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

Alleged apprehended bias - whether member who sat on WCC could also be a member of the AP to assess degree of permanent impairment

Mills v Martin-Brower Australia Pty Ltd [2023] NSWSC 253 – Adamson J – 23/03/2023

On 14/07/2016, the plaintiff injured his right hip at work. The employer accepted liability for that injury. However, he subsequently alleged that he also injured his lumbar spine and/or suffered a consequential injury to his lumbar spine. He underwent right hip replacement surgery on 12/11/2018 and psoas tendon release on 16/07/2020.

The plaintiff claimed compensation under s 66 WCA for permanent impairment of his right hip and lumbar spine. The employer disputed the claim for the lumbar spine.

On 21/03/2022, the liability dispute was heard by Member Paul Sweeney and he determined that the plaintiff suffered injury to his right hip on 14/07/2016 and as a result of his work until 6/01/2017, and that he suffered consequential conditions in the iliopsoas muscle and the low back. He remitted the matter to the President for referral to a Medical Assessor.

Dr Kuru issued a MAC which assessed combined 18% WPI (comprising 20% right lower extremity (hip) less 1/10 deduction under s 323 WIMA and 0% lumbar spine).

The plaintiff appealed, but the MAP confirmed the MAC.

The plaintiff then applied to the Supreme Court for judicial review of the MAP's decision on the following grounds: (1) Member Sweeney (a member of the MAP) had already determined a matter involving him and ought to have recused himself; (2) He was denied procedural fairness because he was not advised that Mr Sweeney was to be on the MAP and he was not given an opportunity to object to him being on the MAP; (3) The MAP did not apply the findings of the Commission (constituted by Mr Sweeney); and (4) The MAP erred in law because it did not correctly apply the applicable guidelines, which applied as a matter of law, and ought to have appreciated that the MA had not applied the guidelines correctly.

The plaintiff argued that if he had been notified that Member Sweeney would be on the MAP, he would have had the opportunity to object and, if he had chosen to object, the objection would have succeeded based on *Livesey v NSW Bar Association* (1983) 151 CLR 288 at 300; [1983] HCA 17 (*Livesey*). He also argued that it was not necessary for him to indicate to the Court what his response to such notification would have been and what submissions would have been made because the threshold for materiality for a denial of procedural fairness was low: *Nathanson v Minister for Home Affairs* [2022] HCA 26; (2022) 96 ALJR 737 (*Nathanson*) at [33] (Kiefel CJ, Keane and Gleeson JJ). Therefore, the MAP's decision should be set aside and the matter remitted to a differently constituted MAP.

Adamson J dismissed the summons and ordered the plaintiff to pay the first defendant's costs. Her Honour's reasons are summarised as follows.

Her Honour noted that the well-established that the principles relating to bias apply not only to judicial decision-makers but also to administrative decision-makers, such as the MAP. The test for apprehended bias is whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question he or she is required to decide: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; [2000] HCA 63 at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

Her Honour stated that the fair-minded lay observer would appreciate that Member Sweeney had expressed a tentative view (which was in favour of the plaintiff) about the existence of a lumbar injury in his decision on liability, but had expressly eschewed such a finding (on the basis that it was not required for a referral to be made), before referring the matter for medical assessment. Further, such an observer would also have appreciated that the question that the Member was obliged to address when sitting alone as the Commission, was a different question to the one which arose when he formed part of the MAP which was required to determine an appeal against the MAC. In circumstances where such an observer can be taken to appreciate the different roles played by the Commission when determining a liability dispute, and the Medical Assessor and MAP when determining a medical dispute, she was not persuaded that there was any apprehension of bias.

In her Honour's view, if the plaintiff had been notified that it was proposed that Member Sweeney would form part of the MAP, any application to the Member that he was obliged to recuse himself on the ground of apprehension of bias would have been bound to fail. Therefore, there was no "practical injustice" occasioned by the fact that the parties were not informed of the composition of the MAP: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 (*Ex parte Lam*) at [38] (Gleeson CJ).

Her Honour also held that there was no analogy between the present case and *Livesey*. In *Livesy*, two of the members of this Court had expressed strong and disparaging views about *Livesey* in proceedings to which he was not a party. Subsequently, those two members sat, with a third judge, on an application by the NSW Bar Association to have his name removed from the roll of legal practitioners on the grounds of professional misconduct. The High Court set aside the order removing Livesey's name from the roll on the grounds of apprehension of bias.

