that the psychological injury was either "wholly" or "predominantly" caused by actions taken by or proposed to be taken by or on behalf of the appellant with respect to transfer, performance appraisal and/or discipline. Further, she was not satisfied that those actions were reasonable. The Member also determined that the respondent had no capacity for work.

The appellant appealed and asserted that the Member erred as follows: (1) in law, or committed jurisdictional error or a constructive failure to exercise jurisdiction, by merely reciting parts of the evidence and failing to make material findings of fact and resolve factual conflicts based on the evidence before her; (2) She failed to provide an adequate statement of reasons, thus failing to comply with r 78 of the 2021 Rules; (3) in law by failing to engage or grapple with the competing cases presented by both parties in their submissions; and (4) in finding that the psychological injury was not wholly or predominantly caused by reasonable action with respect to the s 11A factors advanced at first instance.

Deputy President Wood upheld the appeal and her reasons are summarised below:

Wood DP upheld grounds (2) and (4) and she stated, relevantly:

> 133. It is clear from the authorities, including *Hamad*, that in the context of more than one potentially causative event, whether the events were causative of the psychological injury requires medical evidence. The Member was, therefore, required to determine the weight to be afforded to, and the acceptance or rejection of, medical opinions about causation, before she concluded what was, or was not causative of the injury. The Member accepted the opinion of Dr Smith over that of Dr Bisht because Dr Smith provided reasons as to why he maintained his view after reviewing the opinion of Dr Bisht. The Member referred to the issue of the respondent's failure to disclose his earlier psychological problems and the effect that had on the probity of the medical opinions. She concluded that, as the past history related to other causes, they appeared to be of no concern in the context of Dr Bisht's finding that the injury was an aggravation of a pre-existing condition. The appellant, however, submitted to the Member that the respondent's failure to disclose his psychological history and drug use affected the respondent's credit, so that the respondent's factual assertions could only be accepted if they were corroborated by other objective evidence. The Member did not go so far as to address that submission.

134. The Member concluded that the injury was caused by the appellant's behaviour towards the respondent after Mr Newell was appointed and the respondent had raised Mr Newell's conduct with Mr Condie. There was a conflict in the factual evidence as to whether the respondent did disclose Mr Newell's alleged illegal activities to Mr Condie prior to the appellant initiating performance management practices and before the respondent lodged a public interest declaration in October or November 2019. The appellant's case was that while the respondent mentioned that he knew matters about Mr Newell, there was nothing concrete disclosed by the respondent in the meeting in March 2019, or in May 2019. In the appellant's case, the first performance management meeting took place in March 2019, which the appellant maintained was well before the respondent raised issues with Mr Condie, or anyone else, about Mr Newell's activities. The Member did not deal with the apparent conflict in the evidence as to whether the relevant actions took place before or after the respondent complained of Mr Newell's conduct, before reaching her conclusion that the performance issues were not raised until after the respondent complained to Mr Condie about Mr Newell.

135. The reasoning by the Member that the respondent consistently reported that after he made the complaint, he was poorly treated and suffered a deterioration in his psychological health again relies upon the question of when the respondent did in fact complain about Mr Newell's conduct. In addition, the reasoning relies upon the assumption that the respondent was being poorly treated, when the appellant's case was that it was fairly dealing with performance issues and those actions had nothing to do with the respondent informing on Mr Newell. The Member found consistency in the evidence from Mr Menser and Mr Connell and the history recorded by Ms Felber. She did not, however, weigh the respondent's evidence against that presented by the appellant in order to determine whether the facts asserted by the respondent were made out and the respondent's evidence was sufficient to be accepted.

136. The Member also did not address the appellant's assertion that the evidence of Mr Connell, Mr Menser and Mr Martin should be afforded little or no weight. The Member explicitly accepted the evidence of Mr Menser and that of Mr Connell without assessing the probative value of that evidence. It follows that the Member, in accepting that evidence on its face without considering the appellant's argument, erred by overlooking a material submission made by the appellant.

137. As Kirby J observed in *Dranichnikov v Minister for Immigration & Multicultural Affairs*:

> ... in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.
>
> Obviously, it is not every mistake in understanding the facts, in applying the law or in reasoning to a conclusion that will amount to a constructive failure to exercise jurisdiction.

138. The Member's conclusion will constitute legal error if it amounts to a failure to deal with the appellant's case on the evidence.[43] However, it was not necessary for me to be satisfied that an error of law is exposed because s 352(5) of the 1998 Act is engaged if I am satisfied that an error of fact, law or discretion had occurred. The Member either misunderstood the appellant's case, or simply failed to address its submissions in relation to:

> (a) the credibility of the respondent's evidence;
>
> (b) the lack of probative value of the evidence of Mr Menser and Mr Connell, and
>
> (c) the appellant's allegation that the respondent did not disclose Mr Newell's conduct to Mr Condie until well after the performance issues were raised.

139. The Member did not expose her reasoning for concluding that the appellant's management behaviour towards the respondent commenced after the discussion with Mr Condie about Mr Newell's unsuitability for the role.

140. The Member arrived at her conclusions without sufficiently engaging with the appellant's submissions in relation to those matters. Rule 78(2)(c) of the 2021 Rules requires the Member to provide brief reasons, including the reasoning processes that led her to the conclusions made by her. Those omissions on the part of the Member are sufficient to show error on her part in her determination as to the whole or predominant cause of the injury and such error is of the kind of error required by s 352(5) of the 1998 Act.

Wood DP concluded that it was not necessary to determine grounds (1) and (3). She revoked the COD and remitted the matter to a different Member for re-determination.