Bulletin

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Independent Review Office

RECENT CASES

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

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Supreme Court of NSW Decisions

Judicial review of a determination of the PIC's Medical Appeal Panel (MAP) – psychological injury - powers of Appeal Panel – No denial of procedural fairness arose from the MAP's decision not to re-examine the plaintiff as the requirement for the MAP to consider his request to be re-examined had not arisen

Finnegan v Komatsu Forklift Australia Pty Ltd [2023] NSWSC 38 – Chen J – 3/02/2023

In 2014, the plaintiff was appointed by the defendant as a Customer Service Supervisor. By mid-2015, he began to suffer psychological symptoms including anxiety and stress. On 11/03/2016, the defendant stood him down because of concerns about his behaviour and work performance. He returned to work on 11/04/2016, but he again ceased work on 26/04/2016 and his employment was terminated on 22/11/2016.

The plaintiff claimed compensation for anxiety and depression, but the defendant disputed the claim. He then claimed compensation under s 66 WCA for 17% WPI, based upon an assessment from Dr J Bertucen, but the defendant also disputed that claim.

The dispute under s 66 WCA was referred to Dr P Morris and he issued a MAC which assessed 8% WPI under PIRS. This did not satisfy the s 66 threshold. The PIC issued a COD, based upon that MAC.

The plaintiff appealed against the MAC under ss 327(3)(c) and (d) WIMA.

On 14/01/2022, a MAP of the PIC confirmed the MAC.

The plaintiff sought judicial review by the Supreme Court of NSW and alleged that the MAP's decision was the result of error and procedural unfairness and that there was jurisdictional error and error of law on the face of the record. He alleged that the MAP failed to consider correct criteria, failed to consider arguments made in support of [the] appeal, failed to consider all relevant material and failed to re-examine him.

Chen J dismissed the summons and ordered the plaintiff to pay the first defendant's costs.

His Honour observed that:

> (1) (at a minimum) "*a mere error of fact which is patent on the face of the reasons for a decision does not render the decision liable to be set aside in proceedings by way of judicial review*": *Chan* at [47];
>
> (2) the supervisory jurisdiction of the Court, under s 69 of the Supreme Court Act, is available to correct jurisdictional error, or error of law on the face of the record, and only errors in fact-

finding when the error is within one of these categories: *Folbigg v Attorney General of New South Wales* [2021] NSWCA 44 at [8]; and

(3) the first 3 grounds of review advanced by the plaintiff allege "error in point of law" without clearly identifying the precise nature of the legal error. Whether there is such an error will turn upon a proper analysis and "no amount of formulary" will transform something into a legal error if it is not: *Australian Telecommunications Corporation v Lambroglou* (1990) 12 AAR 515, 527; [1990] FCA 689.

His Honour was not persuaded that the MAP misdirected itself or erred in finding that there was no evidence that the plaintiff had an ongoing inability to manage his finances independently. He found that the MAP accepted that the plaintiff had an impaired ability to manage his finances until at least 2017, but he rejected the plaintiff's arguments for the following reasons:

(1) They do not correctly reflect the MAP's reasons and findings and it did not make a "no evidence" finding;

(2) Noting how the plaintiff put his case to the MAP, it is now not open to him to raise a different ground (namely that there was other evidence which, if accepted, would be sufficient to support a finding of fact that he seeks). If he sought to argue that he could not live independently because he could not manage his finances, that case had to be marshalled below; and

(3) Even if there was an error, an error of this kind, is not an error of law on the face of the record.

His Honour rejected a contention that that the MAP failed to consider arguments in support of the appeal, which gave rise to jurisdictional error and error of law on the face of the record. He did not accept that any reviewable error was demonstrated.

His Honour found that there was no substance to the assertion that the MAP failed to consider all relevant material and he found that the MAP's reasons were sufficient and that there was no error.

