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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1. Collins v Insurance Australia Ltd [2022] NSWCA 135
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Court of Appeal Decisions

MACA 1999 - collision caused stationary traffic on highway – driver injured avoiding stationary traffic – whether stationary traffic a "situation" – whether original collision caused "dangerous situation" – Appeal allowed

Collins v Insurance Australia Ltd [2022] NSWCA 135 – Meagher & Kirk JJA & Basten AJA – 2/08/2022

On 17/08/2014, the driver of a motor vehicle crossed onto the wrong side of the road on the Kings Highway near Monga, south-east of Canberra, and collided with another vehicle. Subsequently, the appellant was driving west on the Kings Highway, approximately 1km to 2km from the site of the original accident. After a long blind bend in the road, she was confronted with a line of stationary vehicles that extended from the original accident. To avoid a collision with the rear-most vehicle, she steered her vehicle up the embankment on the left side of the road, causing it to overturn. She suffered injuries.

By the time the appellant commenced proceedings in the District Court, the driver who caused the original accident had died. On 2/08/2021, Abadee DCJ held that the insurer was not liable for the appellant's injuries and that the insurance policy did not cover the claim because the appellant's injuries were not the result of a "dangerous situation caused by the driving of the vehicle" under s 3A(1)(d) of the MACA 1999. The appellant appealed.

On appeal, the issues were whether: (1) the primary judge erred in finding that the appellant was 50-65m away from the rear-most vehicle when she first saw the queue of stationary vehicles; (2) the appellant's injuries resulted from a "dangerous situation" caused by the insured driver's driving of his vehicle; (3) the insured driver owed the appellant a duty of care; (4) the insured driver breached a duty owed to the appellant; and (5) the appellant was contributorily negligent.

The Court allowed the appeal and the headnote reads as follows:

> **Issue 1 – distance of vehicle**
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> **per Basten AJA (Meagher and Kirk JJA agreeing):**
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> (1) The primary judge did not err in finding that the appellant was 50-65m away from the rear-most vehicle when she first saw the queue of stationary vehicles: [67].

Issue 2 – "dangerous situation"

per Basten AJA (Meagher and Kirk JJA agreeing):

(2) The heavy traffic resulting from the original collision was a "situation" within s 3A(1)(d) of the MACA. The situation was caused by the insured driver colliding with another vehicle: [105].

(3) Whether a situation is "dangerous" must be determined prospectively by reference to the state of affairs immediately prior to the injury. Having regard to purpose of legislation "dangerous" should be given its ordinary meaning: [98], [106].

Chapman v Hearse (1961) 106 CLR 112; [1961] HCA 46; *Zotti v Australian Associated Motor Insurers Ltd* [2009] NSWCA 323; 54 MVR 111; *Allianz Australia Insurance Ltd v GSF Australia Ltd* (2005) 221 CLR 568; [2005] HCA 26; *Kimber v Chief Executive, Department of Treasury and Finance, for Chief Executive, Department for Health and Wellbeing (SA Ambulance Service)* [2021] SASCA 133, referred to.

MACA 1999 (NSW), ss 5, 6; Motor Accidents Amendment Act 1995 (NSW); Motor Accidents Compensation Amendment Act 2006 (NSW); Motor Accidents Compensation Amendment Act 2010 (NSW), considered.

(4) There was a "dangerous situation" because (i) a queue of stationary vehicles were not visible to a driver until within 50-65m; (ii) the existence of the queue could not have been anticipated by reasonable drivers taking care for their safety; (iii) it was not necessary for a driver to drive at less 60 km/h where the speed limit was 90 km/h and there was no sign advising a lower speed limit and (iv) a car driving at 60 km/h could not stop in time without difficulty: [106]-[109].

Issue 3 – duty of care

per Basten AJA (Meagher JA agreeing):

(5) The insured driver owed a duty of care to the appellant. A negligent driver who causes a collision on a regional highway creates a risk of injury to other road users who were not involved in the initial collision. The dangerousness of the situation was not a function of time or geography: [122], [130].

