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.

Decisions reported in this issue

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Supreme Court of NSW Decisions

MAIA 2017 – judicial review – Delegate of the President of PIC failed to exercise statutory function – matter remitted to President for determination of the application for review of a MAC according to law

Bell v Allianz Insurance Australia Ltd [2022] NSWSC 1108 – Basten AJ – 18/08/2022

The plaintiff applied for judicial review of a decision of a delegate of the President of the PIC. The Plaintiff applied for review of a MAC issued by a MA on 28/02/2021 regarding the degree of WPI suffered as a result of psychological injury caused by a MVA. The delegate refused the application for review.

Basten JA noted that on 11/07/2018, a man attempted to steal the plaintiff's Harley-Davidson motorcycle in broad daylight from a carpark where was temporarily parked while he went into nearby commercial premises. The plaintiff heard the person try to start the motorcycle and ran after him. The man was unable to start the engine and was wheeling the motorcycle away. As the plaintiff closed in, the man saw him and pushed the motorcycle towards the plaintiff, so that it fell on him, with the foot peg causing a flesh wound to his leg. Another motorcycle then approached, picked up the would-be thief as a pillion passenger and turned as if to drive towards the plaintiff. The plaintiff, rightly or wrongly, treated that conduct as threatening and formed the belief that the would-be thief and his colleague were members of a motorcycle gang. The man was later apprehended by police and prosecuted.

A medical dispute was referred to an assessor under the *MAIA* and the MA issued a certificate dated 28/02/2021, which found that the psychological injuries were not related to the MVA and that an assessment of WPI was not required.

On 3/06/2021, the plaintiff's solicitor lodged an application for review of the MAC with the PIC. Pursuant to s 7.26(5) of *MAIA* the President (in practice his delegate) must decide as to whether there is "reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application".

On 26/08/2021, the delegate dismissed the application for review on the basis that they were not satisfied that there was a reasonable cause to suspect that the medical assessment was incorrect.

His Honour noted that the Summons set out 10 separate grounds of review, including a failure by the delegate to take account of relevant considerations (which itself included 9 particulars). However, he stated that the "element of superfluity may be put to one side" as there was a basis in the MA's reasoning which should have given rise to a reasonable suspicion on the part of the delegate that the assessment was incorrect in a material respect.

His Honour stated, relevantly (citations removed):

> 7. …Put succinctly, the issue may be identified as follows.
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> 8. First, the assessor was satisfied that the symptoms described by the plaintiff, which he accepted as true, were "consistent with a post-traumatic stress disorder diagnosis". However, the assessor continued:
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> > With respect to Criterion A, there would need to be a traumatic life-threatening event, which understandably within this narrative is Mr Bell fearing for his life and his safety from others, 'the bikies' in the narrative. There is documented fear of reprisals from bikies.
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> 9. Secondly, the assessor considered (correctly) whether that there was a "motor accident" that caused the injury. A motor accident is defined (in part) to mean "an incident or accident involving the use or operation of a motor vehicle". [2] The assessor found that the injury resulted from the perceived threats to the plaintiff's safety and the feeling of intimidation. The assessor continued:
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> > I am uncertain whether this constitutes part of a motor vehicle accident, or even a motor vehicle accident.
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> 10. The assessor further observed that "the ultimate adjudication may well be made by others". For reasons which will be explained below, he was at least arguably correct in this observation.
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> 11. The third step in the reasoning was where the possible error arose. If it remained open (as the assessor assumed it did) that the threats and intimidation formed part of a single incident involving the use or operation of a motor vehicle, then it was necessary to assess the resulting whole person impairment. It was only if the threats and intimidation did not form part of a motor accident that no assessment of whole person impairment was required. Accordingly, at least on the face of the reasons, if the assessor had not determined the scope of the motor accident the assessor erred by not making that assessment.
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> 12. That it was not part of the medical assessor's function to determine the scope of a motor accident, where that issue was controversial, was explained by the Court of Appeal in *AAI Limited v State Insurance Regulatory Authority of New South Wales* (*formerly the Motor Accidents Authority of New South Wales*), ("*AAI Ltd*") McColl JA stating:
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> > If, however, in a matter referred to a medical assessor, it is apparent that doubt about whether an incident falls within the statutory definition exists, the medical assessor should make findings about causation by reference to the physical event or events and leave it to the court to determine whether or not the events constitute a 'motor accident'.
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> 13. Whether the issue was to be determined by a court or by a claims assessor under the separate process provided for in s 7.36, as a precondition to the commencement of court proceedings (absent an exemption certificate), the case states a legal proposition that the issue is not, understandably, one for a medical assessor.
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> 14. Unless there was some other factor in play, there appeared to be a failure on the part of the assessor to carry out his statutory function of assessing whole person impairment. It was not in issue that he did not do that. There was therefore reasonable cause to suspect that that failure rendered the certificate incorrect in a material respect.
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> 15. That raises a question as to whether there was any justification for the delegate not so finding. The delegate was required to assess the application by reference to the "particulars" set out in it. The particulars in effect characterised the error in two ways. The first, set out by the delegate at par 6(a), read as follows:
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> > The Assessor was not required to determine whether the events which were the subject of the applicant's injury constituted a motor accident. The Assessor did this and in doing so, strayed beyond the statutory limits under which he was confined and did not conduct his assessment in compliance with the Guidelines.

16. The alternative particular was identified at par 6(f) in the following terms:

> The Assessor failed to assess the degree of permanent impairment caused by the applicant's psychiatric condition, although this was the task he was required to do under clause 6.5 of the Guidelines.

17. In short, either the assessor had decided the issue adversely to the plaintiff (no motor accident) which was beyond his power, or he had not, in which case there was a failure to complete his statutory function.

18. The delegate dealt with the first proposition on the following basis:

> The Assessor acknowledges twice in this paragraph that he is not in a position to make an 'ultimate adjudication' in respect to causation 'which may well be made by others'. He states that from a 'psychiatric opinion' even if the part of the incident involving the motorcycle constituted a motor vehicle accident, it was not the cause of the applicant's psychiatric injury because Criterion A for PTSD would not be satisfied from that part of the incident.

19. Accepting that it was open to the delegate to reason in that way, it became necessary for the delegate then to explain why, leaving the question of the extent of the events encompassed by the "motor accident" open, the assessor failed to assess whole person impairment.