His Honour also noted that the plaintiff argued that the MAP's failure to consider his request to re-examine him, and to fail to provide reasons for not doings so, denied him procedural fairness and resulted in jurisdictional error. However, he found that as no error was demonstrated with respect to this decision as the occasion for the plaintiff to be re-examined and the requirement of the MAP to consider that request had not arisen.

His Honour dismissed the summons and ordered the plaintiff to pay the first defendant's costs.

MAIA - claim rejected by insurer — application for review — MA found injury was not minor – Insurer applied for review of MA's certificate — gateway function of President of PIC under s 7.26(5) of the Act—delegate referred review application to MRP — whether there is an implied obligation to give reasons for decision — delegate fell into error — decision to refer assessment to MRP quashed

Pinarbasi v AAI Ltd t/as GIO [2023] NSWSC 80 – Schmidt AJ – 14/02/2023

In July 2018 the plaintiff was injured in a MVA. However, his claim under the MAIA was rejected on the basis that he suffered "minor injury". He successfully applied for a review of that decision and a MA (Dr Herald) found that he had not suffered a minor injury to his right shoulder.

The insurer applied for a review of the MA's decision and the President's delegate concluded that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect and referred the matter to a Medical Review Panel (MRP).

The plaintiff applied to the Supreme Court for judicial review of the delegate's decision.

Schmidt AJ noted that there was an issue whether there was an implied obligation to give reasons for decision when the s 7.26 gateway function was exercised, which the delegate had not complied with.

Her Honour held that s 7.26(5) does not impose an obligation on the delegate to give reasons for their decision and she stated, relevantly:

28 A more similar provision to s 7.26(5) of the *Motor Accidents Injuries Act*, s 63(3) of the *Motor Accidents Compensation Act 1999 (NSW)*, arose to be considered in *Marsh*. There an application for review of a medical assessment had been refused, but reasons had been given by the proper officer there exercising that gateway function. Whether there was an obligation to give reasons thus did not arise for consideration in that case. But what was there decided is relevant to the determination of the second issue raised by Mr Pinarbasi.

29 I am nevertheless satisfied that a similar conclusion must be arrived at in relation to the construction of s 7.26(5) of the *Motor Accidents Injuries Act*, as that reached in relation to s 327(4) of the *Workplace Injury Management and Workers Compensation Act* in *Riverina Wines*. That follows from the similar nature of the two gateway functions, despite the differences in wording in the two sections.

30 Both gateway functions are administrative, not judicial in character; neither require the correctness of the medical assessment sought to be reviewed to be determined; neither otherwise determine ultimate rights or liabilities; and neither attract any appeal rights, alleged error having to be pursued by way of judicial review application.

31 It follows that on its proper construction, there is also not implied in s 7.26(5) any obligation to give reasons for the decision the President or the delegate arrives at, when exercising that gateway function, when an application for review of a medical assessor's certificate is made.

32 As explained in *Avon* at 360, even though there is no requirement to give reasons when the gateway function is exercised, the decision may be reviewed in proceedings such as this. Such an application will succeed, if on a full consideration of the material which arose to be considered, the conclusion reached is capable of explanation only on the ground of some misconception as to the applicable law.

33 Thus, *"[i]f the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition*." In such a case it is not necessary "*to be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law*".

Her Honour also stated (at [40]) that the exercise of the resulting gateway function also cannot proceed simply on the basis that of the conclusion that there having been a medical dispute before the MA involving conflicting medical opinions, that there must be reasonable cause to suspect that the medical assessment was incorrect in a material respect, because the assessor came to a different view to that arrived at in the medical opinions on which the party challenging the assessment had relied.

However, Her Honour held that the delegate erred by accepting that the MA having reached a different opinion to that of the doctors on whom the insurer relied, provided a reasonable cause to suspect that the medical assessment was incorrect in a material respect. For the reasons explained in *Marsh*, that complaint was not capable of providing a basis for the required statutory opinion. It followed that the delegate's conclusion was capable of explanation only on the ground of a misconception about the applicable law.