Chapman v Hearse (1961) 106 CLR 112; [1961] HCA 46; *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330; [2007] HCA 42, referred to.

per Kirk JA:

(6) The duty of a motorist to other road users is well established. The issue here was whether the distance in time and space between the insured driver's collision and the appellant's accident was such as to take the appellant outside of the class of road users to whom the duty was owed. It did not. The consequences of the original collision were still in play. The appellant suffered physical injury, being a risk of harm of a kind that was certainly reasonably foreseeable, and which the insured driver should have had in contemplation. It was a risk of harm of a kind for which the duty of a driver has been held to extend in other cases. The insured driver created a dangerous situation by putting an obstacle in the path of subsequent vehicles. Motorists in the position of the appellant were vulnerable to a meaningful extent: [12]-[16], [23], [25]-[26], [29]-[30].

Sutherland Shire Council v Heyman (1985) 157 CLR 424; *Vairy v Wyong Shire Council* (2005) 223 CLR 422; [2005] HCA 62; *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59; *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649; [2009] NSWCA 258; *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515; [2004] HCA 16, referred to.

Issue 4 – breach of duty

per Basten AJA (Meagher JA agreeing):

(7) The foreseeability and materiality of the risk must be assessed from the time of the original collision, not by reference to the precise circumstances in which it materialised. The seriousness of the possible consequences is relevant to determining whether a reasonable person would

have taken precautions. The consequential risks arising from a collision on a two-lane highway were foreseeable and not insignificant. A reasonable person in the insured driver's position would have taken precautions to avoid the collision: [134]-[137].

per Kirk JA:

(8) Breach must be assessed prospectively. The trial judge erroneously focused on the precise mechanism by which harm in fact occurred. Whether there was a geographic connection between the two accidents was irrelevant to the likelihood of the foreseeable risk of harm eventuating. A risk may be characterised as "not insignificant" even where it has a "low" chance of occurring. A reasonable person in the insured driver's position would have taken precautions to avoid causing the not insignificant risk of physical harm to other road users: [38]-[41].

Issue 5 – contributory negligence

Per Basten AJA (Meagher and Kirk JJA agreeing):

(9) The driver of the rear-most vehicle in the queue and the vehicle behind the plaintiff were able to avoid a collision and injury. The appellant was 20% contributorily negligent: [145].

Supreme Court of NSW Decisions

Judicial review – jurisdictional error and error on the face of the record – extension of time – delay explained – incorrect legal test applied by delegate – no point of principle

AAI Limited t/as GIO v Luk [2022] NSWSC 1007 – Lonergan J – 29/07/2022

The first defendant was injured in a MVA on 30/07/2018 and the plaintiff is the CTP insurer of the vehicle at fault. There was a dispute between the parties as to whether the first defendant's injuries were minor for the purposes of s 1.6 of the MAIA 2017.

On 11/06/2019, Dr Perla certified that the first defendant's back injury was not a minor injury and he diagnosed this as "disc extrusion with radiculopathy."

On 17/10/2019, Dr Keller reviewed the first defendant and provided a report to the plaintiff, which raised a question over the first defendant's allegation that he was unable to return to work as a chartered accountant and he referred to some inconsistent movement restriction in the lower back, unexplained altered sensation in the left foot and unexplained weakness in the left ankle.

On 5/03/2020, Dr Coroneos, neurosurgeon, reviewed the first defendant for the plaintiff. He referred to the MRI films and his interpretation of them. He noted that in August 2018, the treating GP noted a complaint of "funny feelings" and weakness in the right lower limb, which suggested that the MRI findings were actually related to spondylosis, not injury. He also questioned why the first defendant had not returned to work. He concluded that the first defendant may have experienced a cervical and lumbar soft tissue strain in the MVA, but from a neurosurgical perspective the effects had ceased.

In May and September 2020, surveillance was conducted and this suggests that there is inconsistency between the way the first defendant behaves when he is engaging in medical assessments as opposed to his normal activities.

On 14/05/2021, the plaintiff applied for further assessment under to s 7.24(2) of the Act and Regulation 13 of the Motor Accident Injuries Regulation 2017 (NSW).

On 22/12/2021, the Delegate made a decision dismissing the application, but this was not sent to the plaintiff until February 2022.

On 23/02/2022 the plaintiff made an application to the Delegate to withdraw and remake the decision in accordance with the principles set out in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597; [2002] HCA 11.