Accordingly, her Honour concluded that the plaintiff had not established any error of law on the basis of apprehended bias or denial of procedural fairness.

The plaintiff also argued that the MA's finding of asymmetric loss of range led to a finding of DRE Lumbar Category II and not DRE Lumbar Category I. Therefore, the MAC should be revoked and a new MAC issued which assessed DRE Lumbar Category II. However, her Honour rejected that argument and she stated, relevantly:

> 48. There are two principal difficulties with this submission. First, as set out above, the Commission (Member Sweeney) expressly did not find that the claimant had suffered an injury to his lumbar spine, but rather ordered that the Medical Assessor certify the degree of whole person impairment of the claimant's right lower extremity (hip), iliopsoas muscle and lumbar spine as a result of the injury on 14 July 2016 and the nature of his work from that date until 6 January 2017.
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> 49. However, in any event, it can be seen from the reasons of the Medical Assessor and the Appeal Panel's consideration of those reasons that both decision-makers were alive to the issue of whether the symptoms in the claimant's lumbar spine were such as to give rise to a permanent impairment of the lumbar spine within the DRE categories.
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> 50. The second difficulty is that it is not enough that there be, as was found in the present case, "asymmetric loss of range or motion". Rather, it is necessary that the "[c]linical history and examination findings [including asymmetric loss of range or motion], [be] compatible with specific injury" for DRE Lumbar Category II to be the appropriate category.

Her Honour held that in this matter, as both the Medical Assessor and the MAP recorded, there was no separate injury to the lumbar spine. In light of the lack of abnormality of any other finding relating to the lumbar spine other than pain and asymmetry of movement, the Medical Assessor considered the loss of range of motion to be attributable to the hip replacement rather than to the lumbar spine. There was no failure to abide by the terms of the referral or to apply the Guidelines and it was open to the Medical Assessor to apply the Guidelines in the way that he did and there was no breach of the principles enunciated in *Ozcan v Macarthur Disability Services Ltd* [2021] NSWCA 56; (2021) 306 IR 52, which relate to the determination and aggregation of % WPI for injuries subsequent to, and resultant upon, a first injury.

District Court of NSW Decisions

Application for leave under s 26 of the PIC Act – Held: The PIC does not have power to determine its own jurisdiction – the matter is not federally impacted, but leave was granted under s 26(3) of the PIC Act and the matter remitted to the PIC for determination under s 26(5) of the PIC Act

Lee v Fletcher International Exports Pty Ltd [2023] NSWDC 71 – Judge Andronos SC – 24/03/23

This matter was previously reported in Bulletin 123, but the following summary is provided.

The plaintiff alleged that she suffered physical and psychological injuries in a workplace accident on 27/102020. However, the defendant disputed the claim. On 19/01/2022, she commenced PIC proceedings, but before doing so she moved to Queensland.

At arbitration, the defendant raised a jurisdictional question and alleged that PIC had no power because the matter involved the exercise of federal jurisdiction as defined in s 25 of the PIC Act. It also argued that by virtue of its performance of functions under the statutory self-insurance regime, its position in these proceedings "may be assimilated to that of the State of NSW".

Member Whiffen determined that the PIC was not exercising federal jurisdiction and that the PIC had power to determine the dispute and he determined the dispute on its meris.

On appeal, ***Deputy President Snell*** found that the question of whether or not the PIC had jurisdiction was not a question that the PIC was empowered to determine. Although his opinion was that a determination of the dispute would not involve the exercise of federal jurisdiction, the *PIC Act* reserved the power to determine whether federal jurisdiction is invoked to the District Court of NSW.

Based on the decisions in *Burns v Corbett; Burns v Gaynor; Attorney General for NSW v Burns; Attorney General for NSW v Burns; NSW v Burns* (2018) 265 CLR 304 at [3]; [2018] HCA 15 and *Citta Hobart Pty Ltd v Cawthorn* (2022) 96 ALJR 476; [2022] HCA 16 at [27], he found that the original Member's decision was made without power and had no legal force: *Fletcher International Exports Pty Ltd v Lee* [2022] NSWPICPD 39.