Accordingly, her Honour quashed the delegate's decision to refer to assessment to the MRP.

PIC - Presidential Decisions

Federal jurisdiction – Div 3.2 of the PIC Act 2020 - Citta Hobart Pty Ltd v Cawthorn [2022] HCA 16, Love v Attorney General (NSW) [1990] HCA 4; R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd [1970] HCA 8; Brandy v Human Rights & Equal Opportunity Commission [1995] HCA 10 considered and applied

State of New South Wales v Kanajenahalli – Deputy President Wood – 18/01/2023

The respondent was employed by the appellant from 29/04/2019 as an Unaccredited Trainee in Paediatrics and Child Health, under a 12-month contract arranged through the Australian Health Practitioner Regulation Agency (AHPRA). He ceased work on 11/06/2019 and resigned on 12/06/2019. He claimed compensation for a psychological injury (described as "burnout" and "depression"), but the appellant disputed the claim.

The respondent claimed weekly payments, s 60 expenses and compensation under s 66 WCA in the PIC for "an aggravation, acceleration, exacerbation or deterioration of a psychological disease" (deemed date: 11/06/2019).

On 10/01/2022, ***Member Burge*** issued a COD which found for the respondent and dismissed the appellant's defence under s 11A WCA (performance appraisal and/or discipline). The appellant appealed.

Deputy President Wood identified a preliminary issue, namely that the worker was a Queensland resident when the ARD was filed. Therefore, for the PIC to have jurisdiction to determine the dispute it must be shown that it is a court of the State (and thus invested with the relevant federal jurisdiction) or that it is exercising administrative power and not judicial power in determining it.

The jurisdiction issue was not raised before or considered by the Member and Wood DP listed the matter for oral submissions on 15/12/2022.

During that hearing, both parties agreed that the dispute was between a resident of Queensland and the State of NSW and that the PIC is not a court of the State and is not invested with judicial power to determine the dispute.

However, the parties argued that the Member was exercising administrative power and not judicial power by determining the dispute and that a determination of the appeal would also involve the exercise of administrative power. Therefore, the PIC has jurisdiction to determine the dispute and the appeal.

The appellant relied upon the decision of Snell DP in *Lee* as authority that the Member was exercising administrative power in the decision-making process. However, she held that *Lee* is not authority for that proposition and the essence of that appeal centred around whether the argument that the dispute was between a State and a resident of another State was "colourable" or arguable, and whether the Member erred in awarding compensation on the basis that he was of the opinion that he had jurisdiction to do so.

The respondent argued that because the PIC is not a court, the power exercised by the Member was administrative power. However, Wood DP rejected that argument. She noted that in *Orellana-Fuentes*, Ipp JA (Spigelman CJ and Handley JA agreeing) said:

> Undoubtedly, the Commission does exercise judicial powers, but this does not necessarily make it a court. There are many institutions that exercise judicial powers but are well recognised not to be courts.

Wood DP held that the fact that the PIC is not a court does not necessarily lead to the conclusion that all its decisions are administrative in nature.

The respondent also argued that the PIC's inability to enforce its own decisions is a factor leading to a determination that the Member's decision was not an exercise of judicial power and that the power to enforce an order has long been regarded as an essential element in the exercise of judicial power.

The respondent also relied upon *Brandy v Human Rights & Equal Opportunity Commission*, in which Deane, Dawson, Gaudron and McHugh JJ said (citations omitted):

> However, there is one aspect of judicial power which may serve to characterize a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power. In *Waterside Workers' Federation of Australia v. J.W. Alexander Ltd* Barton J said:
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> > It is important to observe that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole the judicial power is undeniably complete.'
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> > ...
> >
> > However, notwithstanding the reference by Griffith CJ to a tribunal 'called upon to take action', it is not essential to the exercise of judicial power that the tribunal should be called upon to execute its own decision. As Dixon CJ and McTiernan J observed in *Reg. v. Davison*, an order of a court of petty sessions for the payment of money is made in the exercise of judicial power, but the execution of such an order is by means of a warrant granted by a justice of the peace as an independent administrative act.