However, on 30/03/2022 the Delegate issued a further decision refusing to review the earlier decision.

The plaintiff sought a declaration setting aside or declaring invalid determinations made by a Delegate of the PIC on 21/12/2021 and 30/03/2022. Those determinations resulted from the plaintiff's application for a further medical assessment of injuries suffered by the first defendant. It also sought an extension of time to lodge the judicial review proceedings in respect of the first decision.

Lonergan J stated that the reasons for delay are clear as it is necessary to first exhaust existing remedies - (*Rodger v Dr Gelder* (2015) 71 MVR 514; [2015] NSWCA 211 - which included requesting the Delegate to revisit the decision made in December 2021. Further, that initial decision was provided very late to the insurer - a delay of about six weeks. He therefore allowed the extension.

His Honour held that the delegate's decision is patently wrong because it applied the wrong test at law and he stated, relevantly:

> 19. The Delegate was required to consider and form an opinion in accordance with s 7.24(5) of the Act as to whether she reached the state of satisfaction that the material relied upon by the insurer was additional relevant information that was capable of having a material effect on the outcome of the previous assessment pursuant to Regulation 13(2).
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> 20. The Delegate did not do so. She failed to take into account properly or at all the test to be applied as set out in the decision of the NSW Court of Appeal in *Jubb*. As a result of this failure, there is both jurisdictional error and error on the face of the record.
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> 21. *Jubb* revisited the more narrow construction of the relevant test applied by Rothman J in *Singh v Motor Accidents Authority of NSW (No. 2)* [2010] NSWSC 1443 and Button J in *McCosker v Motor Accidents Authority of New South Wales* [2015] NSWSC 434. As stated by Gleeson JA (with whom Meagher JA and Payne JA agreed) at [80] in *Jubb*:
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> > [80] … the premise of the second proposition in *Singh (No 2)* seems to be that a further medical opinion cannot constitute "additional information" unless it is based on a change in the claimant's underlying symptoms and circumstances. The correctness of that premise may be doubted. It would seem to conflate the separate grounds referred to in s 62(1)(a) of "deterioration of the injury" and "additional relevant information". For the latter ground, it is the character of the information as additional and relevant which is to be evaluated by the proper officer when forming the opinion or state of satisfaction required by s 62(1A). A <u>further medical opinion based on the same material as was available at the time of the earlier assessment may, depending on the cogency of reasons for the opinion expressed, constitute additional information</u>. So much seems to have been accepted by Meagher JA in *Henderson v QBE Insurance* at [106]. (emphasis added)
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> 22. *Jubb* is the proper approach and although Gleeson JA refrained from overruling the *McCosker* decision and other like decisions, it amounts to a correction of the approach taken and is the test to be applied.
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> 23. The Delegate applied the wrong test. The Delegate stated that expert opinion based on the same material that was before the Medical Assessor was prohibited from constituting additional relevant information. The correct test is that it may constitute additional information, depending on the cogency of reasons provided.

His Honour set aside the decisions dated 21/12/2021 and 30/03/2022, extended the time to commence the proceedings to 26/04/022 and remitted the matter to the President of the PIC for determination by a different delegate according to law.

Jurisdictional error - judicial review of decision of appeal panel – where appeal panel confirmed MAC determining 13% WPI - whether the appeal panel asked itself the wrong question by confining itself to the precise grammatical meaning of the terms of the referral – Summons dismissed with costs

Mifsud v Pitador Excavations Pty Limited t/as JD Concrete Pty Ltd [2022] NSWSC 1010 – Campbell J – 29/07/2022

The plaintiff applied for judicial review of the decision of a MAP convened under s 328 of the *WIMA* by the Registrar of the former WCC, which heard his appeal against a MAC (13% WPI) with respect to a work injury on 23/03/2015.

The MAP confirmed the MAC, but also found that the amended referral issued to the AMS failed to include a specific request for an assessment of WPI caused by a frank injury to the right shoulder on 23/03/2015. The MAP made a second decision regarding this issue.

