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. Jarvis v Allianz Australia Insurance Limited [2022] NSWCA 232
2. Snapes Australia Pty Ltd v Tuliakiono [2022] NSWPICPD 44
3. Ram v Pubcorp Pty Ltd [2022] NSWPIC 643

Court of Appeal Decisions

MACA 1999 - Appeal from judicial review of decision of MRP - Whether MVA caused psychiatric injury – Whether degree of WPI greater than 10% - Whether MRP failed to respond to substantial argument regarding temporal connection between accident and PTSD symptoms – No jurisdictional error found

Jarvis v Allianz Australia Insurance Limited [2022] NSWCA 232 – Bell CJ, Brereton JA & Basten AJA – 15/11/2022

The judicial review decision was reported in Bulletin 110, but the following summary is provided for easy reference.

On 4/05/2011, the appellant was involved in a low-speed MVA (a bus ran into the back of his car), which caused minor damage. However, this followed upon many other MVAs in which he had either been, or seen, including an accident during a speedway race in which he was trapped upside down in a car for a lengthy period, seeing the car in flames and fearing he would drown as water used to douse the flames filled his helmet.

In the 2011 MVA, the appellant suffered minor physical injuries to the neck and shoulders, which quickly resolved, but he developed symptoms of PTSD. He claimed damages under the MACA and the insurer admitted liability, but it disputed that he had suffered greater than 10% WPI and that dispute was referred to a MA for assessment.

On 4/10/2019, Dr Andrews diagnosed an adjustment disorder with anxiety, PTSD and major depressive disorder as a result of the MVA and assessed 15% WPI. He considered that the appellant's previous multiple exposures to MVA's may have led to vulnerability to overreacting in this circumstance and, on balance, Criterion A in DSM-5 had been met. In relation to the issue of apportionment for any pre-existing impairment, he noted the absence of any pre-existing or subsequent impairment and said, "*while [Mr Jarvis] had been subject to trauma in the past, there is no evidence that this caused any condition or illness. He was fully functional and had no impairment prior to May 2011*".

The Insurer sought a review by a MRP and on 18/11/2020, the MRP revoked the MAC and issued a new MAC which certified that WPI was not greater than 10% because there was "*nil diagnosed psychiatric disorder related to the motor accident.*" It expressed the view that the PTSD was consistent with the speedway race accident, but the 2011 accident would not satisfy Criterion A of DSM-5.

The appellant applied for judicial review of the MRP's decision on seven grounds, which were distilled during the hearing to assert jurisdictional error as follows: (1) it failed to engage with his evidence or submissions before it; (2) it denied him procedural fairness by deciding the matter on a basis upon which he was not given notice; and (3) it constructively failed to exercise a statutory function in that it failed to make a new assessment of all the matters with which the assessment was concerned, and/or did not make its assessment in accordance with the Permanent Impairment Guidelines.

Justice McCallum dismissed the summons and found that the appellant had not established any jurisdictional error or error of law on the face of the record.

The Court dismissed the appeal and the Headnote to the decision provides:

> Per ***Basten AJA [78] (Bell CJ agreeing; Brereton JA dissenting [1], [31])***, dismissing the appeal, with costs:
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> **As to whether the review panel failed to respond to a substantial argument raised by the appellant about the temporal connection between the accident and his symptoms:**
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> 1. ***Per Basten AJA (Bell CJ agreeing)***: The review panel addressed the appellant's argument that the accident caused the symptoms because the symptoms developed after the accident. The panel, exercising its medical expertise in determining that the accident did not satisfy Criterion A for PTSD under DSM-5, implicitly, if not expressly, rejected the appellant's argument, which relied upon post hoc ergo propter hoc reasoning. It was open to the panel to make a different finding to the original assessor, and to determine that there was insufficient causal connection between the accident and the appellant's condition: [57]-[63].
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> 2. ***Per Brereton JA, contra:*** The review panel's reasoning does not engage with the fact that the appellant was asymptomatic before the accident, and first experienced symptoms after it. The review panel did not refer to the temporal sequence or its significance, and did not address the argument that even if the PTSD is referable to earlier traumatic incidents, the onset of symptoms, which included some that appear referable to the accident, was triggered by the accident. As such, the panel either failed to engage with a substantial argument put to it on a crucial issue, or failed to apply itself to the real statutory question by overlooking a critical aspect of the evidence. On either basis, this was jurisdictional error, and the primary judge erred in not so concluding. [21]-[24]; [28]-[30].
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> **As to whether the appellant had sufficient notice of and opportunity to respond to the issue of causation before the review panel:**
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> 3. ***Per Basten AJA (Bell CJ agreeing; Brereton JA not deciding)***: A review panel undertakes a fresh assessment of the claim. Ordinarily, a claimant would not need to be given notice of a dispositive issue which is in dispute. The causal connection between the accident and the appellant's symptoms was an issue that was apparent in the insurer's statement in support of its review application, and from the medical opinions provided to the assessor and review panel: [65]-[67].
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> **As to compliance with the Act and Guidelines**
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> 4. ***Per Basten AJA (Bell CJ agreeing; Brereton JA not deciding)***: A review panel is not required to address matters which do not arise because it has formed an adverse view of the claim for reasons not requiring resolution of those matters. The review panel addressed the relevant issue of causation consistently with the Guidelines, in finding that the accident made a "less than negligible" contribution to the appellant's symptoms: [70]-[72].