The plaintiff applied to the District Court of NSW for leave to commence proceedings against the Defendant under s 26 of the PIC Act and also sought an order for remittal to the President of the PIC for determination by a member of the PIC.

Judge Andronos SC identified the real issue in dispute between the parties as whether the determination of the matter by the PIC would involve "an exercise of federal jurisdiction", defined in s 25 of *the PIC Act* as jurisdiction of a kind referred to in s 75 of the *Commonwealth Constitution*.

The plaintiff argued that the proceedings do not involve the exercise of federal jurisdiction because it is a compensation matter application within the meaning of s 25 of *the PIC Act*, and it is between two private parties - one a resident of Queensland and the other not being a resident of any State due to it being a corporation.

His Honour noted that if this is correct, the matter does not fall within s 75 of *the Constitution* and there is no impediment to the PIC exercising jurisdiction. However, that is subject to the proviso that the PIC does not have the power to determine its own jurisdiction.

The defendant acknowledged that it is a private corporation and has no residence for the purpose of s 75 of *the Constitution*, but argued that it relevantly exercises functions which are those exercised by a State, and accordingly, its position is properly characterised as that of the State for the purpose of s 75 of *the Constitution* and, by extension, s 25 of *the PIC Act*. It relied upon the decision in *Crouch v Commissioner for Railways (Queensland)* (1985) 159 CLR 22; [1985] HCA 69, where the Court considered an action brought against the Queensland Commissioner for Railways (a corporation sole).

In *Crouch,* the plurality of the High Court (Mason, Wilson, Brennan, Deane and Dawson JJ) stated:

> ...neither a person appointed as a nominal defendant to represent a State in an action to enforce a claim against the State nor a State Minister who sues in his or her own name on behalf of the State to enforce a right of the State constitutes the State. The subject of the action in which he or she is sued or sues in that capacity might well however, depending upon the context, properly be described as a "matter" between the other party and the State against which or for whose benefit the claim lies, at whose expense it is resisted or pursued and from or by whose treasury any verdict will be satisfied or received. [At 36-37].
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> When the word "matter" is used in Ch. III of *the Constitution* in its ordinary prima facie sense of the subject matter for determination in a legal proceeding rather than the legal proceeding itself, it focuses attention upon the substance of the dispute...whether a particular "matter" lies within the original jurisdiction of the Court under s. 75(iv) as a matter "[b]etween States" or as a matter "between a State and a resident of another State" falls to be determined by reference to the substantial subject matter of the controversy and not by reference only to the form in which the legal proceedings involving it happen to be framed. [At 37].

The defendant also argued that due to its role as a self-insurer, particularly as a participant in a scheme mandated by the *Workers Compensation Act*, it is performing functions which are properly characterised as those of the State of NSW. It also argued that its declinature of liability, which is an exercise of its functions as a self-insurer, gives rise to the jurisdiction of the PIC or Court, as the case may be, because that is the predicate of the dispute. Accordingly, one must look to that status as the relevant capacity in which the defendant is sued.

His Honour held that the position of the defendant cannot be assimilated to that of the State of NSW in the circumstances before him. He stated:

> 30. Federal jurisdiction is only enlivened when there is a "matter" between a State and a resident of another State. "Matter" is not synonymous with a legal proceeding but means the subject matter for determination in a legal proceeding. The question whether a particular "matter" lies within the original jurisdiction of the High Court under s 75(iv) as a matter "between a State and a resident of another State" falls to be determined by reference to the substantial subject matter of the controversy and not by reference only to the form in which the legal proceedings involving it happen to be framed: *Crouch* at 37.
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> 31. In *Crouch* at 39-40, the plurality of the High Court considered a number of factors in determining whether the subject matter of that claim was a claim against an instrumentality or emanation of the State sued in its capacity as such. In that case, the claim arose from the discharge of traditional governmental functions of the State; the burden of any judgment if the plaintiff's claim should succeed would fall upon the Consolidated Revenue of the State and the funds involved in resisting the claim were to come from the same source.
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> 32. None of those factors are present in the matter currently before the Court. The claim does not arise from the discharge of traditional governmental functions of the State. The defendant is a private corporation engaged in trade or commerce. The plaintiff brings proceedings in her capacity as an employee seeking compensation for an alleged workplace injury suffered in the course of employment. As a self-insurer, it may be inferred that the defendant will meet both the plaintiff's claim and the burden of any judgment should the plaintiff ultimately succeed.