The real issue before the MAP concerned the AMS' interpretation of the amended referral for assessment dated 16/10/2020, and the scope of the required assessment because the AMS was unable to make a diagnosis of Complex Regional Pain Syndrome ("CRPS"). For this reason, the AMS made no assessment of WPI referrable to his finding of a restricted range of motion of the right elbow and wrist. The AMS assessed 13% WPI (right upper extremity (shoulder)) and 0% WPI for CRPS and peripheral nerves.

There was no real dispute that the plaintiff suffered WPI as a direct result of a frank injury to his right shoulder. In the appeal, he argued the referral to the AMS should have allowed an assessment of the right shoulder, right elbow and right wrist, whether or not CRPS was present as the cause of the elbow & wrist impairment. The AMS' findings for the right elbow and wrist would have resulted in an assessment of 23% WPI. This would have satisfied the threshold under s 39(2) *WCA* and entitled the plaintiff to continuing weekly payments after 260 weeks.

The plaintiff sought judicial review on the following grounds: (1) The MAP erred law and made a jurisdictional error when it held that an assessment by range of motion was only available if CRPS was found; (2) The MAP erred in law and made a jurisdictional error when it held that the Guides did not authorise assessment for range of movement where CRPS had not been established; (3) the MAP erred in law and made a jurisdictional error when it failed to hold that the referral required an assessment of WPI resulting from the accepted injury to the shoulder; (4) The MAP erred in law and made a demonstrable error when it held that the referral restricted the AMS from assessing the impairment resulting from the injury and only permitted an assessment of the elbow and wrist if there was a finding of CRPS such as to allow an assessment applying chapter 17 of the Guides; (5) The MAP erred in law and made a jurisdictional error when it held that the AMS was restricted by the referral to only assessing impairment of the elbow and wrist if he found CRPS when the claim was for impairment resulting from injury to the right shoulder, elbow and wrist; and (6) The MAP erred in law and made a jurisdictional error when it held that the Registrar could limit the impairments to be assessed to those impairments that exist when there is a finding of CRPS when the Registrar's only power was to refer a medical dispute for assessment.

However, at the hearing of the summons, the plaintiff applied for leave to add an additional ground, namely: (7) The MAP erred in law on the face on the record and made a jurisdictional error when it asked the wrong question to identify the dispute that had been referred for assessment.

Campbell J dismissed the summons and his reasons are summarised below.

- At [55]: His Honour was prepared to accept that the MAP "seems to have failed to understand and address Mr McManamey's argument about the alternative means of using loss of range of movement in the joints of the arm to assess impairment even when CRPS was not involved." He also accepted that the MAP "tethered itself too tightly to the terms in which the referral was expressed rather than taking a broader view of the material which defined the particular medical dispute between the parties which they had presented for resolution." The AMS did not take a "pragmatic approach", but rather identified the scope of the dispute by reference to the materials as required by law. He did not limit himself to the terms of the referral.

- At [56]: His Honour acknowledged that the MAP required the amendment of the referral in obedience to the judgment of Adamson J in *Skates v Hill Industries Ltd at first instance* [2020] NSWSC 837 at [73]. However, in its judgment in *Skates,* the Court of Appeal a broader approach. In my judgment, it is erroneous for an AMS or an appeal panel to treat the precise terms in which the referral is expressed as fundamental to jurisdiction or power. If this is so, amendment was strictly unnecessary even if it may have been expedient. With some hesitation having regard to what Basten JA said in *Skates* (at [31]) about the bounds of the Appeal Panel's medical expertise, I would be prepared to hold that focusing solely upon the terms of the referral may in some cases constitute jurisdictional error or constructive jurisdictional error.
- At [57]: I am accordingly satisfied that Mr Mifsud has established error on the part of the Appeal Panel on these two bases. The question then is: are these errors either jurisdictional or errors of law on the face of the record requiring the intervention of this Court?
- At [58]: My difficulty in the present case is that I do not regard these "errors", if I'm correct about them, as material: *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; [2018] HCA 34. If one considers the material, other than the terms of the referral, which defines the dispute, the sole justification for considering both of Mr Mifsud's elbow and wrist restrictions as part of his overall work-related impairment is the hypothesis propounded by A/Prof Boesel that Mr Mifsud suffered CRPS Type 2 due to an intra-operative occurrence. An occurrence of this type would be a consequence of the frank work injury to his right shoulder which the surgery was undertaken to treat. A/Prof Boesel's opinion was foundational to Mr Mifsud's "claim".
- At [61}: His Honour said it was important to emphasise that the plaintiff now accepts that CRPS does not provide the relevant causal pathway required by the terms of s 66 WCA to found an entitlement to permanent impairment compensation.
- At [62]: It is for the plaintiff to demonstrate that his injury "results in" the permanent impairment for which he contends. The phrase "results in" connotes legal causation in the sense of permanent impairment caused by or materially contributed to by the work injury. This will typically require the establishment of medical causation, subject to the principles established in *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538; [1940] HCA 45 and subsequent cases.
- At [63]; Counsel for the plaintiff argued:

  > "… one of the things that was available to [the Appeal Panel] was to look at the entirety of the evidence and come up with the conclusion that whilst [Mr Mifsud] did not have CRPS as at that time, he had nonetheless in the past had a condition which had features of CRPS, was causally related to the shoulder and that the loss of range of movement in the elbow and the wrist was a consequence of that."

- However, the plaintiff's Counsel accepted that there was no evidence that you could have a past condition of CRPS that might be linked to such losses which were relevantly permanent and his Honour held that there is no supporting medical material in the plaintiff's claim.
- At [64]: Considering this material together it is quite clear that the MAP decided that the only available construction of the referral was in effect that the assessment of the degree of impairment of Mr Mifsud's right upper extremity was restricted to that caused by CRPS Type 2. The MAP seemed to have arrived at that conclusion on the basis that all of the body parts mentioned in the parenthesis of the referral were qualified by the concluding words "– as a result of CRPS Type 2 (if present)". With respect, the MAP's own decision acknowledged that the right shoulder impairment was referrable to the frank injury. It was an error for the MAP to focus on the referral, but on the other hand, the claim that the additional impairment constituted by the loss of range of motion in the elbow and wrist was related to the injury otherwise than "as a result of CRPS Type 2" had not then been made. Effectively, the MAP refused to permit this claim to be made for the first time on appeal because the employer had not had the opportunity to consider it.

- At [65]: His Honour said that CRPS was the only means by which the whole of the asserted WPI in the right upper extremity could be said to have resulted from his work injury. Had the MAP looked beyond the terms of the referral they would have identified the dispute by reference to "the disputants competing claims" and decided that the only hypothesis available on the material before them by which the condition of the right elbow and wrist could be included in an assessment of permanent impairment was by the causal pathway of CRPS. That ground, which was pressed before the AMS, had been abandoned before them. Therefore, neither tethering themselves too tightly to the terms of the referral nor misunderstanding the plaintiff's argument about an available basis for assessment under Chapter 2, SIRA guidelines and Chapter 16 AMA5 was a material error.
- At [67]: His Honour noted that the plaintiff did not apply for re-examination by a member of the MAP and in circumstances where no re-examination took place, it is difficult to see how the Appeal Panel could have arrived at an alternative hypothesis, not articulated in the medical material proffered by either party, which they were prepared to accept as the correct conclusion supporting the degree of WPI for which the plaintiff contended.

PIC – Medical Appeal Panel Decisions

Medical appeal – whether the MA failed to apply a s 323 WIMA deduction; whether MA had failed to consider surveillance material - whether the MA failed to adequately consider evidence of inconsistent presentation – Held: there was no evidence for a s 323 deduction - the MA made a demonstrable error in not referring to surveillance material it in his reasons – On re-examination by the MP, there was no evidence of an organic basis and the worker's presentation to both the MA and MP were inconsistent with material in the surveillance reports and early clinical notes - surveillance descriptions and photographs of the worker's movements thereof showed normal use of the injured right extremity - injuries were at best psychologically based and there was no residual orthopaedic impairment – MAC revoked

ISS Property Services Pty Ltd v Ayoubi [2022] NSWPICMP 293 – Member Wynyard, Dr R Pillemer & Dr J Bodel – 19/07/2022

On 14/12/2021, Dr J B Stephenson issued a MAC which assessed 30% WPI for injuries to the fingers and thumb, right wrist, right elbow and right shoulder, caused when a sash window fell on the worker's hand. The appellant appealed against a MAC under ss 327(3)(c) and (d) *WIMA*.

