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

1. Holcim (Australia) Pty Ltd v Thomas [2022] NSWCA 183
2. Flanagan v Allianz Australia Insurance Ltd [2022] NSWSC 1374
3. Richards v Macarthur Electrical Connection Services Pty Ltd [2022] NSWPICPD 37
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5. Cottom v Scone Race Club Limited [2022] NSWPIC 519
6. Laverty v Council of the City of Newcastle [2022] NSWPIC 543

Court of Appeal Decisions

Claim for new hearing aids – Previous claim made in 1999 and hearing aids were held to be reasonably necessary - Claim made upon the 1999 employer - worker suffered further work-related hearing loss, but he did not give that employer notice of an injury – Held: worker was not obliged to give notice of injury to later employer as the appellant was liable for consequences of the 1999 injury

Holcim (Australia) Pty Ltd v Thomas [2022] NSWCA 183 – Ward P, Macfarlan & White JJA – 20/09/22

The worker claimed the cost of further hearing aids from the appellant, with whom he worked until 2009, but he did not make a claim for further hearing loss against his later employer (ACI Operations). In 1999, he claimed lump sum compensation under s 66 *WCA* against the appellant and the dispute resolved for 14.87% permanent hearing loss.

In 2010 and 2016, the worker claimed the cost of hearing aids from the appellant and the appellant paid the claims. On 14/09/2020, he claimed the cost of further hearing aids from the appellant, but it disputed the claim.

Senior Member Capel issued a COD, which determined that the worker suffered work-related hearing loss on 28/06/1999 (deemed). He noted the s 66 resolution in 1999 and that the appellant paid for hearing aids when claims in 2010 and 2016. He found that the appellant was the last employer who employed the worker in an employment to the nature of which the injury was due for the purposes of s 17(1)(a)(i) *WCA* when he gave notice of injury to the appellant in 1999. Therefore, the provision of bilateral digital hearing aids is reasonably necessary as a consequence of that injury.

The appellant appealed and ***Deputy President Wood*** confirmed the COD.

The appellant sought leave to appeal to the Court of Appeal (as the amount in dispute was less than $20,000) and argued that the questions involved in the appeal are:

> (1) Whether upon the true construction of the legislation a limited injury deemed to occur in 1999 can operate to enable recovery of medical expense in 2020 in the presence of significant increase in the hearing loss and subsequent work in employment to the nature of which industrial deafness is due; and
>
> (2) Whether upon its true construction sec 17(3) *WCA* applies when the factual elements of a further and more substantial injury have supervened after the giving of notice of injury completing the existence of a deemed injury.

However, the worker argued that the question is whether liability to pay for the hearing aids imposed upon the employer ceases if they engage in further employment that aggravates the hearing loss.

The ***Court of Appeal*** refused to grant leave to appeal and dismissed it for reasons that are summarised below.

White JA (with who, Ward P and Macfarlan JA agreed) did not consider that either party's submission accurately identifies a point of law arising from the Deputy President's decision and, if there be an error in the decisions below, the error is one of fact, not law. He stated, relevantly:

> 22. Holcim submits that s 17 should not be construed in such a way as would mean that the decision of the worker whether or not to give notice of injury should determine which employer was liable to pay for the cost of further hearing aids.
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> 23. Holcim submitted that, as the worker had suffered a significant increase in hearing loss after a period of noisy employment with a subsequent employer, the responsibility of the earlier employer for hearing loss fixed at the date of injury of 28 June 1999 should be regarded as spent. The later employer would then be liable for the cost of hearing aids if and when the worker chose to give notice of injury to the later employer.
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> 24. There is nothing in the text of s 17 that supports such a construction. It could only be supported if there is implied in the legislation an obligation by the worker to give notice of injury to the subsequent employer. (Even then, as explained below, it would not follow that the subsequent employer would necessarily be liable for the whole cost of medical treatment, whether by way of new hearing aids or otherwise.)
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> 25. Deputy President Wood was correct in saying (at [85]) that there is no requirement in the legislation that compels the worker to give a notice of injury to a later employer…
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> 28. …Neither construction is consistent with the text of the legislation. The loss of hearing which Mr Thomas suffered that was the subject of his notice of injury of June 1999 was an injury. The injury was agreed to have resulted in a hearing loss of 14.8%. Section 17 provides that further hearing loss is a further and separate injury.

His Honour stated that if the worker gave notice of injury to his later employer, then than employer would be liable for the consequences of the further hearing loss, not the total hearing loss. In the same way, the appellant is liable for the consequences of the 1999 hearing loss. He stated, relevantly:

> 31. Under s 60 the question is whether the cost of "that treatment or service" (that is, a particular treatment or service) is reasonably necessary as a result of an injury received by a worker. In the case against Holcim, the injury received by Mr Thomas was the injury the subject of his notice of 28 June 1999, that is, a binaural loss of hearing of 14.8%. The question before the Commission was whether or not the particular hearing aids whose cost was sought to be recovered from Holcim were reasonably necessary, as a result of that injury…
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> 34. These are clear findings that the bilateral digital hearing aids the subject of Senior Member Capel's determination were assessed by him as being reasonably necessary as a result of Mr Thomas's binaural loss of hearing of 14.8% suffered in 1999.
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> 35. The appeal papers did not include any evidence relevant to this question, presumably because, at least prima facie, the question is one of fact rather than law.
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> 36. The appeal to Deputy President Wood lay if Senior Member Capel's determination were affected by any error of fact, law or discretion and to the correction of any such error. It was not a review, nor a new hearing (1998 Act, s 352(5)).