PIC - Presidential Decisions

Interlocutory decision – s 352(3A) WIMA - remittal of matter to the President for referral to a MA to assess WPI in circumstances where there is a dispute about whether the s 66(1A) threshold is met – Interlocutory decision – Leave to appeal refused

Snapes Australia Pty Ltd v Tuliakiono [2022] NSWPICPD 44 – Acting Deputy President Parker SC – 15/11/2022

The worker was injured at work on 26/10/2015 and suffered impairment of the left shoulder, left knee and back.

In 2019 proceedings, Consent Orders were filed which provided for an award for the respondent in respect of the alleged injuries to the lumbar spine and left knee and leave to discontinue the s 66 claim in respect of the left upper extremity.

In these proceedings, the worker claimed 20% WPI, based assessments from Dr Bodel, (left upper extremity, left lower extremity and the lumbar spine).

The appellant argued that the consent orders gave rise to an estoppel with respect to the claims for the left lower extremity and the lumbar spine.

Member Young determined the estoppel issue in favour of the appellant, concluding that:

> where there are consent awards in favour of a party on the issue of injury, those awards give rise to an estoppel preventing the affected party from re-litigating that finding. That being the case, there will be an award in favour of the [appellant] in respect of those alleged injuries. There will be an award in favour of the [respondent] in respect of injury to the [respondent's] left upper extremity and a remit to the President for referral to a Medical Assessor for assessment of whole person impairment.

The appeal concerns itself with the direction that the matter be remitted to the President for referral to a MA for assessment of WPI for the left upper extremity (shoulder) where the highest assessment was not greater than the 10% threshold under s 66(1) WCA.

Acting Deputy President Parker SC determined the appeal.

He noted that the appellant argued that the Member's decision was a final decision on the basis that if it had favoured them, the worker's s 66 claim would have been concluded. However, Parker ADP held that the decision was interlocutory and that the appellant required leave to appeal under s 352(3A) WIMA.

The appellant argued that leave should be granted because:

- the Member erred in law by making an award for s 66 compensation when the worker is not entitled it "pursuant to the proper application of the law".
- The issue in dispute involves obvious error and to allow the decision to stand would mean that the worker would be prosecuting a claim for s 66 compensation despite not satisfying the requirements of section 66(1) WCA. This would be contrary to the law.
- The grant of leave in this matter will avoid additional costs and delay. The referral to a MA is not necessary when the worker has no entitlement to s 66 compensation. The referral is unnecessary and will result in additional costs and delays in the determination of the dispute between the parties. The grant of leave to appeal would avoid the unnecessary medical assessment by a MA.

Parker ADP declined to grant leave to appeal. His reasons are summarised below:

- The Member's decision is not plainly erroneous in law.
- At first instance, the appellant made no submissions regarding the injury to the left upper extremity and in its written submissions, it stated that if the Member held that the worker's claim, was not estopped, it did not oppose a referral to the President for remittance (sic) to a MA in respect of the pleaded injuries.
- The pleaded injuries included an injury to the left upper extremity.
- The appellant's submissions at first instance were confined to the left knee and the lumbar spine and this was inevitable given the terms of the previous consent orders.
- It was not until the application for reconsideration was before the Member that the appellant advanced its arguments pressed in this appeal.
- Parker ADP stated that if he had reached a different conclusion regarding the grant of leave, he would have directed the parties to file additional submissions about whether the appellant should be allowed to raise this argument on appeal in circumstances where it was not squarely raised initially.
- A grant of leave was neither necessary nor desirable for the proper and effective determination of the dispute regarding the worker's entitlement to compensation for permanent impairment.

- Further, it is much more likely that the WPI assessment by the MA will resolve the dispute between the parties.
- If the MA's assessment is not greater than 10%, the worker will have failed.
- If the MA's assessment is greater than 10%, the appellant is not precluded from appealing the referral and advancing its submissions made in this appeal.

PIC – Member Decisions

Workers Compensation

Section 60 – Whether cervical surgery is reasonably necessary as a result of a work-related injury – worker failed to establish injury – award for the respondent

Ram v Pubcorp Pty Ltd [2022] NSWPIC 643 – Member Sweeney – 18/11/2022

The worker was employed by the respondent as a gardener/handyman by Pubcorp Pty Ltd until August 2019, when he reported a work-related injury to his low back. He has not returned to work and underwent 2 surgeries to his lower back. The respondent accepted liability for the back injury.

On 21/09/2021, Dr Darwish, treating neurosurgeon, recommended C5/C6 anterior cervical discectomy and fusion surgery. However, the insurer disputed liability for that proposed surgery and issued a s 78 Notice, which relied on ss 4(a), 4(b)(ii), 9A, 33 and 60 WCA.

