Bulletin

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Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

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Court of Appeal Decisions

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Iqbal v Hotel Operation Solutions Pty Ltd [2022] NSWCA 138 – Brereton & Mitchelmore JJA & Basten AJA – 4/08/2022

Between 2008 and 2010, the appellant was employed by the respondent, which provided labour hire for hotels. In October 2010, he reported pain and pins and needles in his right hand and the right side of his neck. In 2012, he obtained CT scans of his cervical and lumbar spines. The scan of his cervical spine showed disc protrusions with spinal cord compression.

In November 2020, the appellant commenced WCC proceedings in and alleged that his injuries resulted from the nature and conditions of his employment.

An arbitrator held that he sustained injury to his cervical spine as a result of the nature and conditions of his employment pursuant to s 4(b)(ii) *WCA*, but held that there was no evidence of work-related injury to the lumbar spine. The appellant was referred to an AMS for an assessment of WPI with respect to the cervical spine and consequential injuries.

The appellant appealed against the Arbitrator's rejection of the injuries to the lumbar spine, but Snell DP confirmed the arbitrator's determination.

The appellant appealed to the Court of Appeal and challenged the arbitrator's categorisation of his injuries. He argued that, as a matter of law, s 4(b) required the arbitrator to categorise degenerative changes as "biological" and trauma-based changes as "pathological". He argued that his injuries should have been categorised as "contracted … in the course of employment" under s 4(b)(i). He also argued that there was no evidence supporting the arbitrator's finding that he had pre-existing injuries that were aggravated in the course of employment under s 4(b)(ii).

The Court dismissed the appeal and held that the meaning of "disease" under s 4(b) must be given its broadest meaning. Section 4(b) does not require the application of strict categories of "biological" and "pathological" disease injuries.

The Court further held that the appellant bore the burden of establishing a work-related condition in the lumbar spine. He could not invert the onus of proof by asserting that there was no evidence of a pre-existing degenerative condition. He could not rely on his own evidence to establish that there was no evidence that he had no prior condition.

PIC - Presidential Decisions

Reconsideration application – s 57 of the PIC Act 2020 –Samuel v Sebel Furniture Limited [2006] NSWWCCPD 141; 5 DDCR 482 discussed and applied – held that the appropriate remedy that should be sought should be under s 353 of the WIMA instead of a reconsideration application

Fairfield City Council v McCall (No 2) [2022] NSWPICPD 29 – Acting Deputy President Parker SC – 27/07/2022

The background to this matter, including the Presidential decision **(Fairfield City Council v McCall [20220 NSWPICPD 15)** that is the subject of the reconsideration application, was reported in Bulletin 115. However, the following summary is provided as follows.

At first instance, ***Member Wright*** noted that the medical evidence indicated pre-existing lumbar spondylosis, but the dispute between the parties was whether this was aggravated by the nature and conditions of employment.

The appellant relied upon Dr Edwards' opinion that there was no work-related injury and that the symptoms were due to the pre-existing condition. However, the Member preferred the opinion of Dr Poplawski, that the nature and conditions of employment resulted in a cumulative injury to the lumbar spine starting on 12/03/2018 and continuing thereafter at a lesser level with further specific aggravation on 24/09/2019. He found that employment was the main contributing factor to the aggravation (s 4(b)(ii) WCA) and that the deemed date of injury was 24/090/2019 (s 16(1)(a)(i) WCA). He awarded weekly payments under s 36 WCA and s 60 expenses.

The appellant appealed and alleged that the Member erred in law: (1) in determining the matter on a basis not put by the parties; (2) in reversing the onus of [roof or failing to properly consider it; (3) in incorrectly drawing an adverse inference against it; and (4) in failing to give adequate reasons.

Acting Deputy President Parker SC determined the appeal and dismissed it

The appellant applied for reconsideration of this decision and the application was opposed by the worker.

Parker DP refused the application and his reasons are summarised below:

- The basis for the Application for Reconsideration arises in respect of the acceptance by the Acting Deputy President that the Worker made the submission as recorded in paragraph 64 of his Decision and paragraph 132 of the Decision of the Member.
- The appellant argued that no such submission was made at any time and the availability of the inference referred to was not raised with the parties and itself in particular. The worker did not submit that an adverse inference should be drawn against it and this was not an issue raised with the parties. Therefore, the determination constitutes an error of the kind dealt with in *Seltsam Pty Limited v Ghaleb* and *JA & MA Costa Pty Limited v Makouk* with the consequence that the decision should be revoked and the matter remitted for further hearing.
- The appellant argued that there is a strong likelihood that the error affected the result for two reasons: (1) if the matter had been raised either on behalf of the worker or by the Member, the Member would simply have been informed that there was no report available from the Doctor, the subject of the inference; and (2) the Member clearly placed significant reliance on the 'inference' as is evident from paragraphs 132 and 138 of the Statement of Reasons. Finally, the matter should be dealt with by way of reconsideration as an alternative to appeal because of the significant further cost, including the prospects of an adverse costs order.