The Court held that s 261 *WIMA* does not apply, as due to s 17 *WCA*, no date of injury for the further hearing loss suffered through the worker's later employment has yet arisen (as no notice of injury has been given to that employer). Section 261 does not impose any obligation upon him to make a claim under s 17.

Supreme Court of NSW Decisions – Judicial review

Judicial review of decision of Review Panel under Div 7.5 of the Guidelines under the MAIA 2017 (NSW) – Assessment of permanent impairment using incorrect AMA4 Table – error on the face of the record and jurisdictional error established – Matter remitted to PIC for re-determination according to law

Flanagan v Allianz Australia Insurance Ltd [2022] NSWSC 1374 – Justice Chen – 12/10/2022

On 22/08/2018, the plaintiff was injured in a MVA and suffered a number of injuries, which resulted in permanent impairments.

On 12/01/2021, a Medical Assessor (MA) assessed 11% WPI (Right ankle & subtalar joint injuries; Skin: injury & scars to right thigh; right knee, left knee, right Achilles, right ankle).

The defendant appealed against the MAC and the dispute was referred to a Medical Review Panel (MRP) and on 14/11/2021, the MRP assessed 8% WPI.

The plaintiff applied to the Supreme Court of NSW for judicial review of the decision of the MRP on 6 grounds.

Justice Chen found that there was no merit to grounds (1) and (2) and noted that grounds (3) and (4) were withdrawn. Therefore, the grounds to be determined were:

> (5) Failure to comply with cl 6.41 of the Guidelines; and
>
> (6) Failure to comply with cl. 6.70 of the Guidelines.

In relation to ground (5), the plaintiff argued that the MRP failed to comply with cl 6.41 of the Guidelines, and specifically asserted that:

> (a) there was "clear inconsistency" between the clinical findings of Dr Wong and the MRP in relation to the presence (or otherwise) of mild laxity: Dr Wong found "right knee-mild PCL laxity", whereas the MRP found no laxity;
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> (b) the clinical finding in relation to the presence/absence of laxity was an inconsistency that was required, by reason of cl 6.41 of the Guidelines, to be brought to her attention; and
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> (c) the failure to do so amounted to "constructive failure to exercise jurisdiction".

His Honour noted that the parties argued this ground on the basis that the MRP was required to assess the dispute in compliance with this clause and that invalidity results from a failure to do so. However, he held that the plaintiff failed to demonstrate reviewable error because he did not accept that inconsistency was shown between the clinical assessments of Dr Wong (and Dr Davis) and those of the MRP, so as to engage cl 6.41 of the Guidelines. He stated, relevantly:

> 58. In *Dominice v Allianz Australia Insurance Limited* [2017] NSWCA 171 ('*Dominice*'), Simpson JA said, of an identically worded clause in guidelines issued under s 44(1)(c) of the Motor Accidents Compensation Act, that the clause required (at [60]):
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> > a medical assessor who detects inconsistency between clinical findings and information obtained through medical records and/or observations of non-clinical activities to draw these inconsistencies to the claimant's attention in order to provide an opportunity for explanation.
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> 59. Simpson JA explained the purpose of the clause in the following terms (at [61]):
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> > [The clause] offers a guard against the drawing, unfairly, of conclusions about inconsistencies detected in a claimant's presentation. It can also, as in the present case, act as a guard against conclusions that may be unfairly drawn in favour of a claimant, against the interests of an insurer, where the conclusions (as here) are unsupported by medical records or history.

His Honour stated that the clause "is plainly directed to inconsistency" and that is the way it has been construed: *Dominice* at [60]-[61]; *Insurance Australia Ltd v Warren* [2019] NSWSC 1126 at [144] (Harrison AsJ); *AAI Limited v Boga* [2020] NSWSC 1903 at [106]-[126] (Cavanagh J); *QBE Insurance (Australia) Ltd v Shah* [2021] NSWSC 288 at [56]-[58] and [65] (Fagan J) ('*Shah*'). That is, cl 6.41 operates when an inconsistency is found, not merely upon identification of a difference between a clinical finding at one assessment performed when compared to another: *Shah* at [65]. The fact that Dr Davis found mild PCL laxity does not lead to a different conclusion and for a different conclusion to be reached, the plaintiff would need to demonstrate that there was inconsistency, not merely a difference.

In relation to ground (6), his Honour noted that the plaintiff argued that the MRP was required to comply with cl 6.70 of the Guidelines, but did not do so, such that it erroneously failed to assess permanent impairment in her right knee. In simple terms, she argued that the clinical examination performed by the MRP demonstrated that there was a permanent impairment of the right knee based upon loss of flexion, and the failure to assess that impairment was due to an erroneous application of cl 6.70.

His Honour stated:

> 71. I address this ground as follows: first, by identifying the relevant clauses within Part 6 of the Guidelines; secondly, by identifying the assessments of the plaintiff's right knee undertaken by Dr Wong and, thereafter, by the Review Panel; thirdly, by resolving the competing arguments in connection with the failure to assess impairment in accordance with Table 41; and, fourthly, by dealing with the first defendant's argument relating to discretionary refusal of relief.