33. The defendant is sued in its capacity as the plaintiff's employer at the time of the accident. The relevant source of the plaintiff's entitlement is s 9 of the *Workers Compensation Act*, which imposes a liability on the defendant as employer to pay compensation. This is a private, inter partes relationship between an employer and employee, and does not raise any matter which can properly be described as a matter in which a function of a State is engaged.

34. The matters raised by the defendant as assimilating the position of the defendant to that of the State are not sufficient, in my view, to do so. While there is no doubt that the Management Act imposes real and substantive obligations on an insurer, including a self-insurer, I do not find that they either are functions of the State, nor that they are the true "matter" between the parties in the sense required for s 75(iv) of *the Constitution* to be engaged. The defendant's alleged liability is that of an employer. The fact that it may have obligations under the *Management Act* to assess claims, make payments and discharge certain other obligations as to the payment of medical expenses does not alter the substantial subject matter of the controversy. In any event, the evidence does not establish a claim arising out of an allegation of breach by the defendant of its obligations under the *Management Act*.

His Honour held that federal jurisdiction is not invoked in determination of the dispute and he therefore granted the plaintiff leave to proceed and remitted the matter to the PIC for determination.

PIC - Presidential Decisions

Section 11A WCA – whether action taken with respect to discipline was reasonable – adequacy of reasons – s 294 WIMA & r 78 of the PIC Rules

The Hills Shire Council v Podesta [2023] NSWPICPD 10 – Deputy President Parker SC – 9/03/2023

In 2016, the worker became Workshop Team Leader. In mid-2017, Mr Gallahar became Workshop Coordinator. Shortly thereafter conflict emerged between Mr Gallahar and workshop staff, including the worker, and in mid-2020, six of the eight members of the workshop team (including the worker) lodged a formal grievance about Mr Gallahar.

On 20/08/2020, Mr Colburt (the appellant's group manager of the appellant) arranged for a mediation at which the worker expressed some of his grievances, Mr Gallahar denied the allegations and the worker left the meeting.

On 23/09/2020, Mr Colburt met with workshop staff and told them that Mr Gallahar had raised a number of issues about the workshop's practices and that the appellant would investigate these.

On 25/09/2020, Mr Gallahar resigned and the worker took on some of the purchasing duties.

In around October 2020, there was a restructure and a new team leader, Mr Zanetic, was employed. In November 2020, an anonymous letter was left on Mr Zanetic's desk containing the following words: "We sacked the last guy, look out or you will be next."

On 17/11/2020, Mr Edgar, the appellant's general manager, called a meeting of the workshop employees. Two days later, there was an unauthorised stoppage by members of the workshop staff and on 25/11/2020, letters were sent to workshop members including the worker, advising them of interviews to be conducted by an external investigator about the note and other workshop practices.

On 4/12/2020, the worker was interviewed by the external investigator and on 23/12/2020, he took annual leave until early February 2021. On 20/01/2021, he consulted Dr Singh and gave a history of stress at work and at home.

On 5/02/2021, the worker attended a second interview with the external investigator. On 7/02/2021, he saw Dr Singh and said that he felt stressed and unable to go back to work. The doctor certified him unfit for work.

On 12/03/2021 the appellant wrote to the worker inviting him to respond to allegations based on the investigator's report and on 13/03/2021, the worker submitted workers compensation claim forms.

The appellant disputed the claim and relied upon s 11A WCA.

Member Toohey conducted an arbitration, during which the appellant sought leave to cross-examine the worker regarding the history he gave to the doctors about his various activities and the work he performed on his car. It argued that the worker's bank records raised questions about that history and that his credibility was in question and it was also evidence going to his capacity for employment.

The Member refused to grant leave to cross-examine the worker and she identified the real dispute as whether events between mid-2017 and late 2020 caused or contributed to the worker's injury and whether it was wholly or predominantly caused by reasonable action taken in respect of his employment from the end of 2020.