- Parker ADP held that the appellant's remedy in respect of the decision of 29/04/2022 is by way of appeal to the Court of Appeal under s 353 *WIMA* and not reconsideration by the PIC. His reasons are summarised as follows:

  > (a) Whilst s 57(1) may well be wide enough to enable the Presidential Member to reconsider a matter vitiated by error of law, I doubt that such errors are the intended subject of s 57(1).
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  > (b) The text of s 57(2)–(6) identifying the types of error otherwise contemplated by the section, albeit "without limiting the generality of subsection (1)", are plainly not errors of law.
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  > (c) Furthermore, the previous authorities on similar provisions which provide context to the current provision have by and large concerned themselves with evidentiary matters.
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  > (d) Section 353 *WIMA* provides for a party "aggrieved by a decision ... in point of law" to appeal directly to the Court of Appeal. While it may be that where there is a clear undisputed legal error s 57(1) could be utilised to make the correction, this is not such a case.
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  > (e) The legal error is neither clear nor undisputed.
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  > (f) The objects of the 2020 Act include the disposition of proceedings with "as little formality as possible" in a timely, fair, consistent and high quality manner. This has to be read in the context of a clearly defined appellate procedure set out in ss 352 and 353 *WIMA*.
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  > (g) The appeal decision was made on 29/04/2022 and the application for reconsideration lodged on 8/06/2022. That is a significant period of delay. The application has been filed after the period for appeal to the Court of Appeal has expired. It is not in my view "timely".
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  > (h) There are obvious circumstances in which the remedy given by s 57 would be readily deployed to achieve a timely and fair disposition of matters with as little formality as possible. For example where the Member overlooked a body of undisputed evidence, or an agreed factual position or a concession made by the parties or where evidence not previously available has become available. In such cases where there was a serious possibility of an altered outcome it is plainly convenient and in line with the objects of the 2020 Act for the decision to be reconsidered and dealt with in accordance with s 57. This is not such a matter.
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  > (i) In this matter, however, the employer's complaint is that there has been legal error and in this circumstance the appropriate remedy in my view is s 353. I accept that there are cost implications. But the worker does not accept that there has been an error.

Parker ADP stated that if he had exercised the discretion in favour of reconsideration, he would have found against the appellant's challenge. He set out what the Member said in his reasons at paragraph [132]:

> The [worker] submitted that there is no report or evidence from Dr Foo in evidence without explanation from the [employer] and the inference should be made that the evidence or report of Dr Foo would not have assisted the [employer]. I note that no explanation was forthcoming from the [employer] in this regard. I accept that the [worker] was required by the [employer] to be examined by Dr Foo for the purpose of returning to work and that the [worker] did so consult with Dr Foo on or about 11 December 2019. The [employer] submitted that Dr Foo was not in the employ of the [employer] and the [worker] could have asked for his opinion. I do not accept this submission. It is usually the case that in this jurisdiction that an examining doctor in these circumstances is not in the employ the [employer]. I infer that the report or evidence of Dr Foo would not have assisted the [employer's] case. (emphasis added)

Parker ADP said that he underlined the part of the passage about which the appellant complains. The challenge is whether or not the Member was correct in his conclusion that the worker made a submission that the inference should be made that Dr Foo's evidence would not have assisted the employer's case. He is not entirely convinced that the Member says what the appellant contends. In other words, the Member correctly stated the worker's counsel's submission, which is limited to the absence of evidence from Dr Foo. The absence of this report or evidence was clearly a live issue between the parties and whether the worker's counsel submitted that there should be an adverse inference or not is not to the point. The parties, in particular the appellant, opened the issue of what inference, if any, could be drawn from the absence of Dr Foo's report.

Parker ADP held that the substance of the Member's reasons (at paragraph [132]) is that: (a) there was no report or evidence from Dr Foo; (b) there was no explanation from the employer as to why there was no report or evidence from Dr Foo; (c) the employer required the worker to be examined by Dr Foo for the purpose of returning to work; (d) the worker consulted Dr Foo on or about 11 December 2019; (e) Dr Foo was not in the employ of the employer; (f) the submission that the worker could have asked for Dr Foo's opinion was not accepted; and (g) the Member inferred that Dr Foo's report or evidence would not have assisted the employer's case.

There was no challenge to items (a) to (f). In relation to (g) the appellant argued "*that if the matter had been raised either on behalf of the worker or by the Member the Member would have simply been informed that there was no report available from the Doctor, the subject of the inference*". However, that is the very point that should have been made to the Member at the hearing of the ARD. The inference became available because the appellant's counsel failed to provide an explanation for the absence of the report and/or evidence of Dr Foo and this was a matter requiring explanation. The explanation now given (in submissions and not by way of evidence) is that there was no report and the Member was entitled to draw inferences from the evidence before him whether or not a party submitted that a particular inference should or should not be drawn.

In any event a *Jones v Dunkel* inference does not supply evidence, it merely makes a conclusion properly based on other evidence before the Commission more easily accepted. The rule in Jones v Dunkel does not fill in gaps in the evidence or convert conjecture or suspicion into an inference. It follows that even if the employer were correct that the Member was not entitled to draw the inference that he did at reasons [132], the outcome would have been the same.

Because the inference does not provide evidence but merely makes other evidence more easily accepted, it follows that the decision against the employer in the hearing before the Member must have rested on other satisfactory evidence. In this circumstance the employer could not satisfy the requirement that the outcome of the hearing, had the inference not been drawn, would have been different.

Section 4(b) WCA - failure to discharge the onus of proof to establish injury – Department of Education and Training v Ireland [2008] NSWWCCPD 134 applied – approach to contemporaneous documents - Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 and ET-China.com International Holdings Ltd v Cheung [2021] NSWCA 24 considered

Morris v Woolworths Group Limited [2022] NSWPICPD 30 – President Judge Phillips – 3/08/2022

The appellant was employed by the respondent from 18/05/1978 until August 2019 (when she retired).

On 31/01/2019 the appellant alleged that she injured her left knee at work, while working as a customer service manager and said that while obtaining a product requested by a customer, she turned and put weight on her left side and immediately felt burning pain. She reported the incident and a written report of the injury was completed that day. She returned to work the next day and continued to perform her same duties until 18/06/2019 when she took 10 weeks' long service leave. At the end of her long service leave, she decided to retire on account of her physical and mental exhaustion from injury and other stressors of the work environment.