His Honour found that the MRP erred in stating that there "was no assessable impairment with range of movement" because it assessed flexion in the right knee as 105°. That is a restricted range of motion and entitled the plaintiff to a 4% WPI under Table 41. Therefore, if Table 41 applied, the plaintiff's right knee was 4% WPI, rather than the 2% WPI by applying Table 64. The MRP was required to assess permanent impairment consistent with the directive in cl 6.70, adopting Table 41, because that method clearly established the "highest rating" of impairment. He concluded:

> 87. In my view, the Review Panel fell into error in failing to apply Table 41 when assessing the plaintiff's right knee impairment. It erred in law because the facts, as found, were necessarily within the description entitling the plaintiff to an assessable impairment, and a contrary decision has been made: *Azzopardi v Tasman UEB industries Ltd* (1985) 4 NSWLR 139, 156. The error may also be described as where the relevant facts have been clearly established but the reasons demonstrate the decision-maker acted on the wrong basis in important respects, such that the decision-maker has failed to properly exercise their jurisdiction: *Nufarm Australia Ltd v Dow AgroSciences Australia Ltd (No 2)* (2011) 282 ALR 24; [2011] FCA 757 at [102]-[103] (Robertson J); *Rodger v De Gelder* (2015) 71 MVR 514; [2015] NSWCA 211 at [95] (Gleeson JA). Or, further still, by ignoring relevant material in a way that affects the exercise of power, because the Review Panel failed to exercise jurisdiction to decide a question according to the applicable criterion. The last two instances of error are jurisdictional, and the first constitutes an error of law on the face of the record. Finally, having regard to the way in which the parties argued the matter (see [70], above), error is established permitting the grant of relief, subject to discretionary refusal.

Accordingly, his Honour revoked the MRP's decision and remitted the matter to the PIC for determination according to law.

PIC - Presidential Decisions

Death claim – children of the deceased who were engaged in apprenticeships were not students as defined by s 25(5) WCA and are not entitled to receive weekly payments.

Richards v Macarthur Electrical Connection Services Pty Ltd [2022] NSWPICPD 37 – Deputy President Wood – 12/09/2022

The first and second appellants (sons of the deceased worker) claimed weekly payments in respect of their father's death. Both were under the age of 21 years at the time of his death, and both were engaged in apprenticeships.

The appellants argued that they were entitled to weekly payments under s 25(1)(b)(ii) *WCA* on the basis that they were students as defined in s 25(5) *WCA* (a person receiving full-time education at a school, college or university). However, the first respondent disputed this claim.

On 16/12 2021, ***Member Sweeney*** issued a COD, which determined that the appellants were not entitled to weekly payments because they were not students as defined in s 25(5) *WCA*.

The appellants appealed against the COD and asserted that the Member erred as follows: (1) denial of procedural fairness by failing to deal with submissions and evidence relied upon by him; (2) denial of procedural fairness by failing to provide lawful reasons in reaching his conclusion; and (3) failure to apply proper principles of statutory construction in resolving the issues.

Deputy President Wood determined the appeal and confirmed the COD, for reasons that are summarised below.

Wood DP rejected ground (1) and she held that the Member dealt with the appellant's submissions. She also stated, relevantly:

> 85. The appellants assert that the Member failed to reproduce the sections of the Apprenticeship and Traineeship Act and the guidelines from Training Services NSW. The assertion does not make it clear why the Member was required to reproduce those sections or that material. The sections of the Apprenticeship and Traineeship Act and guidelines relied upon were before the Member and he noted the submissions made in relation to the material. The Member's reasons did not traverse the relationship between TAFE, the employers and the appellants in any adverse way.
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> 86. The appellants contend that the Member ought to have dealt with their statement evidence and that the Member disregarded the evidence of Mr Fensom. The Member was not required to either accept or reject the appellants' statement evidence, which was consistent with the accepted facts that the appellants attended TAFE one day per week and received practical training in employment four days per week, for which they received a wage. Nor was he required to deal with the evidence of Mr Fensom or indeed Ms Harris, whose evidence was also consistent with those accepted facts. In those circumstances, the observations of Flick J in Huntsman Chemical Australia recorded above at [72] are relevant.
>
> 87. The appellants contend that the Member's treatment of the above evidence and submissions constituted error. For the reasons given above, I do not accept that the Member erred in the manner alleged and this ground of appeal fails.

Wood DP rejected ground (2) and she stated that the appellants' argument that the Member's finding that "the work on the job … [was] performed as part of a contract of apprenticeship and an apprentice", was not open to him, that no such contract was tendered in evidence and that it was not a fair reading of the evidence. She held that the evidence was sufficient for the Member to conclude that an apprenticeship contract was in place between each of the appellants and their respective employers, despite the fact that the actual written contract was not in evidence. She rejected the assertion that the Member's conclusion was not an inference available to him to draw and was not a fair reading of the evidence.