Wood DP held that this argument was not persuasive.

The respondent also argued there are restrictions upon what disputes may be brought to the PIC, which is different to the operation of a court that deals with matters at large, the rules of evidence do not apply and leave is required to raise issues that are outside the notified dispute.

However, Wood DP held that the respondent did not point to any particular authority for this proposition and that the matters it raised are not determinative and the PIC is required to act in accordance with principles of procedural fairness.

The respondent argued, based upon *Cawthorn*, if the PIC found that the Member's determination was an exercise of judicial power, it is limited to expressing an opinion and cannot determine whether the decision is, or is not, an exercise in judicial power.

Wood DP stated that in *Cawthorn*, the plurality said (citations omitted):

> A court in which judicial power is invested therefore 'has jurisdiction to determine – and to determine judicially – whether it has the jurisdiction to entertain a particular application or to make a particular order'. The court, in other words, has 'jurisdiction to decide its own jurisdiction' in the performance of which it exercises judicial power.
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> A tribunal that is not a court and that is invested with non-judicial power correspondingly has authority – in the exercise of non-judicial power – to 'make up its mind' or ''decide' in the sense of forming an opinion' about the limits of its own jurisdiction 'for the purpose of determining its own action'. The authority is not to 'reach a conclusion having legal effect' but to form an opinion for the purpose of 'moulding its conduct to accord with the law'.

Therefore, it is necessary to consider the character of the power being exercised, in order to form an opinion as to whether it is an exercise of judicial power.

In *Love*, the High Court observed that *"[j]udicial power has proved to be insusceptible of comprehensive definition."* However, as Kitto J described in *Tasmanian Breweries*:

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power

> which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.

The respondent sought to rely on the Court of Appeal's decision in *Searle*. That matter involved a claim under the motor accidents legislation, which was determined in the Motor Accidents Division of the PIC. Kirk JA (with Bell CJ and Ward P agreeing) observed:

> Mr McGregor also submitted that determination of claims for statutory benefits under the [Motor Accident Injuries Act 2017 (NSW)] would be subject to the *Burns v Corbett* limitation. That is a submission open to substantial doubt, for it is questionable whether the various determinations of such benefits involve the exercise of judicial power. In that regard it is notable that claims for statutory workers compensation benefits in the federal sphere have long been, in general, determined first by an administrative agency (Comcare), with review rights in the Administrative Appeals Tribunal ... However, it is not necessary to address the issue of the nature of claims for statutory benefits here.

Wood DP held that *Searle* does not assist the parties in respect of an assessment of whether the determination in this matter was an exercise of judicial power, as the Court of Appeal did not consider the nature of the power exercised in the Workers Compensation Division of the PIC, which resulted in enforceable orders awarding weekly compensation and treatment expenses under the workers compensation scheme, and it certainly did not consider the nature of the power to be exercised at the presidential level.

Wood DP referred to the judgment of Weber SC DCJ of the District Court in *Islam*, which provides a useful summary of the indicia drawn from the various authorities dealing with the distinction between administrative and judicial powers. That is, that judicial power:

> (a) is exercised independently of the person against whom the proceedings are brought;
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> (b) is binding and authoritative, whether or not it is subject to appeal;
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> (c) determines existing rights and obligations according to law, thus quelling the controversy between the parties, and
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> (d) must be exercised judicially by way of an "open and public enquiry (unless the subject matter necessitates an exception)" and the "observance of the rules of procedural fairness.

In this matter, the Member's decision involved a consideration of the relevant legislation (s 11A of *WCA*) and the applicable authorities, an assessment of the available evidence and an independent evaluation of each parties' case. Section 56 of the *PIC Act* provides that the decision is final and binding, and an appeal pursuant to s 352 *WIMA* is limited to the question of whether the determination is or is not affected by error of fact, law or discretion. It operates to quell the controversy between the parties in respect of whether the appellant's conduct was reasonable and whether the respondent is accordingly entitled to compensation.