On 21/04/2020, a MRI scan of the left knee indicated a meniscal tear and osteoarthritis.

On 7/08/2020, the appellant claimed compensation for knee injury. However, the respondent disputed the claim under ss 4, 4(b)(ii) *WCA*.

The appellant filed an ARD and the issues for determination were: (1) whether she suffered an injury on 31/01/2019;(2) the precise nature and mechanism of injury; and (3) if an injury was sustained, whether she suffered any incapacity for work or had a reasonable necessity for medical treatment.

On 20/09/2021, ***Member Batchelor*** heard the matter. He subsequently issued a COD which entered an award for the respondent.

The appellant appealed that determination and alleged that the Member committed mixed errors of fact and law as follows:

> (1) He failed to find that the appellant suffered an aggravation, acceleration exacerbation or deterioration of osteoarthritis, and a tear of the medial meniscus, in her left knee on 31/01/ 2019 arising out of or in the course of her employment with the respondent; and
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> (2) He failed to find that she appellant was entitled to an award of weekly compensation and a general order providing for payment of her medical expenses.

President Judge Phillips determined the appeal. He dismissed the appeal and his reasons are summarised below.

The appellant argued that there was a single episode of injury, there was pathology consistent with that episode of injury and no finding other than one attributing the relevant pathology to the only evidence as to a cause for such pathology was open to the Member. She asserted that he made the Member made eight factual errors, namely:

> (a) failing to find that the injury sustained on 31/01/2019 caused the aggravation of osteoarthritis in that knee and a tear of the meniscus;
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> (b) failing to find that the symptoms in the left knee did not resolve;
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> (c) failing to accept that the relevant mechanism of injury involved the twisting of the left knee;
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> (d) failing to appreciate that there was no other event or explanation for the pathology revealed by the MRI other than the injury on 31/01/2019;
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> (e) placing misconceived and erroneous weight on the record of injury; recorded by a fellow worker in the Safety Incident Report;
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> (f) erroneously characterising and treating the sparse detail recorded in the Safety Incident Report as a comprehensive record of the circumstances of injury;
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> (g) rejecting the sole forensic report before him – the report of Dr Reece who had taken an essentially reliable ("broadly consistent" in the words of the Member) history of injury;
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> (h) failing to find the absence of any resolution of symptoms.

The respondent argued that the Member's findings with respect to the evidence and the weight to be given to various aspects of the evidence are within the province of a first instance decision maker and cannot be overturned unless they were wrong or were against the weight of the evidence. The respondent disputes the Member made any such error.

His Honour rejected ground (1)(a). He noted that the Member found the appellant did not discharge her onus of proof and he stated that a problem for the appellant's submission is the Safety Incident Report. Clearly the Member was troubled by the difference in the history of the incident recorded by Dr Reece as opposed to what was recorded in the Safety Incident Report. On appeal, the appellant asserted that the Member ought to have treated the Safety Incident Report with caution, consistent with the approach taken with regards to medical records. In particular, there is now a dispute about the mechanism of the injury as recorded in the Safety Incident Report.

His Honour stated, relevantly:

> 60. There are a number of problems with this submission. I accept, as argued by the respondent, that this was not an argument advanced before the Member. To the contrary, the appellant placed significant reliance upon the Safety Incident Report in her written submissions before the Member. Indeed, the fact that the Safety Incident Report was "contemporaneous" was highlighted in the appellant's submissions before the Member. Additionally, the appellant has not taken issue with the contents of the Safety Incident Report in her statement. To the contrary, it was submitted below as follows:
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> > The contemporaneous evidence recorded in the document [the Safety Incident Report] is consistent with the [appellant's] account of injury in her statement. (emphasis added)
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> 61. Indeed the Member remarked upon the discrepancies between the Safety Incident Report, the appellant's statement and the history recorded by Dr Reece. Notwithstanding how the matter was conducted below, the appellant now attempts to undermine the history that was recorded in the Safety Incident Report. ..
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> 64. The appellant does not state which aspects of the Safety Incident Report were wrong or should not have been relied upon by the Member. The appellant herself has taken no issue with what is recorded in the Safety Incident Report. Indeed the mechanism of the injury as involving a "mat" is recorded on no less than four occasions in the document.
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> 65. It is clear from a reading of the Member's decision that he was troubled by the "discrepancies" between the Safety Incident Report which he described as a "contemporaneous document" and histories later given by the appellant in her statement of 18 February 2021, over two years after the event on 31 January 2019, and Dr Reece's history recounted in her medical report of 1 October 2020. Critically, the Member was concerned, notwithstanding the severe nature of the asserted injury, that the appellant did not seek medical attention for the injury until April 2020. Additionally, though there is evidence that the appellant did consult with Dr Kolli in 2019, there is no mention of an injury to the knee. Indeed the appellant did not consult Dr Kolli regarding her knee injury until April 2020.
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> 66. On appeal, intervention depends upon the existence of and then the correction of error. At no stage did the appellant submit that the Safety Incident Report had to be treated with caution as is now submitted. Even though the appellant herself placed reliance upon the Safety Incident Report and the contemporaneous report of injury, no issue was taken by the appellant with the contents of that document as is done now on appeal. No error in approach on behalf of the Member can arise in relation to these matters.
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> 67. In light of the factual matters that I have also set out above, it was within the decision-maker's discretion not to make the finding which this appeal ground particular asserts should have been made and that it was an error not to do so. The appellant has not identified where the Member was "wrong" in a *Raulston* sense in terms of the findings that were made. Rather, the appellant has made a number of assertions:
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> > (a) accepted injury on 31 January 2019;
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> > (b) that the pain and discomfort arising from this injury did not abate, which as described above is not correct, and
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> > (c) the respondent did not proffer any medical case and as a result, the appellant's medical case had to be accepted.
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> In terms of the appellant's case, there was indeed an injury on 31 January 2019 as is asserted in (a) above. However, the proposition in (b) above is contestable and I deal with that with respect to [60(b)] and [60(h)] below. Finally in relation to (c) above, this submission fails to deal with the appellant's own obligation to satisfy her onus of proof. The Member ultimately found that the appellant did not discharge this burden.