The appellants argued that the Member's reasons "do not adequately disclose the basis for his decision". However, Wood DP stated that the Member's determination was a factual determination and in essence he reasoned that: (a) the appellants were required to spend a number of hours per year doing coursework; (b) the education provided on the work site could not be classed as "education at a school, college or university"; (c) the evidence of the education at a school, college or university was overwhelmed by the work performed over the four days on site; (d) in ordinary language, the appellants' education at a school college or university could not be considered full-time, and (e) the appellants were receiving part-time education at a school, college or university as part of a full-time apprenticeship. In describing the time spent at TAFE as being "overwhelmed" by the practical work on site, the Member clearly had in mind the observations of Constance DP in *DMLC*, a decision relied upon by the appellants, in which the question was whether "the education being received is the most significant factor occupying time in the child's activities of life."

Wood DP held that the Member's reasoning provided an adequate basis upon which to conclude that the practical work on site could not be considered education at TAFE and that he was not satisfied that the appellants were receiving a full-time education at TAFE at the date of the deceased's death.

Wood DP also rejected ground (3). She noted that Member considered that the appellants could be described as a "student" (as defined in the Macquarie Compact Dictionary, 8th edition), but he concluded that their education at a school could not be said to be 'full-time'. Rather, they were receiving a part-time education at TAFE as part of a full-time apprenticeship. She stated, relevantly:

> 105. Thus, the Member rested his determination on the ordinary language of the provision. The Member's treatment of the definition does not offend the requirement for the construction of the definition to be consistent with the language and purpose of the statute.
>
> 106. The construction put forward by the appellants, that is that the appellants satisfied the definition of "students" cannot be accepted. Applying the principles quoted above, the definition must be read as a whole. As observed in Alcan, the starting point is the text itself. That is, the appellants must be "receiving full-time education at a school, college or university."
>
> 107. The appellants submit that the Member ought to have focused on the reception of the education and not where it took place. There is no proper reason as to why there should be a greater focus on the receipt of the education or that the requirement for it to be at a school, college or university should be read down. The text is clear in its meaning.
>
> 108. The appellants contend that because the education is "facilitated" "by" or "through" TAFE, the definition is satisfied. Those words do not appear in the definition and are not synonymous with the word "at." To interpret the definition in such a manner is inconsistent with the rules of statutory interpretation and requires reading into the definition words that could have been used by the legislature but were not. In essence, the appellants assert that the word "at" is either void or insignificant, which is again contrary to the principles of statutory construction.

Accordingly, Wood DP confirmed the COD.

PIC – Member Decisions

Workers Compensation

A Member of the PIC does not have jurisdiction to determine an appeal against a decision of the President's Delegate

Konza v Burkes Transport (Services) Pty Limited [2022] NSWPIC 512 – Member Beilby – 15/09/2022

The worker injured his left shoulder/arm at work. On 30/11/2021, the respondent issued a WCD, which reduced weekly payments under s 37 WCA from $1,144 pw to $681.40 per week, on the basis that the worker could work as a school crossing supervisor for 20 hpw.

The applicant disputed the WCD and on 28/03/2022, the dispute was referred to a Delegate of the President. The Delegate held that the WCA was appropriately made and correct and entered an award for the respondent.

The worker sought to appeal against the Delegate's decision, and he filed further evidence that indicated that it was not reasonable for him to work as a school crossing supervisor, including information about a criminal record and further material regarding his capacity to work and personal predisposition to children (which was not favourable). In effect, he sought a reconsideration of the Delegate's decision and an Appeal on the basis that the Delegate had fallen into error.

Member Beilby identified the issues for determination as being:

> (1) Is there jurisdiction to determine this dispute?
>
> (2) if so, is the Delegate's decision affected by error; and
>
> (3) can the dispute be heard by way of a de-novo hearing?

The Member noted that s 299(1) *WIMA* provides that the President can revoke an IPD at any time. However, PIC Procedural Direction WC2 – Interim Payment Direction – states:

> The President may revoke an interim payment direction on application of a party or on the President's own motion (s 299 of the 1998 Act). An application to revoke an interim payment direction is made by filing an application to revoke an interim payment direction through the Commission's online portal.
>
> If an interim payment direction is revoked, the obligation to make payments under the direction ceases, but this does not affect the requirement to make payments due before the revocation. The President may also amend or re-issue an interim payment direction.

The respondent argued that the grounds upon which the President can revoke an IPD need to be identified and this has not been done.

The Member stated that the worker's "appeal" appeared to be based on 3 grounds, essentially:

(1) that the Delegate failed to properly engage with his submission that the respondent had not discharged its onus of proof that work as a school crossing supervisor was suitable employment for the purposes of s 32A *WIMA;*

(2) that the Delegate reversed the onus of proof and misdirected himself that he was required to provide evidence that the role of a school crossing supervisor would not be suitable employment when as a preliminary it was the respondent's onus to prove that it was suitable employment within the meaning of s 32A *WCA* when it made its WCD on 30/11/2021; and

(3) that the Delegate erred by determining that this work was suitable employment when there was no evidence from the respondent that he would pass the three preliminary clearances required for that work, namely: (a) working with children check, (b) police check, (c) health assessment/clearance.

The Member stated that s 296 *WIMA* provides:

> **Exercise of functions of President**
>
> (1) The President may exercise functions under this Part with respect to a dispute on the basis of the documents and information provided to the President when the dispute was referred for determination by the Commission.
>
> (2) Except as provided by this Part, the exercise of any function of the President under Division 2 or 3 of this Part is not subject to appeal or review.