Wood DP further noted that an *Anshun* estoppel can arise from the PIC's determinations in some circumstances. Also, a Member is required to provide written reasons for the decision and decisions of the PIC are published and are therefore open to public scrutiny. Importantly, the Member's order that the appellant pay the respondent compensation is enforceable in accordance with s 59 of the *PIC Act*. She concluded:

> 66. While each of these matters would not, of themselves, be sufficient to show that the Member was exercising judicial power, considering them cumulatively leads me to be of the opinion that the Member was impermissibly exercising judicial power in determining the dispute between the parties. In *Orellana-Fuentes* Ipp JA (with Spigelman CJ and Handley JA agreeing) considered that "[u]ndoubtedly, the Commission does exercise judicial powers."

67. A fortiori, I am of the opinion that a determination of the appeal would also involve an impermissible exercise of judicial power. The same indicia pointing to the exercise of judicial power that is relevant to a decision of a non-presidential member is equally applicable to a decision of a Presidential member. In addition, a Presidential member is required to be or have been a judicial officer or be an Australian lawyer of at least seven years' standing, a decision of a Presidential member is authoritative, and an appeal from such a decision is only available in point of law.

68. The respondent indicates that, if I am of the opinion that the Member's determination of the dispute and/or a determination of the appeal is an exercise of judicial power contrary to s 75 of the Constitution, then these proceedings should be stayed in order for him to pursue appropriate proceedings in another jurisdiction, either in the Supreme Court, or in the District Court in accordance with Division 3.2 of the 2020 Act. The appellant indicates that it would not object to such a course but submits that it reserves its position in relation to how it wishes to respond to any such application.

Wood DP stayed the appeal for 12 weeks to enable the parties to take necessary steps to progress the matter in a different forum. She granted the parties liberty to apply in the event that they were aggrieved by the stay order.

Section 38 WCA – Member's obligation to give reasons – failure to give reasons

Ferro v Mercon Group Pty Ltd [2023] NSWPICPD 4 – Acting Deputy President Parker SC – 1/02/2023

On 3/02/2017 the appellant suffered a severe left ankle injury at work and the respondent accepted liability for that injury. However, the appellant also alleged injuries to the cervical spine, lumbar spine, laceration to the head, impairment of the visual system and a psychological injury (PTSD and depression) and the respondent disputed liability for those injuries.

The appellant filed an ARD and claimed compensation with respect to all of the alleged injuries.

On 14/04/2022, ***Member Burge*** issued a COD, which found that the appellant injured his left lower extremity (leg and ankle) and suffered a psychological injury, but he entered an award for the respondent with respect to the other alleged injuries. He also found that the appellant had not satisfied the requirements for an award for weekly compensation under s 38 *WCA* and he entered an award for the respondent with respect to the claim for continuing weekly payments from 3/08/2019.

The appellant appealed and asserted that the Member erred as follows:

(1) In law by failing to give any or any adequate reasons for making an award for the respondent in respect of the claim for weekly compensation on or from 3/08/2019;

(2) In fact or law when he made an award for the respondent in respect of the claim from 3/08/2019 and continuing; and

(3) Such other grounds as become apparent when the transcript is available.

Acting Deputy President Parker SC determined the appeal. He noted that the only controversial factual issues were: (1) whether the insurer had made an assessment of the appellant's current work capacity; and (2) whether ss 38(2) or (3) *WCA*. However, the Member made no findings on those issues.

Parker ADP held that ground (1) was made out and he set aside the offending paragraph of the COD. He noted that the Transcript indicated that appellant's counsel directed the Member's attention to medical evidence that supported the submission that the appellant had no current work capacity. This submission was fundamental to and involved a substantial part of the appellant's case for weekly payments.