20. In respect of the alternative approach identified in particular (f), the delegate reasoned as follows:

> In respect to the applicant's final submission that the Assessor failed to assess the degree of permanent impairment caused by the applicant's psychiatric condition, although this was the task he was required to do…, given that the Assessor determined that the applicant's psychiatric injury was not caused by the motor vehicle accident, it follows that there is no psychiatric impairment that can be assessed for the purposes of whole person impairment resulting from the subject accident.

21. The last conclusion cannot be right: the only reason for not assessing whole person impairment was that the assessor had made a finding that the threats and intimidatory conduct were not part of the motor accident. Yet that was the very determination which the delegate was satisfied the assessor had not made.

22. The remaining question is whether that patent error on the part of the delegate constituted an error of law, apparent as it is on the face of the delegate's reasons. There is well-known authority for the proposition that a perverse or illogical finding of fact does not constitute an error of law. However, while it is open to describe the error as perverse or illogical, it is more than that. The delegate failed to address a clearly articulated proposition put forward by the plaintiff, based on the finding of fact which the delegate accepted (namely that the assessor had not determined the scope of the motor accident), namely that the assessor had failed to complete the exercise of his statutory function. By failing to address that proposition in those circumstances, the delegate had himself failed to exercise the statutory function under s 7.26(5).

23. The plaintiff also submitted that the delegate had approached the issues raised by the plaintiff as if determining the correctness or otherwise of the medical assessment. That, as the plaintiff correctly submitted, was not the delegate's function. That function was only to consider whether there was reasonable cause to suspect error. Although the delegate expressed a final conclusion by reference to the correct legal criterion, the reasoning to that conclusion suggested a different approach had been taken.

24. Further, the plaintiff sought to identify the outcome of the assessment as manifestly unreasonable in the sense that it failed to comply with a standard of reasonableness implicit in the statutory conferral of the function.

25. Although it is not necessary to determine these further grounds of challenge, in circumstances where legal error has been identified in the reasoning of the delegate, there is nevertheless good reason to accept that both further ways of describing the error should be upheld. That reasoning need not be spelt out, as the grounds on which the plaintiff is entitled to the relief sought in the summons are clearly established.

Accordingly, his Honour set aside the delegate's decision and remitted the matter to the President of the PIC for determination according to law.

PIC - Presidential Decisions

Anshun Estoppel - reasonableness – raising a new issue on appeal – factual error

OneSteel Reinforcing Pty Ltd t/as Liberty OneSteel Reinforcing v Dang [2022] NSWPICPD 32 – Deputy President Wood – 15/08/2022

In 2003, the worker commenced employment with the appellant as a processed worker. He claimed PIC proceedings in May 2019, claiming weekly compensation for a closed period and s 60 expenses with respect to a back injury (deemed date: 25/09/2016). The dispute proceeded to conciliation/arbitration on 22/07/2019 and the dispute was resolved.

On 24/07/2019, the PIC published consent orders, as follows: (1) Amend the application to claim weekly benefits from 2/11/2016 (instead of 25/09/2016); (2) Award for the worker at the rate of $192 per week from 25/11/2016 to 2/05/2019 (agreed to total $25,000). Award for the respondent thereafter. (3) The respondent to pay s 60 expenses to $5,500 on production of accounts receipts or Medicare charge. Otherwise, award for the respondent. The PIC also noted that the worker acknowledged that as and from 2/05/2019 he has been able to earn in suitable employment as much or more than he would have earned had he remained in the employ of the respondent uninjured.

On 1/12/2020, the worker sought approval from the appellant to undergo an MRI scan of his lumbar spine. However, the appellant refused to approve it on the basis that the worker had not further entitlement under s 60 by reason of the consent orders.

In May or June 2021, the worker claimed compensation under s 66 WCA for 12% WPI, but the appellant disputed that claim and it asserted that he was prevented from bringing that claim because the claim was based on medical evidence that was in existence at the time of the prior proceedings and was not disclosed. The appellant asserted that it was prejudiced, and that "the full extent" of the respondent's claim brought in 2019 had been resolved.

On 8/09/2021, the worker filed an ARD claiming s 60 expenses (including the cost of the MRI scan) compensation under s 66. The date of injury was pleaded as 25/09/2016.

On 21/10/2021, the dispute came before Senior Member Capel. He noted that the issues in dispute included the appellant's assertion of an estoppel. He directed the parties to file written submissions.

On 19/11/2021, the Senior Member issued a COD, which determined that the worker was not estopped from bringing his claim and that the appellant was liable for the amounts claimed for permanent impairment of the lumbar spine.

The appellant appealed and asserted that the Senior Member erred as follows: (1) in law as to the nature of an Anshun estoppel; (2) in law as to the nature of an Anshun estoppel, the Senior Member erred by failing to exercise his discretion to apply the Anshun principles to the case; (3) in fact by accepting that the worker only made the decision not to proceed with the surgery in 2021, and (4) in law by taking into account an irrelevant consideration.

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

Wood DP rejected ground (1). She noted that the appellant argued that the Senior Member erred in law regarding the nature of an *Anshun* estoppel. It argued that Dr Giblin's supplementary report was clearly available to the worker in the earlier proceedings. Wood DP noted that it was relevant that this report was available, and that the worker elected not to rely on it to bring his s 66 claim at that time and that the appellant argued that the current claim ought not be permitted because the worker should not have split his case.

The appellant cited the decision of the High Court of Australia in *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28 (*Tomlinson*) and argued that the earlier authorities relied upon by the worker and cited by the Senior Member were inconsistent with that decision.

Wood DP noted that in *Tomlinson*, the plurality considered the concept of abuse of process, and observed:

> Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel.
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> Accordingly, it has been recognised that making a claim or raising an issue which was made or raised and determined in an earlier proceeding, or which ought reasonably to have been made or raised for determination in that earlier proceeding, can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel.

Wood held that based upon this passage, it is clear that an abuse of process and an Anshun estoppel are two distinct concepts, although may have overlapping features. In *Tomlinson*, their Honours proceeded to observed that:

> The third form of estoppel is now most often referred to as 'Anshun estoppel' although it is still sometimes referred to as the 'extended principle' in Henderson v Henderson. That third form of estoppel is an extension of the first and of the second. Estoppel in that extended form operates to preclude the assertion of a claim, or the raising of an issue of fact or law, if that claim or issue was so connected with the subject matter of the first proceeding as to have made it unreasonable in the context of that first proceeding for the claim not to have been made or the issue not to have been raised in that proceeding. The extended form has been treated in Australia as a 'true estoppel' and not as a form of res judicata in the strict sense. Considerations similar to those which underpin this form of estoppel may support a preclusive abuse of process argument.