The Member noted that a vexed issue was whether or not there was jurisdiction to determine the dispute. The respondent argued that the application was not an application to revoke or amend an IPD, because no IPD was made, and the Delegate simply made an award for the respondent She accepted that argument and found that s 296(2) *WIMA* specifically prohibits appeal or review of a Delegate's decision. Therefore, she did not have jurisdiction to determine the dispute and it was a matter for the worker as to whether they wished to seek a judicial review of the decision.

A Member of the PIC lacks power to order a reconsideration by a Medical Panel

Cottom v Scone Race Club Limited [2022] NSWPIC 519 – Member Wynyard – 20/09/2022

In 2020, the worker claimed weekly payments with respect to an injury suffered on 23/05/2008. The dispute was referred to ***Arbitrator Young*** and, as a claim under s 66 WCA had been added, he remitted the matter to the Registrar of WCC for referral to an AMS.

On 21/10/2020, Dr Burns issued a MAC, which assessed 20% WPI.

On 17/11/2020, the worker's solicitors applied for reconsideration of the MAC, and asked that the issue of a COD be delayed "until this matter is further dealt with by your office or (the Arbitrator). If it is intended to issue the COD, despite this request, we request that (the worker) have an opportunity to make further submissions and/or an extension of time to seek funding from WIRO to obtain further counsel's advice on any appeal".

On 25/11/2020, ***Arbitrator Young*** heard the application for reconsideration. He accepted the application for reconsideration and directed the parties to file ad serve written submissions, after which the matter would be determined on the papers.

The respondent appealed against that decision.

On 9/10/2021, ***Deputy President Wood*** set aside the decision and remitted the matter to a different non-Presidential Member for re-determination.

The application for appeal was then dealt with administratively by the registry and discontinued it without notice to the parties.

On 28/01/2022, ***Member McDonald*** made consent orders, which reinstated the application for appeal and discontinued the application for reconsideration.

However, on 9/03/2022, the worker's solicitor sent an email to the PIC, as follows:

> We are obliged to draw your attention to the provisions of section 14B of the *PIC Act 2021* subsection 14B (4)(c), which clearly preserved the statutory provisions existing prior to the commencement of Schedule 6 of the *PIC Act 2020*, on 1 March 2021.
>
> We also draw your attention to the relevant section of the *WIM Act*, prior to the commencement of Schedule 6.
>
> In these circumstances, we require you to reconsider the referral and grant the applicant the relief he has sought in the original application, within the parameters of the previous legislative provisions. …
>
> Further, given the delay from the original assessment certificate of Dr Burns on 21 October 2020 (now 16 months ago) the applicant attaches an application to admit late documents (AALD) for the consideration of the Appeal Panel (however it is constituted). …"

The PIC (Disputes Support Officer, Ms Heena Mistry) replied:

> I refer to your application to Admit Late Documents and the correspondence attached therein.
>
> You have raised the transitional provisions contain in cl 14B of sch 1 to the Personal Injury Commission Act 2020 and asserted that you 'require you to reconsider the referral and grant the applicant the relief he has sought in the original application, within the parameters of the previous legislative provisions'. It is not clear what is sought by this statement. The matter was determined in accordance with the transitional provisions. It was referred to a medical appeal panel constituted in accordance with s 328 of the Workplace Injury Management and Workers Compensation Act 1998. By the operation of cl 14B, the 'new decision-maker' is to determine the proceedings. That is, a member and two medical assessors (as opposed to an arbitrator and two approved medical specialists).
>
> If the assertion is made in reference to the submissions made under the heading 'paragraph 4.3', dealt with in the my decision at [10]-[11], the legislation that applied 'immediately before the establishment day' likewise did not contain any power to constitute an appeal panel as is constituted in the present matter, i.e. there was no scope within the legislation to have the appeal panel constituted in any way other than by a member and two medical assessors.
>
> In terms of the Application to Admit Late Documents, the material will be forwarded to the appeal panel. The panel may deal with it in accordance with their powers.

The respondent's solicitors objected to the application to admit late documents being admitted into evidence and requested a teleconference to allow it a proper opportunity to respond.

Ms Mistry replied that the matter had been referred to an Appeal Panel, which has the power to admit fresh evidence under s 328(3) *WIMA*. She stated that the objections would be forwarded to the Appeal Panel, who will determine the appropriate steps to take with regards to that evidence and the respondent's objections.

The respondent's solicitors renewed their request for a teleconference, but Ms Mistry replied that the MAP controls its own procedures and that their concerns about procedural fairness were forwarded to it. She rejected the request for a teleconference as it is a matter for the MAP to determine whether to admit the AALD.

On 31/03/2022, the MAP confirmed the MAC. In doing so, it rejected the worker's further statement dated 16/11/2020, and found that the worker's allegation that the referral and MAC were ultra vires were beyond its power as these matters preceded the MAC.

Member Wynyard conducted a teleconference on 22/04/2022. He stated that while counsel appeared, he had difficulty comprehending the purpose of the teleconference.

Counsel for the worker argued that:

(1) the MAP was not provided with all relevant evidence and that the Member had power to order a reconsideration of the original MAC. The Member directed the parties to file written submissions and requested the Medical Assessment File from the PIC.

(2) these are "a pre-establishment" proceeding, as the application to appeal to a MAP was discontinued administratively without notice to the parties, which meant that the provisions of s 378 *WIMA* were preserved despite its repeal upon the commencement of the PIC.