Parker ADP stated, relevantly:

> 34. Contrary to the appellant's submissions, the Member did not expressly find that the appellant had "no current work capacity". He found "total incapacity", but this is not the same as a finding of "no current work capacity". Furthermore, the Member has no authority to make findings with respect to current work capacity for the purpose of s 38 of the 1987 Act. Section 38 requires the insurer to make a work capacity assessment. Therefore the Member's function in the event of a contest is to determine whether the insurer has made an assessment and what is the assessment.
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> 35. A claim under s 38 was clearly raised in the ARD. The appellant's counsel made a clear submission that the appellant's entitlement to compensation was not limited to the 130-week period which expired on 2 August 2019 but extended for a further 130-week period.
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> 36. Counsel did not expressly direct attention to s 38 in terms, but as the only circumstance in which compensation could be payable after 130 weeks was pursuant to s 38 (see s 38(1)), it was not essential to raise the submission. In any event, it is plain from the terms of Order 6 that the Member recognised he was dealing with s 38.
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> 37. As both parties recognised in their submissions on the appeal, s 38 required the insurer to make an assessment as to whether the appellant had a current work capacity or no current work capacity. The Member did not make a finding with respect to whether or not the insurer had made any such assessment…
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> 39. The disposition of the appellant's claim for weekly compensation after 3 August 2019 required the Member to provide reasons sufficient to satisfy s 294(2) and r 78. The absence of reasons is an error of law.
>
> 40. The order made by the Member has the same vice as the order made in *Lee*. Namely, it has the legal and practical potential to deprive the appellant from obtaining a work capacity decision and from recovering compensation from the relevant insurer or both.

Parker ADP found that ground (2) was defective in form and ground (3) was not a valid appeal ground. He remitted the claim under s 38 *WCA* to a different member for re-determination.

Recovery of statutory compensation from the employer barred under s 151Z(1)(c) WCA

Conway v Campbelltown Catholic Club Limited [2023] NSWPICPD 5 – Acting Deputy President Parker SC – 1/02/2023

The appellant alleged that he suffered multiple hernias on 15/06/2016 while lifting rubbish bags at work. The respondent disputed liability.

The appellant underwent surgical treatment for the hernias performed by Dr Fedorine, but he suffered severe complications including an orchidectomy. He alleged that the surgery and medical treatment were performed negligently and on 7/05/2019, he commenced proceedings in the Supreme Court against Dr Fedorine.

On 2/11/2020, the appellant and Dr Fedorine executed a Deed of Release and Indemnity (the Deed), whereby Dr Fedorine agreed to pay the appellant damages of $650,000, inclusive of costs, in full and final settlement of the claim. Dr Fedorine did not admit negligence. As a condition of the settlement, the appellant agreed to discontinue the Supreme Court proceedings.

The appellant then filed an ARD claiming compensation under s 66 WCA against the respondent and the respondent disputed the claim.

On 23/03/2022, ***Member Wynyard*** issued a COD and entered an award for the respondent.

The appellant appealed and asserted that the Member erred in law when he found that the damages paid in the medical negligence settlement gave rise to a bar to him recovering workers compensation benefits under s 151Z(1)(c) *WCA*.

Acting Deputy President Parker SC dismissed the appeal and confirmed the COD. His reasons are summarised below.

Parker ADP noted that the Member found against the appellant on 2 bases, namely:

> (1) s 151Z(1)(c) *WCA* applied and he had recovered damages from a person other than his employer; and
>
> (2) the residual right inguinal hernia did not reach the threshold required by s 66 *WCA*.

However, there was no challenge to (2) and even if the appeal succeeded, there would not be a different award.

In relation to (1), Parker ADP stated that it is established learning in workers compensation law that when a surgical procedure has been carried out to remedy or alleviate an injury compensable under the workers compensation legislation, the total condition resulting from the injury and the surgery is to be attributed to the original injury, so long as the worker reasonably agreed to the operation.