68. The Member was taken to the following passages from authority. In *Onassis* Lord Pearce says as follows:

> It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. (emphasis added)

69. Additionally, the Member had been taken to *Watson* where McLelland CJ said as follows:

> All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

70. The Member also had regard to Ireland and "the dangers of decision makers relying on findings of credit rather than evidence of facts necessary to determine a lawful entitlement."

71. It was entirely within the decision-making function of the Member to carefully evaluate the contemporaneous evidence which was the Safety Incident Report. Indeed the appellant (below) placed much reliance upon this document as substantiating the appellant's claim, stating that it was "consistent" with the appellant's story.

72. The Member found that this was not correct and that there were relevant differences between what was recorded in the Safety Incident Report, the history given to Dr Reece and the appellant's statement. But over and above this, the Member was troubled that the appellant did not seek treatment for the left knee until a consultation with Dr Kolli in April 2020, well over a year after the accident on 31 January 2019. Consistent with the then President's direction in *Ireland* regarding a reliance upon evidence of facts, the Member reached his ultimate finding based upon the following facts: …

73. The Member did not make a finding that the agreed injury on 31 January 2019 caused the aggravation of osteoarthritis in the appellant's left knee and a tear of the meniscus on the basis that the Member was not satisfied that the appellant had discharged her onus of proof. This was a finding that was open to the Member based upon a consideration of the evidence, not just the selected assertions pursued by the appellant. No error has been identified and this particular of error has not been established.

His Honour rejected ground (1)(b) and noted that the appellant asserted that her evidence is that her left knee pain did not abate and that there is no medical case tendered by the respondent to contradict this. She asserted that this history of symptoms was not disputed, but this is not correct. The respondent challenged that history. His Honour stated, relevantly:

> 78. It is not necessarily clear what the factual error is, in the *Raulston* sense, that the appellant is pursuing in this ground. It appears to be an argument that the appellant's evidence, and that of her treating practitioners (and the medico-legal doctor, Dr Reece), was that having been injured on 31 January 2019, her pain thereafter did not abate and consequently, I take it that the argument is that any failure to make this finding was against the evidence and/or the weight of the evidence and was as a consequence a factual error.
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> 79. The starting point in evaluating this argument is of course the statement of the appellant herself…
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> 82. On the appellant's evidence, she worked in her same role performing the same duties from the date of the injury until 18 June 2019, a period of approximately 4 ½ months. However, [18] of the appellant's statement which I have set out above seems to limit the pain and discomfort to the days immediately following the injury on 31 January 2019. That passage of the appellant's statement could not be considered to provide a history of unabated pain and discomfort as it has been submitted. The post injury evidence of disability from the appellant herself was not strong, or consistent with consistent pain. In particular, the passage at [18] of her statement talks about feelings of pain, swelling and discomfort in the days immediately following the 31 January

2019 incident. This could not be construed as covering the entirety of the period from the injury until the appellant commenced her long service leave. It leaves the reader to speculate about pain and disability during that period. Whilst the Member made no particular factual finding that the appellant's pain had resolved itself, it was not a factual error for the Member to fail to make the finding complained of in this aspect of the appeal. The state of the evidence was not such as to compel the making of such a finding.

His Honour rejected ground (1)(c) and he stated, relevantly:

89. Whilst the appellant uses the terms "turning, pivoting or twisting" interchangeably, the specific failure alleged in this ground is that the Member failed to accept that the relevant mechanism of injury involved "twisting" of the left knee. For the reasons outlined above, the Member found that the "injury occurred in the manner described in that contemporaneous document", meaning the Safety Incident Report. And having closely examined that document, the Member found that it "does not, in my view, support the submission that Ms Morris suffered a twisting injury to her left knee on 31 January 2019."

90. Given the description of the injury in the appellant's own statement and how it is recorded in the Safety Incident Report, it is entirely within the proper exercise of the Member's fact finding discretion to make the ultimate finding which appears at reasons [69], namely that he did not accept that the appellant suffered a twisting injury.

His Honour rejected ground (1)(d). He rejected the appellant's submission that there was "no other event or explanation" for the pathology revealed in the MRI, as the evidence revealed at least one other incident that pre-dated the MRI about which the specialist relied upon by the appellant, Dr Reece, made no remark. He stated, relevantly:

98. In any event, the submissions in support of this ground ignore that at all times, the onus of proof resided with the appellant and this is precisely the point made by the Member at reasons [88] when dealing with the mechanism of the injury.

His Honour rejected ground (1)(e) and he stated, relevantly:

100. In this appeal, the appellant mounts a serious attack upon the veracity of the Safety Incident Report document. The appellant goes so far as to submit that the cautionary direction with respect to medical records arising from the Court of Appeal authority of *Mason* should be applied in those terms to a different class of document, namely a contemporaneous record of injury. There are a number of problems with this submission. On appeal, error of fact, law or discretion must be identified. At no stage before the Member did the appellant assert that the Safety Incident Report needed to be treated with caution, to the contrary its veracity was urged upon the Member as being a contemporaneous record consistent with the appellant's account of injury. And later in the same submissions before the Member:

> The unchallenged evidence of the [appellant], and the contemporaneous 'Safety Incident' document confirm the true date of injury and onset of symptoms.