(3) He sought reconsideration of the MAP's decision because his condition has deteriorated, and he suffered a consequential injury to his lumbar spine (after the MAC issued).

(4) the MAP erred in failing or admit or consider his fresh evidence and there would be a practical injustice and a constructive failure to exercise jurisdiction regarding the claim for a consequential injury to the lumbar spine if the MAC was not reconsidered.

The respondent argued that the transitional provisions do not apply as:

(1) when the application to appeal was closed administratively (after the worker's decision to pursue reconsideration) it could not be said that there was any "pending non-court pre-establishment proceeding" as defined by cl 14B. The requirement that an order from Member McDonald be obtained to reinstate the application was confirmation that cll 14A and B did not apply.

(2) the discontinuance of the application for reconsideration before Member McDonald was significant as it relied upon that discontinuance when it consented to the reinstatement of the medical appeal.

(3) Alternatively, if the transitional provisions did apply, as a matter of discretion the Member would not refer the matter for reconsideration in any event, as:

   a. *Sleiman* was distinguishable on its facts;

   b. there was no error by the MAP;

   c. it was not in the interests of justice; and

   d. (4) the proper forum was the Supreme Court.

The Member was satisfied that the transitional provisions applied, which enabled the worker to make his request for a reconsideration. He held that the re-instatement of the appeal by Member McDonald was being no more than a procedural matter, but he considered the consent order discontinuing the application for reconsideration "in a somewhat different light".

The Member rejected the worker's argument that because the MAP did not refer to the AALD, it did not receive them or did not consider them. He was satisfied that an email chain from the PIC to the MAP evidenced that the application and documents were sent to it. He noted that a claim that a MAP did not read or did not adequately read documentation on which a party relies is often made in the MAP jurisdiction and he stated, relevantly:

63. …In *Bojko v ICM Property Service Pty Ltd* Handley AJA, with whom Allsop P and Giles JA agreed, said at [36]:

> Both [grounds of appeal] .... ignore[s] the presumption of regularity which attends administrative action.

64. In *Jones v Registrar WCC* James J said at [50], having referred to *Bojko*:

> There is a presumption of regularity that the AMS had performed such tests as might be required ....

65. It is also fundamental to the task of an Appeal Panel that it read all the material referred to it. A presumption is of course rebuttable, and Mr Hart's case goes some way to doing that when the reasons given by the Panel are considered.

66. As indicated, the Panel reasons dealt in some detail with Mr Cottom 's earlier statement of 16 November 2020, which had criticised the conduct of the Medical Assessor during the assessment. The Panel considered Mr Cottom 's fresh evidence of 16 November 2020, but not that contained in his statement of 25 February 2022.

67. A MAP template has a section entitled "Fresh Evidence" wherein the Panel is required to deal with any evidence as provided for in s 328(3) of the 1998 Act. It may be, as submitted by the respondent, that the Panel simply ignored that evidence as being outside its remit. Nonetheless it may also be that it did not consider it adequately, or at all, as it is difficult to explain why the Panel ruled on one statement, but not the other.

The Member held that no determination is necessary about whether the MAP actually considered the AALD, as the current application is for leave to allow the reconsideration to proceed. He found that there are a number of reasons against granting leave, and he stated, relevantly:

> 69. Deputy President Geoffrey Parker considered the relevant principles in *Fairfield City Council v McCall (No 2)*. The learned Deputy President was dealing with an application for reconsideration of a Certificate of Determination made by a Member. At [26] he referred to dicta of DP Roche in *Samuel v Sebel Furniture Ltd*: (The comments made in the extract are mine).
>
> > 26. The principles outlined in *Samuel* with respect to an application to reconsider under the repealed s 350(3) of the 1998 Act are of assistance ....
> >
> > 27. I set them out without providing the full citation of the supporting authorities as follows:
> >
> > > 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*').
> > >
> > > 2. whilst the word 'decision' is not defined in section 350, it is defined for the purposes of section 352 to include 'an award, order, determination, ruling and direction'. In my view 'decision' in section 350(3) includes, but is not necessarily limited to, any award, order or determination of the Commission.
> > >
> > > *[Comment: I accept that the MAP decision is such a decision. Indeed S 378 specifically permitted reconsideration of a MAP.]*
> > >
> > > 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration ('*Schupp*').
> > >
> > > *[Comment: The litigious history of this matter explains the delay between the MAC of 21 October 2020 and the MAP decision of 31 March 2022. There was no unreasonable delay between the publication of the MAP decision and the present application of 22 April 2022.]*
> > >
> > > 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely ('*Hillier*').

5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result ('*Missourian*').

6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators.

[Comment: As indicated, s 378 extended the reconsideration to Appeal Panel decisions. As will be seen, in the final analysis this was the only avenue of redress available to the applicant.]

7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshan Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*Anshun*') may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings ('*Anshun'*).

8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hillier*' and section 354(3) of the 1998 Act)'.

The Member rejected the worker's argument that there would be a constructive failure to exercise jurisdiction if the evidence regarding the lumbar spine condition was not considered by the MAP because the MAP had no jurisdiction to assess the alleged back condition, which was not part of the medical dispute that was referred for assessment.