Wood DP noted that in its submissions to the Senior Member, the appellant referred to the concept of "abuse of process" and included the extracts from *Tomlinson* which discussed the overlap between estoppel and abuse of process. However, the appellant did not actively submit that there had been an abuse of process in this case or that the worker's action was unjustly oppressive or had brought the administration of justice into disrepute. Its case before the Senior Member was that an Anshun estoppel applied.

Wood DP held that the Senior Member cannot be seen to have fallen into error in circumstances where "abuse of process" was not the subject of its submissions. She rejected the argument that the case law that pre-dated *Tomlinson* are not longer good law. She stated, relevantly:

> 115 …The Senior Member succinctly identified the principles established in Tomlinson, summarised above at [45], including that an estoppel arose in circumstances where the claim or issue was so closely connected to the subject matter of the prior proceedings that it was unreasonable for it not to have been made in those proceedings. That is, that an estoppel could arise where the respondent had split his case, and it was unreasonable for him to have done so.
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> 116 In *Anshun*, Gibbs CJ, Mason and Aickin JJ discussed the principles of what has been generally referred to as the "third form of estoppel." Their Honours said:
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> > In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature

> of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few.

117 It can be seen from the passages quoted above in both *Anshun* and *Tomlinson* that Tomlinson did not change the nature or application of an *Anshun* estoppel and that the earlier cases, including those determined in the context of the statutory scheme applicable to workers compensation, remain authoritative.

118 A summary of the principles enunciated in the early cases with respect to estoppel and its scope in the workers compensation jurisdiction was provided by Neilson CCJ in *Bruce*. Of particular relevance to the issues in this case, his Honour observed that an *Anshun* estoppel extends to claims as well as to defences and would apply if it was unreasonable not to rely on that matter now agitated in the original proceedings. His Honour added that such unreasonableness would depend on the facts of each particular case.

119 In the present matter, the Senior Member observed that:

> I am mindful that in *Tomlinson*, the High Court cited *Anshun* with approval, so the case law has not markedly changed since the demise of the Compensation Court. Of course, the focus in *Tomlinson* was the abuse of process.

120 The Senior Member's conclusion to reject the submission made by the appellant that the earlier cases were no longer good law was consistent with Tomlinson and was correct.

121 The appellant submits that the Senior Member appeared to focus on whether the excuse was reasonable, rather than the potentially more important question of whether the respondent was splitting his case. There is no authority to support the appellant's proposition that the fact that the respondent was "splitting his case" weighs more heavily than a consideration of whether or not it was reasonable for him to have done so.

122 An estoppel arises in circumstances where the claim or issue is so closely connected to the subject matter of the prior proceedings that it was unreasonable for the claim or issue not to have been made in those proceedings. It proceeds on the basis that the party has split his or her case, and it was unreasonable to do so. It is a composite concept.

123 Although he considered it improper of the respondent to withhold the supplementary report, the Senior Member commented that it was not a matter that he was required to deal with. The undisclosed supplementary report was evidence that tended to show that the respondent could have brought his lump sum claim at that time. It did not go to the assessment of whether the action in not pursuing the lump sum claim was or was not reasonable.

124 The appellant's submission is rejected.

125 The appellant asserts that the decision of *Thompson*, in which McGrath CJ concluded that there was no rule that prevented a worker from bringing one type of claim and then claiming a different benefit at a later stage, is inconsistent with *Tomlinson*. The appellant does not explain where any inconsistency lies, and any purported inconsistency is not apparent on a plain reading of both *Thompson* and *Tomlinson*.

Wood DP rejected ground (2) and she stated, relevantly:

> 135 The critical reasons given for not pursuing the claim in the earlier proceedings were that the respondent only had an entitlement to make one claim for lump sum compensation, the surgery, if undertaken, might likely alter the assessment of his whole person impairment and he was yet to make a final determination about the surgery. Those facts found support in the evidence.

136 The Senior Member clearly addressed the relevant factors relied upon by the appellant to show that the failure to bring the claim was unreasonable.

137 The appellant's case substantially rests on an assertion that because the respondent could have brought his case in the earlier proceedings, he should have. That submission falls foul of the observations of Allsop P in *Manojlovski*.

138 There is no basis upon which to assert that the Senior Member failed to "apply the *Anshun* principles," which involved a consideration of whether the respondent's decision to split his claim was unreasonable. Ground Two of the appeal fails.

Wood DP rejected ground (3) and held that the Senior Member's conclusion, that the worker only decided against surgery in 2021, was consistent with the worker's evidence. Dr Darwish subsequently advised him that surgery would not improve his back pain and he then decided to make his claim under s 66 WCA. She stated, relevantly:

144 The appellant has mis-stated the Senior Member's conclusion, which was a finding of fact. It is well settled that, in order to disturb a Member's finding of fact, 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.

145 It cannot be said that, in this case, the Senior Member's finding of fact was arrived at by committing any such errors. The inference drawn by the Senior Member that the respondent finally decided against undergoing surgery in 2021 was available to him and the appellant has not pointed to any persuasive evidence to the contrary. This ground of appeal fails.

Wood DP also rejected ground (4). She noted that the appellant referred to the Senior Member's observation that it did not obtain independent medical evidence in respect of the assessment of the worker's WPI. However, the appellant argued that it should have been expected to obtain such evidence when the doctrine of estoppel was available to it. She held, relevantly:

151 The appellant's grounds of appeal do not point to any error on the part of the Senior Member by proceeding to determine the respondent's lump sum claim. If this ground was intended to raise such a contention, it is not apparent from the manner in which the ground is articulated or in the submissions purportedly addressing this ground.

Accordingly, Wood DP confirmed the COD.

PIC – Member Decisions

Workers Compensation

Worker made a claim under s 66 WCA in respect of the left upper extremity and scarring – respondent argued that she was not entitled to make a further claim as that would contravene s 66(1A) WCA and 322A WIMA – Held: the worker had amended her claim made in 2020 and this claim was not a second claim and that it was in the interests of justice to exercise the discretion under s328(1A) WIMA to refer the matter for further assessment.

Papera v Equity Transport Group Pty Ltd [2022] NSWPIC 421 – Member Rimmer – 28/07/2022

On 31/07/2020, the worker's solicitor made a claim under s 66 *WCA* for 16% WPI based upon an assessment of Dr Endrey-Walder dated 23/07/2020. The respondent relied upon an assessment of 13% WPI from Dr Panjratan and placed an offer based on his report. However, the dispute proceeded to the WCC and on 17/02/2021, Dr Wong issued a MAC which assessed 19% WPI.