101. Having urged the Member to accept the contents of the Safety Incident Report, it cannot by definition be an error to reject that submission and proceed to treat the document with caution as is now alleged.

102. In any event, I do not accept that the principles arising from *Mason* with respect to medical records are applicable to the circumstances of this case and the completion of the Safety Incident Report. As Basten JA said in *Mason*, apparent inconsistencies should be approached with caution for the reasons set out at [2] of *Mason*. This is a well-known principle which directs caution because the purpose of medical treatment is different from a later forensic exercise. Unsurprisingly, the record is more likely to reflect the purpose of medical treatment and will not purport to be a complete history or proof of evidence for use in later legal proceedings.

103. This is to be contrasted with the context and purpose of the Safety Incident Report. Contrary to the purpose of medical records, the specific purpose of the Safety Incident Report is to record, in question and answer form, details of the incident. In this case it is a contemporaneous record made on the day of the occurrence of the accident. It is not a medical record created days, weeks or months later for a different purpose. Indeed the purpose of this document is to record and capture details of the incident in a timely manner. The context in which the document was created is also important. As soon as the appellant raised the fact of the injury having occurred, she was directed to and did in fact report the injury and have it recorded. The appellant's evidence confirms this and takes no issue with the document.

104. The fact that this contemporaneous document may not have the detail of a proof of evidence is not to the point. The Court of Appeal has recently dealt with the issue of witness evidence and documentary evidence in *ET-China.com International Holdings Ltd v Cheung* per Bell P (as he then was) in the following manner:

> 27. Whilst the quality and accuracy of oral recollection of actual conversations should be treated with care and caution given the fallibility of human memory (of which there has been a growing appreciation within the judiciary in recent decades), oral testimony may still be of value and importance, as was recognised in the nuanced observations of Leggatt J (as his Lordship then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC (Comm) 3560 at [22] (*Gestmin*):
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> > the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ***This does not mean that oral testimony serves no useful purpose*** – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to ***gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness*** recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' (emphasis added [by Bell P])
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> 28. Documents and events have to be understood in their context, and evidence of context will often be furnished by witnesses in their oral evidence. Documents, moreover, will not always present a complete picture of events. Indeed it would be rare that they do. Nor do contemporaneous documents necessarily or invariably convey or record the background or context in which events took place. That background or context will be familiar to the actors at the time of those events but may not always emerge from documents.
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> 29. Context is critical for at least two reasons. Documents and events take their meaning from their context. The context in which events occurred may not necessarily be apparent to a court many years later when hearing a case. A clear understanding of context, both commercial and cultural, is also important where, as in the present case, some or all of the events under consideration occurred overseas and in settings that may differ from those usually dealt with in domestic litigation." (emphasis added)

105. As has been described in *Onassis* above, the law has traditionally placed weight upon a contemporaneous record. The appellant's current submission would seek to deviate from that longstanding approach. That is not to say that contemporaneous documents cannot be challenged, and there can be many reasons as to why the veracity of such a document can be challenged, but no such challenge to the integrity of the document was made before the Member. This particular of error has not been established and is consequently dismissed.

His Honour rejected ground (1)(f) and he noted that there was no submission advanced to the Member which said that due to the "sparse detail" in the Safety Incident Report, it could not be relied upon. It was an important document which the Member gave close and careful attention to. The appellant urged the Member to accept the veracity of the Safety Incident Report as establishing injury and cannot now complain that the Member in fact relied upon that same document. There is no error in this approach and no submission that the Member should have treated the document as is alleged in this particular was made below.

His Honour also rejected ground (1)(g) and he stated, relevantly:

> 108. The Member's approach to considering Dr Reece's report is consistent with how such expert material is dealt with in a jurisdiction such as the Commission where the rules of evidence do not apply. This was examined by the Court of Appeal in *Hancock v East Coast Timber Products Pty Limited* [2011] NSWCA 11 where Beazley JA (as her Honour then was) said as follows:
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> > Although not bound by the rules of evidence, there can be no doubt that the Commission is required to be satisfied that expert evidence provides a satisfactory basis upon which the Commission can make its findings. For that reason, an expert's report will need to conform, in a sufficiently satisfactory way, with the usual requirements for expert evidence. As the authorities make plain, even in evidence-based jurisdictions, that does not require strict compliance with each and every feature referred to by Heydon JA in *Makita* to be set out in each and every report. In many cases, certain aspects to which his Honour referred will not be in dispute. A report ought not be rejected for that reason alone.
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> > In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight. This was made apparent in *Brambles Industries Limited v Bell* [2010] NSWCA 162 at [19] per Hodgson JA. That is the way that Keating DCJ dealt with Dr Summersell's evidence in this case, so that is not the relevant error.
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> 109. However, I will not consider this appeal point simply on the basis of the use of the word "rejecting" which is perhaps not apt for the point the appellant is trying to make. Clearly the appellant is complaining about how the Member dealt with Dr Reece's report and points to an apparent inconsistency in terms of the criticism of Dr Reece's history at reasons [83] (see [107] above) and the Member's remark that the history taken by the doctor was "broadly consistent with what is recorded in the Safety Incident Report". Rather, I will deal with this particular of the error alleged on a broader basis than simply that the report was rejected.
>
> 110. I do not accept this submission. Firstly, the Member having made the remark that the history was "broadly consistent" at reasons [66] then goes on to describe a number of "discrepancies" between three documents. They are the Safety Incident Report, the appellant's statement and the history recorded by Dr Reece. At reasons [66(a)]–[66(i)] the Member then details the discrepancies between these three sources of evidence. This was a proper enquiry for the Member to undertake.
>
> 111. Ultimately the Member at reasons [86]–[89] discussed both parties' submissions regarding the utility of Dr Reece's report and was ultimately not satisfied, expressing this dissatisfaction in the following terms:
>
> > Reading the report of Dr Reece as a whole, it may be that reference to the right knee in the report is a typographical error, and that the reference should be to the left knee. Even accepting that such is the case, the difficulty remains in the acceptance of the opinion as to causation in the report because of the inconsistency between the mechanism of injury described in the Safety Incident Report and that relied upon by Dr Reece.