Further, while the worker alleged that is right knee had been deteriorating, he could only have sought a reconsideration of the MAP's decision under s 327(3)(a) *WIMA* and it is not possible to appeal from one MAP to another. In *Sleiman,* Leeming JA considered the effect of a worker's rights under ss 327(3)(a) and (b) where a MAP had given its assessment and he stated:

> 78. It is true that the right to apply for reconsideration is not available as of right but instead is discretionary, and that may be disadvantageous to the worker. However, there is a sound basis in the legal system generally for there to be a single appeal as of right..... Double appeals have long been perceived to be an evil, as was noted in this Court in *Condensing Vaporisers Aust Pty Ltd trading as RJ Tinker & Son v FDC Construction & Fitout Pty Ltd (No 2)* (2014) 86 NSWLR 360; [2014] NSWCA 89 at [27]. …
>
> 84. Accordingly, I conclude that the Registrar's Delegate and the Associate Judge correctly concluded that the further appeal from the Appeal Panel was not available to Mr Sleiman.

The Member held that the before Member McDonald the worker expressly discontinued the reconsideration application and elected to have the matter dealt with by the MAP, and he concluded:

> 77. As indicated in Sleiman, there can be no second appeal to an Appeal Panel, and accordingly the applicant was confined to the evidence that was referred to the Appeal Panel. The application before me suggested that the applicant might have realised subsequent to the discontinuance on 28 January 2022 that a reconsideration was in fact the only viable option for the redress of the matters raised in the subject AALD. At that stage it was too late as the MAP assessment had already issued and in any event, as explained above, the Panel then had no power to entertain the deterioration allegations contained within the subject AALD.

Accordingly, the Member rejected the application.

Worker died from a heart attack whilst certifying to be a casual lifeguard – Held: the certification process aggravated severe underlying cardiac disease within the meaning of s 4(b)(ii) WCA, but the applicant failed to satisfy s 9B WCA as the worker's pre-certification condition was critical, and his risk of suffering an arrhythmic cardiac event without any precipitating activity was very high - Award for the respondent.

Laverty v Council of the City of Newcastle [2022] NSWPIC 543 – Principal Member Harris – 29/09/2022

On 30/10/2020, the deceased worker died whilst participating in the certification process for a casual lifeguard position. His widow claimed death benefits and funeral expenses as a dependent of the deceased.

The ARD described the injury as: (a) an acute thrombotic process leading to coronary ischemia and subsequent cardiac arrythmia in the context of work-related exertion (swimming); (b) death resulted from the injury, and (c) in the alternative, the deceased, during the course of his employment, suffered an aggravation, acceleration, exacerbation or deterioration of his pre-existing coronary heart disease.

Principal Member Harris conducted an arbitration, during which the applicant described the injury as follows: (a) an acute thrombotic process leading to coronary ischemia and subsequent cardiac arrhythmia (the s 4(a) allegation); and/or (b) exertion causing increases in heart rate in light of the pre-existing pathology leading to ischemia and electric disturbance (the s 4(b)(ii) allegation). He stated, relevantly:

> 14. It is unfortunate that a dispute arose in the interpretation of written submissions on the particularisation of injury. The parties were advised at the hearing of the need for care in formulating the allegations of injury and the observations of the Court of Appeal in *Miller v State of New South Wales* of the necessity in identifying the particular injury. The Court then stated with reference to the inadequate particularisation of injury:
>
> > That is insufficient. That introductory section of the form narrates the way in which the deceased died, but without squarely identifying the particular "injury" which, so it was alleged, caused the death. It is one thing to describe the mechanism of death; it is another thing entirely to identify the "injury" for the purposes of a claim under s 25 of the Workers Compensation Act. As noted above, this was clarified in the parties' oral addresses to the Arbitrator.
>
> 15. The applicant's written submissions do not formulate a further particular of injury. The applicant's submissions on delay in resuscitation are considered on the issues arising under s 9B and causation of death. For the reasons provided subsequently, the delay in resuscitation is not relevant to the s 4(b)(ii) issue.

The Principal Member found that the following facts were not in dispute:

> (1) The deceased was 57 years old when he died, and he had a long history of working as a lifeguard (both full-time and causal) and was also employed by Grain Corp for many years until March 2018.
>
> (2) in 2008, the deceased experienced chest pains and had stents inserted into his heart arteries. He had a family background of ischaemic heart disease and in 2009, he developed further angina resulting in further angioplasty and insertion of another in-stent stenosis.
>
> (3) In 2015, the deceased suffered a Non-ST-Elevation Myocardial Infarction (NSTEMI), and a further stent was inserted into the left anterior descending coronary artery.
>
> (4) In August 2020, the deceased applied to the respondent for the position of casual lifeguard for the 2020/2021 season. His application was accepted, and he was required to complete the required testing for his annual certification and employment as a casual lifeguard. As part of this process, on 26/10/2020 he completed the still water swim test of 800 m in under 14 minutes.

(5) On 30/10/2020, he attended Nobbys Beach with other candidates at around 7 am to complete the Mission test component of the certification. The Mission test involved completion of an ocean swim leg, beach run, rescue board paddle and second beach run.

(6) The police report of death to the coroner indicated that the first swimming leg of the Mission test was 400m and the deceased was in the process of completing the second leg when he went missing.