The Member found that from mid-2017 (when Mr Gallahar commenced work) relationships in the workshop became difficult and ultimately toxic. However, she was not persuaded that the worker sustained psychological injury as a result of what happened in the workplace between mid-2017 and around November 2020. She noted that the appellant conceded that the psychological injury was probably predominantly, if not wholly, the result of its action in calling the meeting on 17/11/2020 and the subsequent investigation.

The Member referred to the relevant legal test as set out in *Irwin v Director General of School Education* and *Northern New South Wales Local Health Network v Heggie* and noted, based on what was said in *Department of Education and Training v Sinclair*, that the entire process must be looked at to see if what occurred was reasonable action within s 11A WCA.

The Member found that it was reasonable for the appellant to call a meeting when an anonymous letter was left for the new manager, as this was a serious matter and needed prompt action. However, she was not satisfied that the meeting and the subsequent investigation was reasonable action with respect to discipline.

The Member observed that based on the available evidence it was difficult to determine what had occurred at the meeting on 17/11/2020. She found that it was more probable than not that Mr Edgar had raised his voice at the meeting and she stated:

> That might not of itself be enough to say the manner in which he conducted it was not reasonable but it was not appropriate, in my view to suggest that someone in the team was responsible, no matter how reasonable in his mind that conclusion seemed. It might be appropriate to say that was his suspicion but the evidence indicates that his tone was accusatory. Nor was it appropriate to refer to the exhaustive police investigation of the Claremont serial killings.

There was conflicting evidence as to whether Mr Edgar threatened anyone and the Member was unable to conclude that he used the words to the effect that he would "sack the lot of them". However, she accepted evidence that he used words to the effect that "if things did not change, they would be out of work because there would be no workshop" and that it was "at least perceived to be a threat" to the employment of the workshop staff attending the meeting. She held that this comment was not "appropriate".

The Member referred to the appellant's letter in November 2020, which gave no indication about what the other 'alleged inappropriate practices' were. The worker said that at the first meeting, he was 'shocked' to find that the investigator focused on issues including buying parts for his personal car and inappropriate conduct towards a former female employee. He was 'unprepared' as he understood the investigation would focus solely on the anonymous letter and he was 'shocked and upset' when he was questioned during the second interview about methods for raising purchase orders and about the 'legal side of local government procurement' and because the investigator said he might be subject to further questioning."

The Member stated:

> The allegations and concerns involved serious matters, some potentially criminal. Neither Mr [Colburt] nor Mr Edgar says they were put directly to Mr Podesta prior to the first interview.

> Mr Podesta claims the additional matters raised at the interviews had never been discussed with him. Given he had attended the mediation session, I find it improbable that he had no idea of what might be discussed at the meeting with the investigator but it was not enough for the respondent to refer in broad terms to 'inappropriate conduct'. It is not enough for Mr [Colburt] to say that at no point was Mr Podesta informed that the investigation was going to be only about the anonymous letter and at no point did Mr Podesta raise that concern with him, and it is not enough for Ms Coleman to say that he was never told it would be only about the letter.

The Member referred to *BlueScope Steel Ltd v Markovski* and the passage at [196] that basic fairness required "advance notice of the meeting, the agenda, and the opportunity to bring a support person". The worker was given advance notice of the interview and was given an opportunity to have a support person with him, but he was not given advance notice of the topics to be canvassed. Given the serious nature of the matters under investigation, and the potential implications for the worker, it was not sufficient notice for the appellant to refer in broad terms to 'inappropriate conduct'.

Therefore, the appellant had not discharged its onus of establishing, on the balance of probabilities, that the injury was wholly or predominantly caused by reasonable action taken, or proposed to be taken with respect to discipline.

The Member resolved the issue of capacity adverse to the appellant and she was not persuaded that the video surveillance material was seriously at odds with the worker's claims or with him having an adjustment disorder or depressive disorder. The bank records indicate that he moved around a fair distance at different times and been to a range of shops and venues. That material has not been put to Dr Kaplan (or any other doctor) and I am not persuaded that it is evidence that he has had capacity for employment during the relevant period. If he has had any (minimal) capacity for suitable employment during that time, there is no evidence on which I could sensibly make a finding as to how much.