In *Mahony v J Kruschich (Demolitions) Pty Ltd* [1985] HCA 37, five members of the High Court said:

> ... When an injury is exacerbated by medical treatment, however, the exacerbation may easily be regarded as a foreseeable consequence for which the first tortfeasor is liable. Provided the plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a novus actus interveniens which relieves the first tortfeasor of liability for the plaintiff's subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given ... It may be the very kind of thing which is likely to happen as a result of the first tortfeasor's negligence ... That approach is consistent with the view taken in the workers' compensation cases that the total condition of a worker whose compensable injury is exacerbated by medical treatment, reasonably undertaken to alleviate that injury, is to be attributed to the accident: see *Lindeman Ltd v Colvin* [1946] HCA 35; (1946) 74 CLR 313 per Dixon J at p 321; *Migge v Wormald Bros Industries Ltd* (1972) 2 NSWLR 29, per Mason JA at p 48; on appeal (1973) 47 ALJR 236) ...

In *Lindeman Limited v Colvin* [1946] HCA 35, the respondent suffered an injury to the head. At the hospital he was told that he could walk around in the grounds if the weather was fine and warm. He did so and whilst walking down a flight of steps broke his left leg. The respondent suffered a pathological condition of the bones which rendered his leg liable to spontaneous fracture in the ordinary course of walking. The High Court reversed the Full Court decision in favour of the worker. Latham CJ said:

> Where a second injury follows upon an original injury it may be causally connected with the original injury, as in cases of injury directly due to medical treatment of the injury. But not everything that happens during a period when a man is undergoing medical treatment can be regarded as part of the medical treatment so as to be causally connected with the injury for which he is being treated. A man undergoing medical treatment must have meals, and in one sense the eating of food may be described as an integral part of his medical treatment. But if these meals consist of normal food and he happens to choke himself and die, and the choking had nothing to do with his original injury, there would be no evidence to justify a finding that the death resulted from the original injury and so arose out of his employment. In this case the cause of the fracture was quite independent of the original injury. The bone condition of the respondent was not due to or aggravated by or otherwise affected by the original injury ... The act of walking was not necessitated by the head injury. Walking is a normal activity of ordinary life, and when the respondent was walking in the hospital grounds he was only resuming his normal life. There was no causal connection between the fracture and the original injury, and accordingly, in my opinion, the Commission did err in law in the decisions which it reached, and the questions in the case should be answered in the affirmative. The order of the Full Court should be set aside.

Starke J (page 319) allowed the appeal, as did Dixon J (page 321) and Williams J (page 325). McTiernan J dissented at page 324.

In this matter, both the *WCA* and the *Civil Liability Act* the definition of damages includes "monetary compensation". The appellant's claim was for 21% WPI, as a result of the original hernia injury, which was enlarged by the surgical treatment. Plainly the worker "reasonably accepted" the advice of Dr Fedorine and underwent surgical treatment. It follows that the "total condition" including that which resulted from the surgery is attributed to the injury on 15/06/2016 and it was for that "total condition" that he was compensated under the Deed.

The appellant sought to argue that the payment of damages for the tortious act was separate from the claim for compensation with respect to the original injury.

Parker ADP rejected this submission and found that the appellant received monetary compensation from the doctor pursuant to the deed dated 2/11/2020 and as he had first recovered damages from the doctor, he was not entitled to recover compensation from the respondent by reason of s 151Z(1)(c) *WCA*.

Application for leave to appeal an interlocutory decision – application for leave refused

Fairfield City Council v Comlekci [2023] NSWPICPD 6 – Deputy President Wood – 8/02/2023

The appellant employed the respondent as a child care worker. On 25/10/2019, the respondent injured her right hand in a fall at work and ceased work. She returned to work performing administrative duties and upgraded to pre-injury duties. She claimed compensation and the appellant accepted the claim. However, in early 2020, she was transferred to another child care centre and on 10/09/2020, she suffered a further injury to her right hand at work. She resumed work 2 days per week after a short period of time off work and after several months, resumed full-time hours (50% caring for children and 50% administrative duties). She continued to have medical restrictions with her right hand.