The dispute was referred to the AMS for assessment of the left upper extremity and scarring (TEMSKI) with the date of injury being 10/08/2019, but the AMS took a history that when she fell, the worker felt immediate severe pain in the left shoulder and also had pain at the left elbow.

The AMS noted that the worker said she had no current symptoms in the left elbow, but on examination he found a restriction of movement in the left elbow and assessed 10% upper extremity impairment (UEI). He diagnosed a soft tissue injury to the left elbow and continuing pain and stiffness at the left shoulder and elbow. The AMS also noted that in his report dated 23/07/2020, Dr Endrey-Walder considered that the left elbow had no rateable findings and that Dr Panjratan (report dated 29/10/2020) did not provide a rating for the left elbow.

In a report dated 2/03/2021, Dr Endrey-Walder stated that he found some restriction in the range of left elbow movement. He assessed 1% UEI due to restricted extension and 6% UEI due to restricted flexion which combined with 25% UEI for the left shoulder as assessed on the last examination resulted in 30% UEI or 18% WPI. Combined with 1% WPI for scarring, the total assessment was 19% WPI.

On 5/03/2021, the worker's solicitor gave notice of an amended claim under s 66 *WCA* based on Dr Endrey-Walder's further assessment.

On 16/03/2021, the respondent appealed against the MAC.

On 8/04/2021, Icare accepted for the injury on 10/08/2019 as a "sprain of shoulder joint, strain of unspecified muscles, fascia and tendons at forearm level, unspecified arm, contusion of knee, unspecified strain of elbow, strain of muscle, fascia and tendon at neck level".

On 28/06/2021, the MAP determined the appeal. It revoked the MAC and issued a new MAC, which removed the assessment for the left elbow and assessed 14% WPI (left shoulder and scarring).

On 1/07/2021, the worker filed an Election to Discontinue proceedings.

On 14/07/2021, the worker's solicitor gave notice of a claim for 19% WPI based on the reports of Dr Endrey-Walder (x 2), and the MAC dated 17/02/2021.

The respondent's solicitor placed an offer of 14% WPI (left upper extremity/shoulder) and offered a choice of 3 orthopaedic surgeons. It later arranged for the worker to be examined by Dr JB Stephenson on 21/09/2021, but that appointment was cancelled due to COVID restrictions.

On 2/09/2021, Icare disputed the claim on the basis that the worker was not entitled to make a further claim under s 66 *WCA* by reason of s 66(1A) *WCA* and s 322A *WIMA*.

Member Rimmer identified the issues for determination as being: (1) whether a further claim for permanent impairment compensation contravenes the legislative provisions contained in s 66(1A) *WCA;* and (2) whether a further claim for permanent impairment compensation contravenes the legislative provisions contained in s 322A *WIMA*.

A preliminary issue arose in the arbitration when the worker sought leave to amend the ARD to include a determination of a threshold dispute. The respondent opposed that application and the Member declined to grant leave to amend the ARD.

In relation to issue (1), the worker referred to the decision in *Woolworths Limited v Stafford* [2015] NSWWCCPD 36 (*Stafford*) where Roche DP discussed what constituted a "claim... made under this Act for permanent impairment compensation" for the purposes of s 66(1A) of the 1987 Act and whether a claim could be amended. Mr Stafford suffered a serious head injury on 14/06/2010. In April 2014, he made a claim for permanent impairment compensation in respect of 7% WPI, which was less than the 10% threshold in s 66(1) *WCA*. The insurer denied liability following the High Court's decision in *Goudappel No. 2* [2014] HCA 18; 308 ALR 213. No further action was taken in respect of the claim until September 2014, when an amended claim was made in respect of 12% WPI, on the basis that Mr Stafford was then assessed as having 12% WPI following neuropsychological testing. The insurer denied liability on the basis that s 66(1A) prevented him from making a further claim for compensation. The arbitrator in the initial WCC proceedings determined that he had made only one claim and was not precluded by s 66(1A) from bringing a further claim.

The Member noted that on appeal, Roche DP examined the statutory meaning of the term "claim and held that the term "claim" in s 66(1A) *WCA* imported more than a demand for payment and had to be capable of payment. He stated at [58]:

> For the reasons explained below, applying the above principles in the present matter, and interpreting 'claim' in its proper context, leads to only one conclusion, namely, that it was open to the Arbitrator to find that a 'claim' in s 66(1A) imports more than a 'mere demand for payment but rather is to be read as referring to a claim made in accordance with the 1987 [Act] and [the] 1998 [Act]'...

The Deputy President stated at [68] that a construction that appeared "irrational and unjust" should be avoided. The Deputy President acknowledged at [71] that the 1987 Act remained beneficial legislation and "a beneficial interpretation interprets 'claim' as one valid claim capable of payment in accordance with the legislation". He stated at [72] that:

> a 'claim' for permanent impairment compensation is, by definition, a claim for a 'monetary benefit under' the legislation. A monetary benefit under the legislation is compensation that is paid or payable. If the claim cannot succeed, because it is under the s 66(1) threshold, it cannot be a 'claim' for a monetary benefit under the Act.

The Deputy President determined that the claim made by Mr Stafford in April 2014 was not a valid claim because it was not a claim capable of payment in accordance with the 1987 Act. Accordingly, it could not be his "one claim" for permanent impairment compensation under s 66(1A) *WCA*. He also stated that a claim, whether valid or invalid, can be amended prior to its resolution or determination:

> 90. The suggestion that a claim for permanent impairment compensation, whether valid or invalid, cannot be amended prior to its resolution or determination is clearly wrong and is rejected.

The Member stated, relevantly:

> 91. It is true that neither the legislation nor the Workers Compensation Commission Rules 2011 (the Rules) deal with the amendment of the initial letter of 'claim' for permanent impairment compensation or a permanent impairment claim form. That is hardly surprising. As explained earlier in this decision, when a claim is at that informal stage, the purpose of making a 'claim' is merely to start the claims procedures in Ch 7. It is not a formal pleading. To suggest that, prior to the resolution or determination of the claim, by making a demand for permanent impairment compensation for a certain level of permanent impairment, the worker is permanently locked into that claim, and cannot amend it, is untenable and contrary to all principles of justice."
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> 92. Once an Application to Resolve a Dispute is filed with the Commission, Pt 4 r 4.2 of the Rules provide that the Commission may, on the application of a party, give the party leave to amend any document lodged by the party in the proceedings 'if the Commission considers the amendment to be necessary for the avoidance of justice" (Pt 4 r 4.2(1)). Such an amendment may be made at any stage of the proceedings and on such terms as the Commission thinks fit (Pt 4 r 4.2(3)). Where the Commission grants leave to amend a document, it may give directions as to the conduct of the proceedings consequent on the amendment.
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> 93. As an applicant is permitted, with leave, to amend the formal Application to Resolve a Dispute, "for the avoidance of injustice", so too must a claimant be permitted to amend a letter of claim, or a permanent impairment claim form, prior to the resolution or determination of the claim and prior to commencement of proceedings in the Commission. The contrary suggestion is unsupported by any authority or reasoning. It is clearly preferable that a letter of claim for permanent impairment compensation, or a permanent impairment claim form, should not be served until the worker's condition is stable and has reached maximum medical improvement. If that is done, as it should be, the issue of amending the claim will rarely arise.