The appellant appealed on 7 grounds and alleged that the Member erred as follows: (1) she incorrectly identified and applied legal principles to the determination of "reasonableness" under s 11A WCA; (2) she failed to give sufficient reasons for finding that its actions at the meeting were not reasonable; (3) she failed to apply the proper legal test to the issue of reasonableness of the conduct of the investigation; (4) she failed to give sufficient reasons for finding that its actions in conducting the investigation were not reasonable; (5) she failed to give sufficient weight to Dr Kaplan's opinion based on his viewing of the surveillance material; (6) she erred in failing to give sufficient weight to the worker's financial records in relation to the issue of work capacity; and (7) she erred in refusing to grant it leave to cross-examine the worker.

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

In relation to ground (1), Parker ADP stated that while the Member incorrectly quoted the passage by Geraghty CCJ in *Irwin*, she also referred to *Heggie* and *Sinclair* and she was cognisant of the binding statements of principle contained in *Heggie* and he was not satisfied that she substituted "appropriate" for "reasonable action". She found that the "action with respect to discipline" extended over the entire process, namely, from the meeting of 17 November 2020 until the interviews in 2021 and found multiple factors for her conclusion that the action taken by the appellant failed to achieve a proper balance between the objective of the appellant in conducting the investigation and fairness to the worker.

Parker ADP held that incorrectly quoting from the passage in *Irwin* did not lead the Member to misdirect herself as to the applicable legal principle. Her finding that the appellant failed to discharge the onus of establishing on the balance of probabilities that the injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken with respect to discipline was soundly based.

In relation to ground (2), Parker ADP referred to r 78 of the PIC rules and he stated, relevantly:

109. The requirement to provide reasons is an obligation with respect to the reasons for the determination. It is not an obligation to provide extensive reasons for each subordinate finding leading to the ultimate conclusion.

110. The finding by the Member that the actions of Mr Edgar at the meeting were not appropriate is an evaluative finding by the Member. The inference Mr Edgar drew that workshop staff were responsible for the note left on Mr Zanetic's desk was doubtless available. But Mr Edgar was told by senior members of the workshop staff that they did not believe they or others in the workshop had left the note. Furthermore, access to the workshop was not limited to workshop staff. I accept the respondent's submission that:

> The Member has clearly found that the employer's general manager assembled staff members together and that he rejected an assurance by senior staff members that no person from that workshop team was responsible for the letter. See Mr Edgar's statement [18], Reply 35. The general manager's response to that assurance was to inform them that a murderer had been identified, twenty years after his crime. See again Mr Edgar's statement at [19].

111. In my view, the Member satisfied the requirements of r 78 of the 2021 Rules. Her conclusion with respect to Mr Edgar's response to the denial by the workshop staff that they had placed the letter on the desk and Mr Edgar's referral to the Claremont Street killing were evaluative conclusions open to the Member on the evidence.

112. The requirement of r 78 is that the reasons for the ultimate determination need to be briefly stated. It is not a rule that requires the tribunal to give detailed reasons for intermediate findings. Furthermore, the Member's conclusion as to what was appropriate conduct at the meeting by Mr Edgar seems to me to be an evaluation available on the basis of the evidence…

In relation to ground (3), Parker ADP noted that the Member found it improbable that the additional matters raised at the interview with the worker had never been discussed with him, but the onus was on the appellant to establish the reasonableness of its action including "fairness" to the worker. He accepted the worker's submission that "it was for the employer to bring evidence to demonstrate that it was appropriate that the rights of the worker to advance notice of the meeting's agenda should be suppressed in order to protect the objectives of the employer. No such evidence was brought." Therefore, the appellant failed to demonstrate error on the part of the Member.

In relation to ground (4), Parker ADP found that the Member's reasons identified her reasoning process and the material facts that she found. They complied with s 294 WIMA and r 78 of the PIC Rules.

In relation to grounds (5) and (6), Parker ADP held that when the Statement of Reasons is considered in its entirety, the Member had regard to all of the evidence regarding the worker's capacity, including the surveillance evidence and the financial records. The weight that she gave to the material may not be the same as that which another Member may have done, but that does not show error.

In relation to ground (7), Parker ADP noted that the Member declined to give leave to cross-examine the worker because she said the events proposed to be cross-examined upon post-dated his employment with the appellant and his credibility was already in dispute. The dispute involved s 11A "reasonable disciplinary action" and the worker's capacity for employment. He stated:

179. The principle is that an interlocutory determination can be challenged on an appeal from the final determination provided the interlocutory determination can be said to affect the final result. For the reasons that follow, in my view, the Member's refusal to grant leave to cross-examine did not affect the final result.