Member Sweeney conducted an arbitration and on 18/11/2022, he issued a COD which entered an award for the respondent with respect to the s 60 dispute.

The Member noted that the contemporaneous medical evidence and the claim form that the worker completed in 2019 indicated injuries to the back and legs, but not the cervical spine. It was not until 22/07/2021 that Dr Darwish reported that the worker also injured his neck in the fall in 2019 and that he was going to make a WorkCover claim.

The Member stated that it was likely that the worker has a degenerative condition of his cervical spine. He stated, relevantly (citations removed):

> 78. The caselaw from both the Court of Appeal and the Presidential Unit of the Commission has repeatedly stated that histories in medico-legal reports and in the clinical or continuation notes of medical practitioners should be treated with caution. More so when they are inconsistent with the sworn evidence of a witness. *Daniel Gerard Fitzgibbon v The Waterways Authority & Ors* and *Davis v Council of the City of Wagga Wagga* are only two examples of these cases.
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> 78. On the other hand, the presence or absence of a relatively contemporaneous complaint of symptoms in a document or medical record has generally been regarded as an important measure of the occurrence and nature of injury: see, for example, the approach of the trial judge recorded in *Azzopardi v Tasman UEB Industries Ltd*. The greater the interval between the incident and the first report of symptoms, the more difficult it is to be confident of a causal nexus.
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> 79. The passage of time may cast doubt on the reliability of the evidence of witnesses. In *Coote v Kelly; Northam v Kelly*, Davies J collected a number of cases dealing with credibility and the fallibility of human memory. Many are well-known and I do not propose to recite them in this decision. They provide some logical underpinning for the reluctance to invariably accept the evidence of a witness where there is inconsistency between his evidence and the contemporaneous documentary record, even if the witnesses' evidence is not otherwise impugned. Obviously, it is necessary to scrutinise the written record to ensure that is reliable and not corrupt. As the case law instructs the clinical notes of medical practitioners are not recorded for legal purposes.
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> 80. In this case, I find it difficult to reconcile the absence of any record of a complaint of neck pain over a period of some two years in Dr Gounder's notes and in the histories recorded by three specialists with the applicant's evidence that he experienced neck symptoms from the time of the frank injury.

81. Dr Bodel expressed the opinion that the X-ray report of the cervical spine dated 19 August 2019 and the CT scan of the cervical spine dated 26 August 2019 supported the applicant's contention that he experienced neck pain following the injury. The reason why Mr Brkija, the chiropractor, referred the applicant for X-rays of his cervical, thoracic, lumbar and pelvic areas is not clear from the evidence. However, the clinical note referred to in the CT scan of the cervical, thoracic, lumbar, and sacroiliac joints addressed to Dr Gounder is "Ongoing back pain". There is nothing in this note or the clinical notes of the doctor to suggest that the applicant's neck was symptomatic at the time. If it was, there is nothing in the notes to suggest that it continued to be symptomatic over the next two years.

82. Mr Barter argued that while the clinical notes and the medical histories did not corroborate the applicant they did not flatly contradict is evidence. They did not, for example, contain a denial that the applicant experienced neck pain during the course of his employment. That is true.

83. Nonetheless, Dr Bodel and Dr Powell recorded detailed histories in their initial reports. Dr Powell recorded that in May 2019 the applicant experienced symptoms which extended to his thoracic spine and to his peri-scapular region, although the latter symptoms resolved. It would be surprising if the applicant inadvertently omitted reference to neck symptoms from this account. When the doctor saw the applicant again on 3 December 2020, he recorded that the applicant remained symptomatic "in relation to the lower back". It must also be borne in mind that the history of initially recorded by Bodel and Dr Powell is consistent with the applicant's claim form…

87. In addition to proof of injury to the neck, in order to succeed on this claim the applicant must prove that his employment was a substantial contributing factor to the injury or, if the injury be characterised as a disease, that the employment was the "main contributing factor" to the aggravation of the disease. Further, he must prove that the need for surgery proposed in 2001 results from the injury in 2019.

88. Proof of each of these matters is made difficult by the absence of a recorded complaint of neck injury in the clinical record and in the worker's report of injury form. In my opinion the worker has not proven that sustained a cervical injury arising out of or in the course of his employment. In the event that there was such injury, the absence of complaint over a period of almost two years suggests an absence of causal nexus between injury and the need for surgery. It is not possible to reconcile the absence of complaint in 2019 with the florid symptom complex of neck and arm pain suggestive of nerve root compression found by the medical practitioners in 2021.

89. The evidence of Dr Bodel and Dr Darwish is largely based on an acceptance of what they were told by the applicant in 2021. Dr Darwish, of course, records that the applicant told him he was "confident' that his neck symptoms commenced at the time of the injury. The balance of the evidence, however, casts considerable doubt on this account of the development of his symptoms. I prefer the opinion of Dr Powell. His evidence is more consistent with the entirety of the medical record which is to be preferred to the applicant's recollection.