94. However, there will be rare cases, such as the present, where there is a change in impairment between the date of the initial claim and the date of resolution or determination of that claim. In such cases, it is appropriate that the claim be amended to reflect the correct position. That is especially so where workers are now restricted to only "one claim" for permanent impairment compensation and where formal proceedings have not commenced in the Commission. It is clearly in the interests of justice that, subject to any prejudice to the appellant, and none has been suggested in the present case, particulars of the worker's claim properly reflected the claim that is being pursued.

95. The letter of 26 September 2014 was not a second claim. It merely amended the first claim. Except as otherwise provided by an order or rules of court, and Pt 4 r 4.2 is silent on this issue, amendments to pleadings take effect from the date of the original document which it amends rather than from the date when the amendment is made (*Baldry v Jackson* [1976] 2NSWLR 415 at 419 per Samuels JA, citing *Warner v Sampson* [1959] 1QB 297 and *Sneade v Wotherton Barytes and Lead Mining Co Ltd* [1904] UKLawRpKQB 16; [1904] 1KB 295).

96. In the absence of any other special provision in the legislation or Rules, there is no reason why the above principle should not apply to a document prepared prior to the commencement of proceedings... Thus, the amendment effected by the letter of 26 September 2014 took effect from the date of the first claim on 7 April 2014."

97. In *Mehmet Yildiz v Victoria Yeeros Pty Ltd* [2016] NSWWCC 108 (*Yildiz*) Arbitrator Harris considered whether a worker was precluded from pursuing a claim by s 66(1A) of the 1987 Act. Arbitrator Harris found that the initial claim had "resolved" by the issue of the Certificate of Determination in April 2014 in accordance with the MAC and that Mr Yildiz could not pursue the November 2015 claim because it was precluded by s 66(1A) of the 1987 Act.

98. In *Yildiz*, Arbitrator Harris referred to the reasons of Deputy President Roche in *Stafford* (at [66]-[67]). Arbitrator Harris stated that it was clear that in *Stafford* the claim had not been determined.

99. The applicant also referred to the decision of the Court of Appeal in *Cram Fluid Power Pty Limited v Green* [2015] NSWCA 250, (*Cram Fluid*). In that case, the Court of Appeal considered the effect of the 2012 amendments in relation to a second claim for permanent impairment compensation in circumstances where the worker's initial claim for permanent impairment compensation had been made, accepted and paid pursuant to a complying agreement prior to 19 June 2012. Mr Green's back condition deteriorated, and he had surgery in September 2012. In October 2013, Mr Green made a claim for further permanent impairment compensation, which the insurer denied on the ground that s 66(1A) of the 1987 Act precluded him from bringing a further claim for permanent impairment compensation. An Arbitrator of the WCC determined that Mr Green was not precluded from bringing his further claim for permanent impairment compensation and a Presidential appeal upheld the decision of the Arbitrator. That decision was appealed to the Court of Appeal.

100. In *Cram Fluid*, the Court of Appeal held at [104-110] that as Mr Green had made a claim that specifically sought compensation pursuant to s 66 of the 1987 Act and he recovered permanent impairment compensation pursuant to a complying agreement prior to 19 June 2012, he was not entitled to rely on cl 11 of the 2010 Regulation (currently cl 10 of the 2016 Regulation). Accordingly, he was precluded by s 66(1A) of the 1987 Act from bringing the further claim for permanent impairment compensation.

101. In *Cram Fluid*, no issue arose as to whether the 2010 claim was other than a valid claim, and the Court was of the unanimous view that the entry into a complying agreement which provided for compensation to be paid, meant that the initial claim had been 'resolved'.

102. In *Stafford*, the claim initiated in April 2014 was unresolved when it was sought to be amended in September 2014. Roche DP in *Stafford* did not provide any guidance on the meaning of "resolution" or "determination". In *Yildiz*, Arbitrator Harris found that the initial claim had been "resolved" when Mr Yildiz's rights merged "into determination" by the WCC's issue of a Certificate of Determination in accordance with a MAC. In *Cram Fluid*, the Court of Appeal was unanimously of the view that entry into a complying agreement which provided for compensation to be paid meant that the initial claim had been "resolved".

103. In *Yildiz v Fullview Plastics Pty Ltd* [2019] NSWWCCPD 24 (*Fullview Plastics*), Phillips P held that the later claim was a new and separate claim to the original claim that had been made and resolved by complying agreement and could not be attached to that earlier claim. Phillips P noted at [69-72] that it had not been argued that the original claim, which had been resolved by a Complying Agreement, had been amended to include the later claim.

104. Having regard to the authorities, I am of the view that in the present case, there was no signing of a Complying Agreement resulting in the payment of compensation and no Certificate of Determination was issued after the MAP issued a MAC. Indeed, the proceedings were discontinued on 1 July 2021 about three days after the MAC revoked the MAP issued by the AMS and issued a new MAC. That being the case, I am not satisfied that there was a "resolution" of the 2020 claim which had been made in the WCC.

105. In this matter, the claim was amended on 2 March 2021 to include a claim in respect of the left elbow.

106. In accordance with the reasoning of Roche DP in *Stafford*, I am satisfied that the 2020 Claim was a valid claim, but the claim was unresolved when the applicant amended the claim by letter on 2 March 2021 and remained unresolved as the proceedings in the WCC were discontinued. Further, in accordance with the reasoning of DP Roche in *Stafford*, I am satisfied that the 2020 Claim, which was valid, could be amended prior to its resolution or determination.

107. In the circumstances, I accept that the 2020 Claim was amended by the letter sent 2 March 2021. I therefore accept that the "Claim" made in 2021 was not a second claim for permanent impairment compensation.