180. The proposed cross-examination on the surveillance and financial records went to the respondent's credibility and capacity. Credibility is relevant on each issue. However, the respondent is correct that there was no impediment on the appellant in making submissions to the Member on Mr Podesta's credibility or his capacity for work.

181. Absent cross-examination, the appellant was free to put its case at its highest and to assert Mr Podesta was an unreliable witness whose evidence could not be accepted, and furthermore, that he had fully recovered his capacity for work.

Heart attack – whether injury sustained in accordance with s 4 WCA – whether employment is a substantial contributing factor to the injury – consideration of the test in Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd [2009] NSWCA 324 – decision makers not confined to the statutory matters at s 9A(2) – epidemiological studies – Seltsam Pty Ltd v McGuiness [2000] NSWCA 29 referred to – approach to expert evidence – Hancock v East Coast Timber Products Pty Limited [2011] NSWCA 11 applied and considered – alleged error in failure to reply to a clearly articulated argument not established – Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; Wang v State of NSW [2019] NSWCA 263 applied and considered

Fisher v Nonconformist Pty Ltd [2023] NSWPICPD 12 (Clifford No 4) – President Judge Phillips – 22/03/2023

The previous Presidential decision was reported in Bulletin 100 - *Nonconformist Pty Ltd v Fisher* [2021] NSWPICPD 26). However, the relevant facts are summarised below.

The deceased worker was employed by the respondent as a courier driver. He was the sole director of the respondent company and performed courier services through a sub-contract arrangement between the respondent and Direct Couriers (Aust) Services Pty Ltd (Direct Couriers). On 22/01/2016, in the course of his employment, he died while driving his van during his last delivery run for the day.

The death certificate listed the cause of death as ischaemic heart disease and coronary artery atherosclerosis. The autopsy report prepared for the coroner listed the direct cause of death as ischaemic heart disease with an underlying condition of coronary artery atherosclerosis as an antecedent cause.

The deceased's widow claimed lump sum compensation under s 25 (1) WCA. The widow alleged that she was totally dependent upon the deceased and 2 adult children alleged that they were partially dependent.

However, the insurer disputed the claim on the following grounds: (1) the death did not result from an injury in the course of the deceased's employment (s 4 WCA); (2) the deceased's employment was not a substantial contributing factor to any injury (s 9A WCA); (3) the nature of the deceased's employment did not give rise to a significantly greater risk of injury than if he had not been employed in employment of that nature (s 9B WCA); (4) If the injury was a disease within the meaning of s 4 WCA, it was not contracted in the course of employment and the deceased's employment was not the main contributing factor to the injury or aggravation of the injury.

At first instance (*Clifford no.* 1) Arbitrator Edwards) determined that the appellant liable to pay the compensation claims. The issues of dependency and apportionment were remitted to the Registrar to fix a date for further arbitration.

However, the insurer appealed and Deputy President Wood allowed the appeal (*Clifford no. 2*). She found that the Arbitrator overlooked material evidence and fell into appealable error which affected his finding on causation, revoked the COD and remitted the matter to another member for re-determination.

Member Sweeney determined the matter on remitter (*Clifford no. 3*). He entered an award for the respondent and held that he was satisfied that the appellants had established a personal injury within the meaning of s 4(a) WCA (rather than a disease), but he was not satisfied that employment was a substantial contributing factor to the injury within the meaning of s 9A WCA.

The first appellant appealed and alleged that the Member erred as follows: (1) in law by misapplying the legal test pursuant to s 9A WCA; (2) in law by applying a more onerous standard of proof; (3) in fact by failing to address Dr Helprin's opinion; (4) in fact and/or law by making determinations that were not based on the evidence; and (5) in law by failing to respond to a substantial, clearly articulated argument.

The Second appellant also alleged that the Member failed to provide lawful reasons and that he failed to apply the correct legal test concerning s 9A.

The Third appellant adopted the grounds raised by the first and second appellants.

President Judge Phillips dismissed all appeals and confirmed the COD for reasons that are summarised below.