112. And further:

> In this case, it is a significant omission that the [appellant] did not seek treatment for the left knee that she injured on 31 January 2019 until the consultation with Dr Kolli in April 2020 when the doctor referred the [appellant] to Dr Harbury.

113. At reasons [88] the Member had dealt with the respondent's submissions about the delay in symptoms which Dr Reece had not commented upon, which the Member remarked was a submission "consistent with the onus remaining upon the [appellant] to prove the necessary elements of her case in respect of injury, incapacity, and the reasonable necessity for medical treatment she claims in the proceedings."

114. Contrary to the appellant's submission in this particular of error, the report of Dr Reece was not relied upon by the Member for a number of reasons, the history taken by Dr Reece being one of them.

115. No error has been established in this approach to the report of Dr Reece, indeed the Member's approach is consistent with the approach to expert evidence taken in a Commission such as this and consistent with authorities such as Hancock.

His Honour also rejected ground (1)(h) and he stated that this alleged error could be dealt with relatively shortly based on his reasons in relation to ground (1)(b).

His Honour also dismissed ground (2. He noted that this ground depended upon an error being found in ground (1). No such error was found and this ground therefore failed.

Procedural fairness – Victims Compensation Fund Corporation v Nguyen [2001] NSWCA 264; Allesch v Maun [2000] HCA 40; Coldham; Ex Parte Municipal Officers Association of Australia [1989] HCA 13 applied – determinations of fact – principles applicable – Whiteley Muir & Zwanenberg Ltd v Kerr

Cavar v Nova Security Group Pty Limited [2022] NSWPICPD 31 -Deputy President Wood – 3/08/2022

The appellant alleged that she suffered an injury on 25/10/2020 in the course of her employment as a security guard. She claimed weekly compensation payments and treatment expenses against the respondent and the claim was directed to (icare), which initially accepted it and paid weekly compensation until about 15/07/2021.

On 8/02/2021, the appellant claimed lump sum compensation for permanent impairment under s 66 *WCA*, pain and suffering under the former s 67 *WCA* and damages under s 151G *WCA*.

Icare disputed liability for the claims in dispute notices dated 11/06/2021, 22/06/2021, 27/07/2021 and 29/07/2021. The notice dated 27/07/2021 disputed that the appellant was a worker or deemed worker and she was ever employed by the respondent. It also asserted that the appellant was employed by Heckenburg Group Pty Ltd t/as Heckenburg Protection Agency (Heckenburg), which company sub-contracted to the respondent.

The appellant filed an ARD and ***Member McDonald*** directed the parties to file written submissions. She then issued a COD, which determined that the appellant was not employed by the respondent and entered an award for the respondent.

The appellant appealed on eight grounds and asserted that the Member: (1) failed to provide procedural fairness to her; (2) failed to award her weekly compensation; (3): wrongly calculated PIAWE; (4) failed to award her treatment expenses pursuant to s 60 WCA; (5) failed to award her compensation for pain and suffering in accordance with s 67 *WCA;* (6) failed to reject the evidence of Dr Teychenné contained in his report dated 18 April 2021; (7) failed to refer her claim pursuant to s 66 *WCA* to a medical assessor for assessment; and (8) failed to find that she was employed by the respondent.

Deputy President Wood determined the appeal and dismissed it. Her reasons are summarised below.

Wood DP rejected ground (1). She noted that the appellant complained that the Member erred by allowing the respondent to be legally represented and that she was not served with an application by the respondent to be legally represented and she was not asked whether she consented to such an application. However, she also stated that she wrote to the PIC and the respondent indicating her objection, which Wood DP found "internally inconsistent."

Wood DP stated, relevantly:

> 73. The obligation to provide procedural fairness is concerned with giving a person, whose rights are to be potentially affected, the opportunity to deal with issues arising in the trial. However, a party cannot assert procedural unfairness where the party failed to make proper use of the opportunity provided to be heard.
>
> 74. As Kirby J observed in *Allesch v Maunz*:
>
> > Sometimes, through stubbornness, confusion, misunderstanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided. Affording the opportunity is all that the law and principle require.
>
> 75. Justice Gaudron also observed in *Coldham; Ex Parte Municipal Officers Association of Australia* (citations omitted):
>
> > procedural fairness requires only that a party be given 'a reasonable opportunity to present his case' and not that the tribunal ensure 'that a party takes the best advantage of the opportunity to which he is entitled'.
>
> 76. On the evidence, it is clear that the appellant had the opportunity to oppose the respondent's application and did not avail herself of the opportunity to do so. The appellant cannot therefore assert that the Member failed to provide her with procedural fairness in respect of allowing the respondent to be legally represented. The Member also gave valid reasons as to why it was appropriate for the respondent to be represented.