108. On that basis, the applicant is entitled to pursue her claim for permanent impairment compensation pursuant to s 66(1) of the 1987 Act. Section 66(1A) of the 1987 Act does not apply to preclude the claim which was amended on 2 March 2021 for 19% WPI in respect of injury to the left upper extremity (left shoulder and elbow) sustained on 10 August 2019 and for scarring to the left upper extremity.

In relation to issue (2), the Member stated, relevantly:

133. In the present case it would be contrary to the dictates of justice for the applicant to be bound where the dispute was not resolved by the MAP in accordance with the terms of the referral by the Registrar's delegate. The MAP resolved a different dispute from that which the terms of the referral by the Registrar's delegate required it to decide. Therefore, the dispute as defined in accordance with the terms of referral, when accurately interpreted, remains undecided. Therefore, there has been no final resolution of the dispute which was referred. The applicant and indeed the respondent, should not have to incur costs and unnecessary delay in awaiting and arguing in the NSW Supreme Court an application for judicial review seeking to set aside the MAP's decision and ordering remittal to the President in order to arrange a further assessment. It is quicker, less costly, and less burden on the Supreme Court to simply have the Commission exercise its powers under s 329 regarding any further medical assessment.

134. On balance, I am satisfied having taken into account the facts in this matter, that it is in the interests of justice to exercise the discretion pursuant to s 328(1A) and refer the matter to a Medical Assessor for further assessment of WPI.

135. I note that the respondent has not had an opportunity to have the applicant examined by an IME for the purpose of assessment of the elbow. In those circumstances, the matter should be listed for a further telephone conference to enable the parties to make appropriate arrangements for any examination before the Medical Assessor's further assessment.

Claim for weekly benefits for alleged total incapacity - voluntary payments being made at a rate agreed in prior proceedings – subsequent downgrade in COC's - evidence of ongoing symptoms at left knee and right hip – suitable employment under s 32A WCA - relevance of geographical labour market – Held: worker was unfit for pre-injury duties and other physical work but there was evidence of capacity to work in light sedentary duties - evidence of real jobs in which the worker would be able to work – PIC not satisfied that the worker had no current work capacity & declined to make an award under s 37(1) WCA

Gready v Ricegrowers Limited [2022] NSWPIC 438 – Member Homan – 4/08/2022

The worker was employed as a machinery operator. She suffered injury in a fall at work on 18/09/2020, after which she resumed light duties and then ceased work on 19/02/2021.

In prior PIC proceedings, the respondent agreed to pay the worker voluntary weekly payments from 6/08/2021 at the rate of $750 per week.

However, on 4/03/2022, the NTD certified that the worker had NIL current work capacity and the worker claimed weekly payments at a higher rate (80% of PIAWE ($1,530), as indexed, under s 37(1) *WCA*). The respondent did not determine the claim within the statutory timeframe and the current proceedings were commenced.

Member Homan noted that the sole issue for determination was whether the worker was entitled to weekly payments under s 37(1) *WCA* from 4/03/2022 to date and continuing.

The Member held that in order to determine whether there is suitable employment, it is necessary to consider the nature of the worker's incapacity and the medical evidence, and the certificates of capacity provide a useful starting point. She noted that the certificates issued by the NTD do not provide any indication of the basis for the certification of no current work capacity. They do not contain a diagnosis or the causal relationship to work, the treatment is indicated as "simple analgesia", no estimate is provided for a return to work and no factors affecting recover were identified.

The Member noted that the worker's previous NTD had certified her as having capacity for some type of employment for 18 hours per week, with limitations on sitting, standing and driving "as tolerated", avoidance of excessive use of the cervical and lumbar spines and a lifting/pulling/pushing capacity of 2kg. That certification was from 6/07/2021 to 3/08/2021.

The Member stated, relevantly:

150. Weighing the evidence as a whole, I am satisfied that the symptoms in the applicant's lower limbs have caused her to be incapacitated for any form of physical work or work which requires the applicant to be on her feet.

151. Although the applicant has described symptoms in her back and neck in her statement evidence and in the histories provided to the medicolegal experts, it remains unclear to what extent those symptoms are incapacitating. Those symptoms are not addressed in the treating evidence and Dr Poplawski suggested that such symptoms had largely settled. I am, however, prepared to accept that those symptoms limit the applicant's ability to bend and twist, push, pull or carry weights.

152. The applicant is young and has limited work experience, apart from her work for the respondent, which I accept is not currently suitable. The applicant has, however, completed her Higher School Certificate and has a number of transferable skills as described in the report from Pinnacle Rehab. The applicant has computer skills and experience using Microsoft Word, PowerPoint and Excel. The applicant was noted to have experience with data management programs from her work with the respondent. The applicant was noted to have some interest in the general clerk and customer service roles which are described in the Pinnacle Rehab report.

153. The Pinnacle Rehab report identified these as suitable vocational options for the applicant and indicated that Dr Tang had agreed that these were suitable vocational options for the applicant. The Pinnacle Rehab report described discussions with three employers who had advertised jobs in each of these roles. This suggests that real jobs consistent with the applicant's restrictions at the time of the Pinnacle Rehab report were available in the labour market.

154. It is important to note, however, that the applicant's certified restrictions at the time of the Pinnacle Rehab report were different to those currently certified by Dr Wang. At that point in time, the applicant was not restricted on hours or days per week. As noted above, the applicant is currently certified as having no current work capacity. Prior to the current certifications, limits were placed on her hours by Dr Tang and Dr Al-Karawi.

155. No evidence has been provided from Dr Poplawksi or the applicant's treating practitioners addressing whether the applicant would be restricted in the number of hours worked in light sedentary duties.

156. The medical evidence does suggest some restriction of hours may be appropriate, noting the applicant's reports of pain and sleep difficulties due to pain. Whilst it does not appear from the medical evidence that the applicant's symptoms would be exacerbated by sedentary duties of the kind identified in the Pinnacle Rehab report, those symptoms might, for example, impact upon the applicant's stamina and concentration. The evidence suggests that the applicant's symptoms require intermittent use of anti-inflammatories and occasional tramadol.

157. The most recent evidence from Dr Hughes confirms that he considered the applicant had capacity to perform the duties of the three occupations identified in the Pinnacle Rehab report. No indication has been given from the applicant's practitioners as to whether those vocational options remain suitable since the endorsement of them from Dr Tang.

158. It is relevant to note that there is no evidence that the applicant has participated in the jobseeking training recommended by Pinnacle Rehab or any other occupational rehabilitation services.