On 13/04/2021 the appellant issued a dispute notice and denied liability for continuing weekly payments on the basis that the respondent had not suffered an injury and/or her employment was not the main contributing factor to the injury. In the alternative, it asserted that the effects of the work-related injury had ceased and that the respondent was able to earn as much or more than PIAWE in suitable employment.

On 5/08/2021, the appellant informed the respondent that unless she provided a medical clearance for full duties she was not to attend work. She ceased work and claimed weekly payments and s 60 expenses.

Member Whiffen issued a COD, which determined that the respondent suffered a personal injury arising out of or in the course of employment with the appellant and that her employment was a substantial contributing factor to the injury. He found that she was incapacitated for work from 5/08/2021 and 28/02/2022 and that she was able to earn $772.60 per week in suitable employment during that period. He ordered the appellant to pay reasonably necessary s 60 expenses. He directed each party to file a wages schedule and written submissions with respect to their wages schedule.

The appellant appealed and alleged that the Member erred as follows:

(1) in law in determining the matter on a basis not put by or to the parties;

(2) in fact in relation to current work capacity and ability to earn;

(3) he denied the parties procedural fairness; and

(4) in discretion in relation to the admission of evidence.

Deputy President Wood refused to grant the appellant leave to appeal and remitted the matter to the Member for determination of the remaining issues. Her reasons are summarised below.

As the appellant sought to appeal against an interlocutory decision, a grant of leave was required under s 352(3A) *WIMA*. Under that provision, the PIC is not to grant leave unless it is of the opinion that determining the appeal is necessary or desirable for the proper and effective determination of the dispute.

The appellant argued that leave should be granted as it is necessary for the proper and effective determination of the dispute and it asserted that if ground (2) succeeds, and a "more appropriate"

assessment is made, then the matter will resolve. It also argued that grounds (1) and (3) (which assert a failure to provide procedural fairness) raise important matters of principle so that it is desirable for the proper and effective resolution of the dispute to grant leave to appeal.

The respondent argued that leave should be refused because: (1) the appeal did not satisfy the monetary threshold; (2) the granting of leave to appeal will not resolve the whole dispute; (3) the appeal does not raise any important issue or an issue of principle; (4) the appeal is without merit; and (5) the appellant would have the opportunity to appeal at the conclusion of the matter.

Wood DP rejected the respondent's argument regarding the monetary threshold as based on the amounts claimed in the ARD, the arrears claimed satisfy the threshold. However, she held that the appellant had not alluded to any characteristic of the principles of procedural fairness that establishes that it would be of greater benefit if the issues raised were determined "at this stage".

Section 42 of the *PIC Act* provide that the PIC's objective is the timely disposition of disputes, but the lodgement of the interlocutory appeal had already caused a significant delay in the resolution of the dispute and it would be no more efficient to determine the issues raised in the appeal now than it would be when the proceedings concluded.

Wood DP rejected the appellant's argument that if "a more appropriate" assessment of the respondent's ability to earn was made the matter would resolve. She found that this indicated, on the contrary, that if the issue of the respondent's capacity to earn was determined more favourably to the respondent, this would not assist in the resolution of the dispute. She did not accept that this was a proper basis upon which to grant the appellant leave to appeal.

Wood DP concluded:

> 29. The proceedings before the Member have not concluded. The Member is part way through a determination of the respondent's entitlement to weekly compensation. At the end of the day, one or the other party may be aggrieved or satisfied with the result. I do not consider that it is in the interests of justice that the appeal process intervenes at this interlocutory stage. For that reason, together with the reasons expressed above, I do not consider that it is necessary or desirable for the proper determination of the dispute to grant leave to appeal the interlocutory decision.