Wood DP next determined ground (8) and rejected it. She stated, relevantly:

> 85. The question of whether the appellant was employed by the respondent or by some other entity is a question of fact to be determined on the basis of the available evidence and the inferences that can be drawn from that evidence. Findings of fact made by a primary decision maker will not normally be disturbed if they have rational support in the evidence.
>
> 86. A useful overview of the principles to be applied in relation to an appeal from a primary judge's findings of fact was contained in the judgment of Basten JA (with Allsop P agreeing) in *Najdovski v Crnojlovic* as follows (citations omitted):
>
> > Once primary facts have been found and relevant inferences drawn, the ultimate conclusion may depend upon an evaluative judgment which may not be amenable to precise justification. The constraints which apply to a review of such a judgment recognise that views may reasonably differ as to the appropriate result and that error will not be found if the result is within the appropriate range. It may be that error is demonstrated in failing to reveal a process of reasoning where, although relevant and material facts have been found, the basis for the final conclusion remains impenetrable. There may be occasions in which such a result will demonstrate a failure to fulfil that part of the judicial function which requires revelation of the reasoning process, but more commonly such a case will be resolvable on the basis that the findings of fact are not as they appear or that there is otherwise an unrevealed error of principle.
>
> 87. Section 352(1) of the 1998 Act allows for an appeal against a decision of a non-presidential member to a Presidential member. Section 352(5) of the 1998 Act limits that right of appeal to the establishment of error of fact, law or discretion. Consequently, the application of the above principles needs to be considered in the context of the Commission and its statutory power to intervene.

88. In determining whether the Member has erred in respect of a finding of fact, the principles stated by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr* are relevant and have been consistently applied in the Commission. Those principles were recited by Deputy President Roche in *Raulston v Toll Pty Ltd* as follows:

> (a) [A Member], though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if 'other probabilities so outweigh that chosen by the [Member] that it can be said that his [or her] conclusion was wrong'
>
> (b) Having found the primary facts, the [Member] may draw a particular inference from them. Even here the 'fact of the [Member's] decision must be displaced'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the [Member] was wrong.
>
> (c) It may be shown that [a Member] was wrong 'by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Member] is so preponderant in the opinion of the appellate court that the [Member's] decision is wrong.

The decision of Allsop J (as his Honour then was) in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (Drummond and Mansfield JJ agreeing) is also instructive in the context of the need to establish error. His Honour observed (at [28]):

> in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.'

89. Applying the above principles, the appellant must show that the Member overlooked material facts, or gave undue or too little weight to the evidence, or that the available inference in the opposite sense to that chosen by the Member is so preponderant that it establishes that the Member's decision is wrong.

90. The evidence relied upon by the appellant included numerous text messages sent by "Noah" to the appellant about the arrangements for attending each shift. Relevantly, those arrangements included a reminder to sign on for the shift by indicating that she was working for the respondent. The appellant otherwise relied upon her own testimony that she had not been aware of Heckenburg until 21 July 2021 and her assertions that the documents relied upon by the respondent were fabricated.

91. The Member considered the appellant's submissions about the authenticity of the documentary evidence and the probative value of the evidence provided by the respondent. She also referred to the appellant's reliance on the text messages, which reminded the recipient to sign on as working for the respondent. The Member explained that such a reminder would probably not have been necessary if in fact the worker signing on for the shift was actually employed by the respondent. The Member pointed to the text message sent by the appellant to the respondent requesting work with the respondent because the "subcontractor" was not giving her enough shifts. The Member also pointed to the Induction Agreement, which referred to Heckenburg as the employer and was signed by the appellant. She reasoned that those documents indicated that the appellant was aware that she was employed by Heckenburg and that she had been aware of Heckenburg's existence prior to 21 July 2021. The Member referred to the tax invoices submitted by Heckenburg to the respondent in respect of work performed by the appellant (and other workers).

92. On the basis of that evidence, the Member concluded that the evidence relied on by the respondent was more persuasive than that of the appellant. There was other evidence that indicated that it was more probable that the appellant was employed by Heckenburg. The appellant's records from the Arab Bank Australia Limited showed four direct deposits by "HQ

Group" of varying amounts. Given that Heckenburg's correct legal name was Heckenburg Group Pty Ltd t/as Heckenburg Protection Agency, it is not difficult to infer that those payments were more likely to have been made by Heckenburg than by the respondent.

93. It follows that the Member gave due consideration to the evidence relied upon and the submissions by the appellant and provided reasons for her conclusion that she found the respondent's evidence persuasive. The Member determined the matter in a manner consistent with cl 1 of Sch 1 to the 1998 Act. The Member did not overlook material facts, or give undue or too little weight to the evidence, or arrive at her conclusion when an opposite inference was so preponderant that the Member's decision must be wrong. The Member was entitled to conclude, on the basis of the evidence before her, that the appellant was not employed by the respondent.

Wood DP dismissed the remaining grounds of appeal, which relate to the claims for weekly compensation (including the calculation of PIAW), treatment expenses, s 66 lump sums, pain and suffering pursuant to the former s 67 *WCA* and work injury damages. The Member determined that the respondent was not liable to pay the appellant compensation of any type because it did not employ her. If that finding was correct, then she is not entitled to claim compensation from the respondent.

Wood DP concluded that as grounds (1) and (8) failed, the appellant has no entitlement to claim compensation of any kind from the respondent and she confirmed the COD.

PIC – Member Decisions

Workers Compensation

Consent Awards for the respondent regarding "injury" in weekly benefits proceedings – Worker sought to claim lump sum compensation for those same body parts - Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine distinguished on facts – Claim dismissed.