Following a preliminary review, the MP determined that the worker should be re-examined and this was conducted by Dr Pillemer (Dr Bodel observing) on 19/04/2022.

On appeal., the appellant asserted: (1) the MA had fallen into error in failing to make a deduction pursuant to s 323 *WIMA;* (2) the MA had failed to consider the surveillance material; and (3) the MA had failed to properly consider evidence of inconsistency and accordingly test for consistency in his examination of the worker.

The MP rejected ground (1) and held that it requires more than a simple reference to evidence that may have indicated a pre-existing condition or prior injury to found a s 323 deduction.

In relation to grounds (2) and (3), the MP stated that the function of an MA is "neither arbitral nor adjudicative: it is neither to choose between competing arguments nor to opine on the correctness of other opinions on [the referred] medical question." However it is incumbent on an MA to set out the actual path of reasoning by which he arrived at his opinion, and where more than one conclusion is open to an MA in view of the evidence, he is obliged to give some reasons to explain why he preferred the conclusion he reached, as we have noted at the outset of these reasons in *Vegan*.

The measurements the MA recorded demonstrated that there was very little movement in the fingers at all, and that the range of motion in the shoulder, elbow and wrist were grossly limited. These limitations were observed by Dr Breit, who noted there was negligible movement in any of the joints on testing, including the uninjured thumb, and that the worker's neck and shoulder movements on formal examination were inconsistent with the movements in informal moments such as when talking to his daughter in the consulting room.

The MP's medical experts were satisfied that the evidence contained in the photographs to which the appellant referred showed a range of motion in the digits under examination that was significantly at odds with the much more restricted range of motion accepted by the MA. The MP stated, relevantly:

> 65. The surveillance evidence was not referred to by the MA, and in view of the contrast in presentation between what was observed and photographed by the investigator and that reported by the MA, the conclusion inevitably follows that the MA did not see the surveillance material. The MA is an experienced and respected clinician, and it is improbable that he would not have commented on that material, had he been aware of it.
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> 66. We are therefore satisfied that the MA has made a demonstrable error in both failing to consider the surveillance material, and therefore failing to give any explanation as to why the use of the worker's fingers, hand, arm and elbow reported in the surveillance evidence was not inconsistent with the worker's presentation to the MA…
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> 68. The report of Dr Pillemer is adopted, and a number of issues accordingly arise.
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> 69. The re-examination confirmed that there was no obvious organic problem. When active movement of his shoulder and elbow were attempted, these were minimal, but not confirmed on indirect observation. The isometric contraction noted by Dr Pillemer indicated voluntary restriction of movement.
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> 70. Importantly, there was no circumferential wasting or intrinsic wasting. There was accordingly no clinical evidence that the worker had been using his right hand and upper extremity in anything but a normal fashion.
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> 71. There was no organic basis for the diffuse sensory loss the worker complained of, and his inability to move any of his digits was purely voluntary.
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> 72. These clinical findings are consistent with the contemporaneous clinical notes recorded by the worker's general practitioner (GP), Dr David Huynh of 7 March 2020…
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> 74. These clinical observations have to be considered in the light of the surveillance evidence. The reports of the investigator showed the worker using his right hand in a normal fashion. He was seen in December 2020 variously smoking a cigarette; grasping various items; using his right hand to hold a hose, a bucket and a broom, and the report specifically noted the use of the fingers of the right hand in those functions. Further observations in April 2021 showed him using a mobile phone with the fingers of his right hand, opening a car door and carrying bags of shopping – that is to say, apparently using his hand and fingers in a normal fashion. This evidence is consistent with the lack of wasting noted in Dr Pillemer's re-examination.
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> 75. Moreover, we had before us the photographs taken by the investigator on 21 April 2020. The worker was seen placing his right hand at the back of his head with significant elevation of the right shoulder. Another photograph showed him scratching the back of his left shoulder with his right hand, showing a full range of adduction.
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> 76. A further photograph showed him leaning forward and resting his chin on his right hand, being supported by his thumb and index finger, with the other fingers flexed at the level of the MP joint. These actions are inconsistent with the clinical picture he presented both before the MA, and before us.
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> 77. Whilst the worker suggested in submissions that Dr Breit's opinion was not a basis for challenging the assessment, we disagree. Our findings confirm Dr Breit's findings that there was an abnormal illness behaviour in the worker's presentation to him. We note that the MA referred to Dr Breit's report, but not to that opinion, nor the opinion in Dr Breit's subsequent opinion that Mr El Ayoubi was suffering from a "factitious disorder."
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> 78. We are accordingly satisfied that the injuries sustained on 6 March 2020 would have settled within a month or so, certainly by December 2020, when he was seen using his right hand and fingers in a normal fashion. Mr El Ayoubi's problems are now at best psychologically based, and beyond the expertise of this Panel. There is no residual orthopaedic impairment.