159. The evidence indicates that the insurer has recently procured the services of a different occupational rehabilitation provider, WorkFocus Australia. WorkFocus Australia contacted Dr Bisley in February 2022 in relation to developing vocational goals and return to work plan. There is no evidence to suggest that those goals or plan were finalised.

160. A barrier to the applicant returning to work has been identified in the form of the applicant's place of residence. As noted by Pinnacle Rehab, the labour market available to the applicant is smaller in the regional town of Leeton where she resides than that available, for example, in Sydney. The applicant's submissions also suggested that this was a factor to be taken into account in determining whether there were "real jobs" actually available to the applicant. I accept that the applicant has looked for jobs in her local area but has not found anything suitable.

161. As the comments in *Dewar* set out above make clear, however, following the 2012 amendments, the geographical labour market available to the applicant is excluded from consideration for the purposes of s 32A.

162. Having regard to the evidence as a whole, I am not satisfied that the certificates of capacity issued by Dr Wang provide a reliable indication of the applicant's capacity to work in suitable employment.

163. Whilst I accept that the applicant is not currently suited to any form of physical work or work that requires her to be on her feet, including her pre-injury duties, the medical evidence does suggest the applicant would have capacity to work in light sedentary work, albeit potentially with some reduced hours.

164. The Pinnacle Rehab report has identified three vocational options for which real jobs are available in the labour market. The report explains why the applicant is suited to such jobs having regard to her age, education, skills and work experience and the medical evidence regarding her capacity. The suitability of those jobs was endorsed by Dr Tang. The evidence from Dr Poplawski and Dr Bisley is consistent with such work being suitable.

165. I have accepted that the applicant may not be capable of working full-time hours. I am, however, satisfied that real part-time or casual administrative or customer service roles, similar to those described in the Pinnacle Rehab report, exist in the labour market.

166. Although there has been a passage of time, surgery and two falls since that report was prepared, the medical evidence does not suggest any particular deterioration, as opposed to a continuation or persistence of the applicant's condition.

167. In the absence of further explanation from the applicant's doctors as to why such sedentary work would be unsuitable, I am not satisfied on the evidence that, in the period from 4 March 2022 to date and continuing, the applicant has had "no current work capacity".

168. I am not satisfied that the applicant is entitled to an award pursuant to s 37(1) of the 1987 Act.

169. I decline to make the orders sought by the applicant.

WCD - definition of suitable employment in s 32A WCA - statutory interpretation - volunteer work - consideration of meaning of "employment in work" – Held: — the worker had no current work capacity based on medical information – award made under s 38 WCA

Ammann v State of New South Wales - Prince of Wales Hospital [2022] NSWPIC 443 – Delegate McAdam – 8/08/2022

The worker was employed by the respondent as an administration officer in its cancer services unit. She suffered a psychological injury on 18/06/2019 in the context of an excessive workload and a lack of training and support. Post-injury, she did work briefly as a babysitter, but that work became too much for her.

On 6/01/2022, the respondent made a WCD, that the worker was capable of work for 3 hpd, 2 dpw. That decision was due to take effect on 18/04/2022. However, the respondent made a separate decision on 6/01/2022, that the worker did not meet the requirements to continue to receive weekly payments after 130 weeks (s 38 *WCA*). That decision was also said to take effect on 18/04/2022.

The worker commenced proceedings in the PIC and ***Delegate McAdam*** conducted a teleconference on 6/05/2022. The worker claimed compensation under s 37 *WCA,* but during the teleconference, it was identified that s 38 was a genuine issue and that a dispute notice issued relying on s 38 had been issued on the same day. The applicant was caught by surprise and not prepared to address those issues.

Accordingly, the Delegate directed the respondent to file and serve the relevant s 78 notice, relying on s 38 *WCA* and provided the worker an opportunity to obtain further evidence and file submissions, and the respondent an opportunity to respond to those submissions.

The Delegate stated that he took this "somewhat unusual course" because the worker was in an unusual position. She is an immigrant on a specific type of visa, was unable to work in Australia and was unable to access social security benefits accessible to Australian residents through Centrelink. Had she been forced to discontinue the proceedings she would not have had the benefit of a stay pursuant to s 289B *WIMA*, which would have placed her in a perilous financial position.

The Delegate identified the issue for determination as the worker's capacity for suitable employment. He stated that the question is whether the applicant falls within the provision of s 38(2) or 38(3) of the 1987 Act, that is whether the applicant can be said to have "no current work capacity" or "current work capacity".

The Delegate held that the worker had received weekly benefits for more than 130 weeks and s 38(3) *WCA* therefore applied, such that a worker who has current work capacity can only receive further weekly benefits if: (a) they have applied to the insurer in writing for the continuation of those payments; (b) they have returned to work for at least 15 hpw and are in receipt of weekly earnings of at least $202 pw (as indexed); and (c) they are, and are likely to continue indefinitely to be, incapable of undertaking further additional employment that would increase their current weekly earnings.

The Delegate held that the worker does not satisfy any of the requirements of s 38(3) *WCA*. Therefore, the current dispute relates to s 38(2) *WCA,* that is whether she has no current work capacity and is likely to continue indefinitely to have no current work capacity.

There were other unusual complications, namely that the worker cannot currently work due to the nature of her visa, which means that she can only perform voluntary work. The worker argued that the definitions of "current work capacity" and "no current work capacity" do not describe voluntary activities, but rather earnings and paid work. However, the respondent argued that the fact that the vocational opinions are described as voluntary or volunteer work is not a reflection of capacity or incapacity for paid work.

The Delegate stated, relevantly:

> 75. There is certainly merit the applicant's submissions on this point. Both definitions concerning work capacity in Sch 3 to the 1987 Act refer to "work", either in "the worker's pre-injury employment" or "in suitable employment". It is accepted in this matter that Ms Ammann cannot work in her pre-injury employment. The dispute concerns suitable employment.
>
> 76. Suitable employment is defined in s 32A of the 1987 Act. Much of the focus of the evidence in this case (and in most suitable employment disputes) has been on the various considerations under (a) of the definition, and in particular in this case, as discussed, the "nature of the worker's incapacity and the details provided in medical information". What this focus has, potentially, overlooked, are the words preceding the matters that one must have regard to, that is "means ***employment in work*** for which the worker is currently suited" (emphasis added).
>
> 77. This is a matter of statutory interpretation. *Project Blue Sky v ABA* [1998] HCA 28 makes it clear that all words must be given meaning:
>
> > Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume* Griffith CJ cited *R v Berchet* to support the proposition that it was 'a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent'.
>
> 78. The words that I have emphasised above are what give me pause about the present matter. Ms Ammann is currently incapable of "employment in work", taking the normal meaning of those words, due to her visa status. However, that issue is unconnected with her injury.
>
> 79. The definitions of "current work capacity and "no current work capacity" refer to a "present inability arising from the/an injury". It's not clear to me why the separate definitions use a different article ("the" for "current work capacity" and "an" for "no work capacity") and I don't think anything turns on it. However, the definitions connect the inability to return to work or work in suitable employment with an injury. These definitions also connect the issue to the definition of suitable employment, which, as discussed above, refers to "employment in work".
>
> 80. The applicant's circumstances are unusual. She is unable to generate any income due to her visa status. This would automatically preclude her from satisfying the requirements in s 38(3) as she is incapable of earning more than $202 per week. The definition of suitable employment makes no reference or connection to the injury.