(7) The deceased entered the water and completed the first leg of the ocean swim. He was last seen around 7.50 am. At about "ten to fifteen minutes into the Mission test" there was comment that the deceased had not completed the swim and a search was initiated. Approximately five minutes later, he was found submerged in the water showing no signs of life. He was taken to the beach by jet ski and resuscitation efforts were commenced by lifeguards and subsequently by paramedics. The resuscitation efforts included chest compressions, two shocks from an automated external defibrillator and administration of adrenaline with no effect. He was then conveyed to John Hunter Hospital. Shortly after 9 am, he was pronounced dead.

The Principal Member noted that the post-mortem report indicated significant heart disease, described as a grossly enlarged heart for body size, severe coronary artery disease with multiple coronary artery stents, extensive scarring in the heart muscle (in keeping with previous 'heart attacks') and a thrombus or 'clot' in the already diseased right coronary artery. The degree of heart pathology was associated with a significant risk of death due to a sudden heart rhythm disturbance. There was also severe atherosclerosis.

Professor Keogh confirmed these findings in a report dated 25/07/ 2021, which described the extensive structural ischaemic disease as "extremely severe". The Professor stated that apart from the known heart attack on 26/01/2015 affecting the front wall, there had been a second heart attack at the back of the heart at an unknown time because there was "posteroseptal transmural scarring 50 mm extant".

After discussing the expert medical evidence, the Principal Member held that the deceased did not suffer a s 4(a) injury. He stated, relevantly:

102. I do not accept the applicant's submission that it can be inferred that the thrombus occurred during the swim because Mr Laverty did not complain of symptoms beforehand and commenced the swim. Such an inference cannot be drawn because, as Dr Clifton noted, "some people walk around apparently unaffected by severely stenosed vessels and others don't and I suspect it's something to do with their usual level of activity".

103. It is otherwise unknown, as Dr Clifton stated, whether the thrombus was formed by plaque rupture or by reason of the natural progression of the cardiac disease.

104. The final opinions expressed by both Dr Herman and Dr Clifton do not favour a conclusion that the thrombus occurred during the swim test.

105. Considering the change in opinions by both Dr Clifton and Dr Herman, the applicant has not established that the thrombus occurred during the swim…

In relation to s 4(b)(ii) WCA, the Principal Member held that the applicant must establish that "the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease". He noted that in *AV v AW,* Snell DP identified the following issues under s 4(b)(ii) and stated:

The following may be taken from the above:

(a) The test of 'main contributing factor' in s 4(b)(ii) is more stringent than that in s 4(b)(ii) in its previous form, which applied in conjunction with the test in s 9A. There will be one 'main contributing factor' to an alleged aggravation injury.

(b) The test of 'main contributing factor' is one of causation. It involves consideration of the evidence overall, it is not purely a medical question. It involves an evaluative process, considering

the causal factors to the aggravation, both work and non-work related. Medical evidence to address the ultimate question of whether the test of 'main contributing factor' is satisfied is both relevant and desirable. Its absence is not necessarily fatal, as satisfaction of the test is to be considered on the whole of the evidence.

(c) In a matter involving s 4(b)(ii) it is necessary that the employment be the main contributing factor to the aggravation, not to the underlying disease process as a whole.

The Principal Member identified the relevant issue as being whether the employment aggravated the underlying disease during the period of the swim. If it did, then it was the only factor aggravating the underlying disease and the test of main contributing factor to the aggravation of the disease is established.

In relation s 9B WCA, the Principal Member noted that the parties agreed that the relevant principles were summarised by Snell DP in *Secretary, Department of Communities and Justice v Galea* as follows:

Both parties accept that s 9B has application in the circumstances. Neither party argues that De Silva and Kim are wrongly decided. The following may be taken from those decisions:

(a) the worker carries the onus of establishing that the test in s 9B is satisfied.

(b) where the words 'an injury' first appear in s 9B (1), this refers to an injury asserted by a worker, in respect of which compensation is otherwise payable, subject to satisfaction of the test in s 9B.

(c) where s 9B (1) refers to 'the nature of the employment concerned', it refers to "what the worker in fact does in the employment that caused or contributed to the injury".

(d) s 9B (1) requires that the relevant risk of suffering the injury in the employment concerned be significantly greater than the risk had the worker not been employed in employment of that nature. 'Significant' in this context means 'important; of consequence'. The comparison involves an assessment of comparative risks and is not a true test of causation. The test involves an evaluative judgment, and

(e) the test requires satisfaction on all of the evidence. It does not necessarily "require that there be medical evidence to some particular effect". In cases raising s 9B it is desirable that there be medical evidence addressing the requirements of the section.

The Principal Member stated:

156. Given the matters referred to above and the uncontradicted evidence that Mr Laverty was at a very high risk of suffering an arrhythmic cardiac event without any precipitating activity, the fact that the right coronary artery was blocked due to the superimposed thrombus and the modest level of energy expended in the swim test, I am not satisfied that the s 9B test is established. Mr Laverty was already at severe risk of suffering arrythmia before the swim. There was no significant increase in risk of suffering the injury by reason of the swim…

161. I am not persuaded that earlier intervention would have on the balance of probabilities, avoided the death of Mr Laverty.

The Principal Member found that it was not necessary to consider whether the death resulted from the injury because s 9B WCA was not satisfied. Accordingly, he entered an award for the respondent.