Accordingly, the MP revoked the MAC and issued a fresh MAC, which assessed 0% WPI.

PIC – Medical Review Panel Decisions

MAIA 2017 - medical assessment of minor injury and claimant's review under s 7.26 of the MAIA – Held: All injuries were minor injuries – MAC revoked

AAI Limited t/as GIO v Alshenawa [2022] NSWPICMP 296 – Member Cassidy, Dr D McGrath & Dr S Moloney – 20/07/2022

On 29/01/2020, the respondent was driving his car and was involved in a collision caused by another vehicle. The appellant (the insurer of the vehicle) at fault accepted liability and paid statutory benefits. However, on 11/04/2020, it denied liability for weekly benefits on (after the first 26 weeks) because the respondent's injuries were "minor injuries".

The respondent requested an internal review, but the appellant confirmed its decision. It then applied to DRS for an assessment of a medical dispute and this dispute was later transferred to the PIC.

On 11/05/2021, Assessor Oates issued a Certificate, which determined that the respondent's injuries to the cervical and lumbar spines were not "minor injuries." However, he took a history of a prior injury to the lumbar spine in 2012, but he did not suffer leg pain or pain in his neck and upper arms before the MVA.

The appellant applied for a review of the Assessor's decision and the President of the PIC convened the Review Panel.

The RP noted that the certificate of injury, which was issued less than 1 week after the MVA, diagnosed multi-level cervical disc bulge with radiculopathy and aggravation of pre-existing discogenic back pain as a result of the MVA. It held that there was no evidence that the respondent had suffered any fractures or other joint abnormality to his shoulders as a result of the MVA. It reviewed the imaging studies, the GP's clinical notes and the evidence of Dr Darwish and held that there was no change to the lumbar spine condition since the MVA and it was not satisfied that any disc protrusion or annular tear shown on post-MVA imaging was caused by, or was worsened by, the MVA.

The MRP stated that there was one possible sign of radiculopathy upon examination and it was not satisfied that the respondent was suffering from radiculopathy at the time of its examination. It held that there was nothing in Dr Darwish's reports to confirm the presence of any or at least two of the signs of radiculopathy necessary for the lumbar spine to fall outside of the definition of minor injury in s 1.6 of the *MAIA*.

With respect to the cervical spine, the MRP stated that it confirmed one possible sign of radiculopathy (sensory loss), but this was based on subjective complaints and did not correspond to a nerve root or peripheral nerve distribution. It was therefore not satisfied that the respondent was suffering from radiculopathy at the time of its examination. Further, Dr Darwish's reports and records do not indicate any of the five signs of radiculopathy being present at any time since the MVA.

The MRP reviewed the radiological reports and noted that two MRI scans of the cervical spine revealed "no cause" for the "radiculopathy" complained of by the respondent. There was no correlation between the radiological findings and the respondent's complaints of pain and the complaints of radiating pain into the limbs, hands and fingers are not explained by the MRI findings.

After a thorough history and examination, the medical members of the MRP were not satisfied, that the radiological findings are any more than incidental findings, commonly found in person's in the respondent's age group. The MRP held that the circumstances of the MVA and the history of symptoms do not support a finding that the cervical disc tear and protrusion were caused by the MVA.

Accordingly, the MRP was not satisfied that the injuries to the neck, shoulders or lower back fell outside the definition of "minor Injury" in s 1.6 of the *MAIA*.