81. Putting all this together, I am of the view that the reason for the lack of capacity for "employment in work" must be connected to the injury in some way. One gets to the consideration of suitable employment through the definition of "current work capacity" and "no current work capacity". Both definitions require the consideration of connection to "the/an" injury.

82. In the present circumstances, one of the reasons Ms Ammann has no current work capacity is that she cannot work in employment in work due to her visa status. That is not the sole determinative question, however.

83. I believe this approach is consistent with what Deputy President Roche said in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55 (*Dewar*). He considers the meaning of "employment in work" at [59]:

> The word 'employment' is not defined in the legislation. Its common meaning is 'the state of being employed'. However, 'worker' is defined. It means, subject to specified exclusions, 'a person who has entered into or works under a contract of service or a training contract with an employer' (s 4 of the 1998 Act). In context, the phrase 'employment in work', in the definition of suitable employment, 'in relation to a worker', must refer to real work in the labour market. That is, it must refer to a real job in employment for which the worker is suited.

84. The Deputy President went on to discuss the test to be applied in considering suitable employment (at [60]):

> Therefore, the determination of whether a worker is 'able to return to work in suitable employment' is not a totally theoretical or academic exercise and Mason P's reference to the 'eye of the needle' test may still be relevant in many cases.

85. Considering only the fact that Ms Ammann cannot perform employment in work due to her visa would be purely academic and not consider the reality of her capacity to work.

86. However, that does not mean that the voluntary nature of the roles identified, and the medical evidence discussing the option of volunteer work, is irrelevant. It is a factor for consideration when considering "the nature of the worker's incapacity and details provided in medical information", particular whether the skills identified in performing suitable work in a volunteer capacity would be relevant to a "real job in employment for which the worker is suited".

87. This is, as I understand it, closer to the applicant's case regarding the issue of volunteer employment. The applicant submits that the approval of Dr Cheng refers to "volunteer employment" only and is not an expression of the opinion that the applicant is fit to perform paid employment in these pursuits. The certificates of capacity also express a similar restriction regarding to volunteer work only. Likewise, Dr Saeed's opinions refers to part-time volunteer work.

88. There is a difference between a capacity to perform volunteer work and a capacity to perform "employment for work". Employment options comprising only of volunteer work, or in something like a sheltered workshop, would, most likely, be "totally theoretical or academic" per *Dewar*.

89. I do not think this fully answers the question, however, as there is the existing complication that Ms Ammann can only perform volunteer work. The medical information does not explicitly differentiate between the consideration of whether Ms Ammann could perform volunteer work, but not employment in work.

90. What the medical information does consider is Ms Ammann's general capacity. The applicant's case is that she has no current work capacity. The applicant's case finds support in the following evidence:

(a) the most recent certificate of capacity of Dr Cheng, which downgraded the previous 6 hour per week capacity to nil, with reference to the report of Dr Teoh;

(b) the medical report of Dr Teoh, who found class 5 for unemployability in the PIRS, with the comment that "she is unfit to work". I acknowledge that Dr Teoh also states, "she is fit to work suitable duties, but not her pre-injury duties". However, those suitable duties are not identified and whilst she may be capable of performing theoretical suitable duties, Dr Teoh acknowledges that Ms Ammann tried to work in babysitting "but she was overwhelmed with anxiety symptoms". I prefer his conclusion that she is unfit to work;

(c) the report of Dr Anderson of 30 May 2022, where he amends his earlier opinion in regard to capacity, after considering Ms Ammann's statement. He states, "as usual, a change in facts leads to a change in expert opinion";

(d) Ms Ammann's statement dated 14 April 2022, which explains her issues when she attempted to work in babysitting and her inability to do same, and

(e) Mr Christofaris' statement, which also addresses Ms Ammann's issues with the babysitting role.

91. The evidence in contraindication to the above is:

(a) the certificates of capacity that predate the downgrade certificate (which I acknowledge show a capacity for 6 hours for an extensive period of time);

(b) the vocational assessment report of Resilia, and

(c) Dr Saeed, who supports some voluntary work, but those reports are quite old and predate Ms Ammann's attempt to return to work as a babysitter.

92. The applicant raised issue with the weight that I could give to the vocational assessment report, questioning the academic and vocational qualifications of Ms Warhurst. The applicant also noted the single contact Ms Warhurst had with Ms Ammann. There is some weight to this submission. The respondent has explained Ms Warhurst's academic qualifications, although this is approaching evidence from the bar table. I don't doubt it is correct and very little turns on the actual strength of Ms Warhurst's qualifications. The fact is the evidence is not particularly strong in light of the contradicting evidence provided by medical experts.

93. The test in s 32A requires one to consider the "nature of the incapacity and the details provided in medical information". I have my doubts that a vocational assessment report and labour market analysis could properly be considered medical information in all circumstances. Certainly, the contact with would-be employers is, as is often the case in such matters, circumspect.

94. I do not think that I can give the report no weight, and the information is at times useful. This is the standard kind of vocational evidence provided in work capacity decisions and is critical to considering appropriate suitable employment options. Without such evidence insurers and the Personal Injury Commission would be left in the dark as to the kind of "suitable employment" that might be suited to an injured worker. However, purportedly providing services to a worker "for the purposes of recovery" and then using the evidence gathered to reduce or remove an entitlement is concerning. Likewise, the weight that can be given to a vocational assessment report in terms of considering medical restrictions placed on a worker is limited. I prefer to be guided by a worker's treating team and the independent medical experts who have assessed her.

95. The medical information in this matter overwhelmingly supports a finding that Ms Ammann has no current work capacity, and this incapacity is likely to continue indefinitely. Accordingly, Ms Ammann satisfies the criteria for ongoing weekly payments in s 38(2) of the 1987 Act and is entitled to an award in that regard.