First appellant's appeal

His Honour rejected ground (1) and held that the appellant's assertion was not a fair reading of the Member's approach. He stated, relevantly:

> 161. I do not accept that the Member was engaged in an enquiry that involved him attempting to identify the sole cause of death, rather based upon the evidence the Member was weighing two competing hypotheses, namely that the cardiac event was either triggered by exposure to TRAP or, as Dr Herman found, traditional cardio-vascular risk factors. The Member found that the latter hypothesis was more likely, mainly on the basis that the evidence in support of the TRAP proposition was unsatisfactory. Once the Member made the finding regarding the unsatisfactory nature of the appellants' evidence on this question, the first appellant's submission based upon that evidence must fail. Findings need to be read in the context of the entirety of the decision which for relevant purposes commenced at reasons [98], where the Member has appropriately identified the task to be undertaken in identifying the element of substantial contributing factor to the deceased's injury. A fair reading of the Member's decision reveals that the Member was not satisfied that there was a substantial contributing factor between the deceased's alleged exposure to TRAP and his cardiac event. No error in the Member's approach has been identified.

His Honour rejected ground (2) and he stated that when the Member's reasons are fairly read, he grappled with the complexities of the expert evidence and in particular the scientific research, while performing precisely the task referred to by McDougall J in *Nguyen*. At para [24] of the reasons, he specifically referred to the test of actual persuasion when dealing with epidemiological studies: *Seltsam*. Having correctly identified the test, he Member proceeded to make findings.

His Honour stated:

> 179. Read as a whole and in context, it is apparent that the Member did not feel the actual persuasion of the existence of a fact in the Nguyen sense, namely the connection between TRAP and the deceased's cardiac arrest. This was an available conclusion based on a review of the first appellant's medical case including the studies and other evidence.
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> 180. Further, as I have described in *Bevan* above, it is not the task on appeal "to discern whether some inadequacy may be gleaned from the way in which the reasons have been expressed, nor are such reasons to be minutely construed with an eye keenly attuned to the perception of error". The first appellant's approach to this ground invites the approach warned against by Bellew J in Bevan.
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> 181. For the reasons outlined above, I do not consider that the Member has applied a higher burden of proof. Rather, the Member in a carefully reasoned decision was plainly not persuaded as to the existence of a key fact, namely the relationship between TRAP and the deceased's cardiac arrest, and appears to have made a "rational choice between competing hypotheses" in the *Nguyen* sense in ultimately being persuaded by the opinion of Dr Herman, thus satisfying the balance of probabilities.

His Honour dismissed ground (3) and he noted that the Member was not satisfied that Mr Prezant's evidence was of sufficient quality to provide that satisfactory basis and as a result questioned the provenance of Mr Prezant's quantification of the deceased's exposure to PM2.5 on the day of his death. There was no error in this approach.

His Honour dismissed ground (4) and stated, relevantly:

> 212. I am fortified in this view by virtue of the fact that this appeal ground is advanced on a very narrow basis which has not been made out, namely, that the respondent's expert's opinion had been entirely discounted and as a result the Member was duty bound to accept Mr Prezant's view. This is not correct in principle. Further, this appeal ground does not direct attention to any salient aspects of Mr Prezant's opinion which were unchallenged or could be said to have been established to such a degree that the Member had to accept it. It is clear to me that in accordance with the remarks from Rolfe AJA in *Hull* that I have set out at [205] above, the assumptions upon which Mr Prezant relied, namely the transposition of international studies to Australian conditions, had not been established. This was a rational basis for the Member to reach the conclusion that he did.

His Honour dismissed ground (5). He found that Mr Prezant's evidence did not establish "the actual exposure" that the deceased suffered on 22/01/2016 and at best, it represented his best estimate of the deceased's likely exposure to PM2.5 on the date of his death. The Member dealt with his doubts about these estimations and in the *Dranichnikov* sense, he accepted the respondent's submission that there is no established fact (meaning "actual exposure" being proven) and as a result the first appellant's submission cannot be made good.

Second Appellant's appeal

His Honour rejected the assertion that the Member failed to provide lawful reasons and there is no uncertainty or doubt about the Member's finding that an injury occurred to the deceased in the course of his employment. He also rejected the assertion that the Member applied the wrong test concerning s 9A WCA.