Gimis v Tweed Shire Council [2022] NSWPIC 403 – Member Beilby – 21/07/2022

The worker alleged injuries to his neck, back and left shoulder as a result of operating a ride-on lawnmower at work on 1/03/2019. On 22/10/2020 he claimed weekly benefits, but the respondent disputed the claim under ss 4 and s 9A *WCA*. He filed an ARD claiming weekly benefits and s 60 expenses.

At conciliation/arbitration on 25/06/2021, the worker accepted an offer from the respondent to pay weekly benefits @ $400 per week from 4/02/ 2021, on the following terms:

1. The ARD was amended to claim primary psychological injury as a result of the nature and conditions of employment.

2. Award for the respondent in respect of primary psychological injury.

3. Award for the respondent in respect of allegation of secondary psychological injury.

4. Award for the respondent in respect of allegation of injury to the neck/cervical spine.

5. Award for the respondent in respect of allegation of injury to the left shoulder.

6. The balance of the proceedings be discontinued.

NOTATIONS

1. Respondent to pay voluntary weekly compensation of $400 per week from 4/02/2021 to date and continuing.

2. Respondent to pay voluntary s.60 expenses in respect of treatment to the back/lumbar spine upon production of accounts, receipts or Medicare charge.

3. Upon receipt of above compensation the applicant will have received all his past weekly compensation entitlements and s.60 entitlements to date.

On 22/10/2021, the worker claimed compensation for 18% WPI (cervical spine), 10% WPI (lumbar spine) and 6% WPI (left shoulder).

On 9/02/2022, the insurer disputed liability on the basis that the lumbar spine was assessed at 7% (less than the 10% threshold) and it was not liable for compensation with respect to the cervical spine and left shoulder because of the previous agreement.

The issue for determination were: (1) whether the worker could make a claim for permanent impairment considering the terms of the previous agreement?

Member Beilby noted that the worker relied upon the decision in *Trustees for the Roman Catholic Church for the Diocese of Bathurst v Hine* [2016] NSWCA (*Hine*). The dispute in that matter concerned consent findings that were made in earlier proceedings such that the worker had "*fully recovered*" from the effects of a psychological injury. The worker then filed a claim for lump sum compensation. The employer argued that it had the benefit of an issue estoppel, precluding the worker from denying that she had fully recovered and maintaining that there was a dispute that she was permanently impaired.

The Member noted that *Hine* referred to medical disputes as defined in s 319(a) *WIMA* and that it is authority that the determination of the degree of impairment that results from an injury is a matter wholly within the jurisdiction of the AMS, or on Appeal the AP. That is if there is a medical dispute, the matter must be referred for assessment.

In this matter, the factual matrix of *Hine* - issue Estoppel - did not arise and that decision is not directly relevant to this dispute. In this matter, there is no referral as there was an agreement or Consent Order that there is no "injury". A finding of injury, in the sense of s 4 *WCA*, is not one which is covered by the definition of a medical dispute as provided by s 319(a) *WIMA*. This is confirmed by s 65 *WCA*.

The Member therefore rejected the worker's submission. Whilst the PIC has exclusive jurisdiction to determine the worker's disputed claims, the question of primary injury is one which is reserved for Members of the Commission to determine. Once a Member has made a finding that there has been in fact an injury pursuant to s4 (or there has been agreement) then the matter is referred to a MA for assessment. Unless a finding or agreement is made that an injury has occurred there is no referral to a MA.

It is quite clear by the language used in s 65 *WCA*, that the degree permanent impairment is to be assessed is one that 'results from an injury". That is, it is the domain of the MA to assess impairment, once it has been established that an injury has occurred. Simply put, the determination of "injury" pursuant to s 4, is the domain of the Member not a MA.

The applicant also argued that it was entirely reasonable for them to resolve their claim in the previous proceedings for the most financially advantageous amount possible and it was not unreasonable for him to act in that way at that time.

The Member stated, relevantly:

> 27. The position the applicant was in is outlined at paragraph 1.9 of the applicant's submissions when they said they were faced with a complex paradox which was:
>
> > (a) in the event that the applicant succeeded on hearing and established liability for any of his various injuries, the offer of $400 per week backdated to 4 February 2021 was in the likely range of weekly payments to be awarded by the Commission irrespective of which of his various injuries was determined to be work-related, and
> >
> > (b) in the event that the applicant succeeded on hearing and establish liability for all his various injuries, he could have been awarded less than the offer of $400 per week backdated to 4 February 2021.
>
> 28. It is then said that the applicant understandably accepted the insurer's offer rather than proceed to hearing because even if he succeeded on the issue of liability with respect to the neck, left shoulder and secondary psychological injuries at the hearing, he could have been awarded less than the amount offered for weekly payments, leaving the applicant worse off financially.
>
> 29. This is a conundrum that workers find themselves in the Commission frequently. One would have to ask, such an attractive offer of $400 per week must have had some benefit to the

respondent. The 'devil' in the offer to my mind, is the Awards that were offered for the respondent to offset the attractive financial offer of $400 per week.

30. In those circumstances, I cannot see the real merit or relevance in relation to how the applicant is said to have acted reasonably. It seems to me that it is a compromise position that he has found himself in on the basis of giving Awards in favour of the respondent.

The Member noted that the worker relied on a report of Dr Poplawski dated 14/10/2021 with respect to claim for permanent impairment of the lumbar spine. Dr Poplawski assessed 10% WPI, but after deducting 1/10 under s 323 *WIMA* he assessed 9% WPI. This did not satisfy the s 66(1) threshold.

The Member stated that the parties agreed that if the applicant's arguments regarding estoppel were not successful then there was no jurisdiction to refer this claim to a MA. She concluded that there is no work for the PIC to do and she dismissed the ARD.