Bulletin

Edited by Michelle Riordan

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. Oeding-Erdel v Allianz Australia Insurance Limited [2021] NSWSC 1264
2. Scone Race Club Limited v Cottom [2021] NSWPICPD 33
3. State of New South Wales (NSW Police Force) v Nguyen [2021] NSWPICPD 34
4. Lifestyle Solutions (Aust) Ltd v Van den Berg [2021] NSWPICMP 184
5. Skewes v SP Allen Pty Limited [2021] NSWPICMP 198
6. Ritson v State of New South Wales [2021] NSWPIC 409

Supreme Court of NSW Decisions

Judicial review – Proper officer of SIRA refused an application for review of a medical assessment – Proper officer fell into jurisdictional error by misconstruing the nature of the jurisdiction committed to her under s 63(3) of the MACA

Oeding-Erdel v Allianz Australia Insurance Limited [2021] NSWSC 1264 – McCallum JA – 6/10/2021

The Plaintiff suffered physical and psychological injuries as a result of a MVA in 2016. The defendant admitted liability, but disputed the need for some treatment and the degree of permanent impairment. She lodged 2 applications with SIRA to have the medical disputes referred for assessment by the MAS. She was unsuccessful in establishing permanent impairment of greater than 10% and was therefore not entitled to damages for non-economic loss under s 131 *MACA*. She applied to the Supreme Court of NSW for judicial review of the decisions that produced that result.

McCallum JA determined the summons and noted that the Plaintiff sought review of 3 decisions:

(1) Dr Dixon's assessment of 9% permanent impairment with respect to the neck and back. In relation to this decision, the Plaintiff applied for a review under s 63(1) *MACA* but the proper officer of SIRA dismissed that application. Her Honour noted that the application for judicial review of this decision is out of time and that the Defendant opposes an extension of time and the substantive relief sought.

However, her Honour noted that the Defendant acknowledged that the other 2 decisions should be set aside and that it submits to the relief sought – except in relation to costs. Her Honour noted that these decisions were as follows:

> (2) On 30/11/2020, the proper officer of SIRA refused an application for further assessment of the permanent dispute as allowed under s 62(1)(a) *MACA*, with respect to the temporo-mandibular joint. Assessment of this injury had previously been deferred pending further treatment recommended by an assessor, which the Defendant initially declined to fund. In refusing to refer that application to a medical assessor, the proper officer proceeded on the misapprehension that the TMJ dysfunction had already been assessed, which was wrong.
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> (3) The matter was listed before the claims assessor on 15/02/2021, in order to consider the TMJ claim, but the assessor dismissed the application and indicated that reasons would be published shortly. However, the assessor left SIRA that day and no reasons were ever provided.

Her Honour identified the issues for determination as being: (1) whether an extension of time should be granted for the application for judicial review of the first decision; (2) whether the first decision is vitiated by jurisdictional error; and (3) the costs of the application so far as it concerns the first and second decisions (it is common ground that costs should otherwise follow the event).

Her Honour granted the Plaintiff an extension of time to seek review of the first decision and held that it was appropriate for the Plaintiff to seek to exhaust her administrative avenues for the ultimate remedy she sought before bringing a judicial review application in the Court. Although the decisions concerned different injuries, she held that the challenge to the first decision was relevantly linked with the avenues being pursued by the Plaintiff in respect of her other injuries.

The Plaintiff argued that SIRA fell into jurisdictional error by misconstruing the nature of the jurisdiction committed to it and, rather than looking to whether the appeal grounds were capable of being made out, erred in proceeding to determine the appeal, that being jurisdiction committed to a Medical Appeal Panel.

Her Honour stated that the proper officer's task was to have regard to the particulars set out in the application and to ask, if those contentions are correct, am I satisfied that there is *reasonable cause to suspect* that the medical assessment was incorrect in a material respect. Her Honour was satisfied that the proper officer did misconstrue the function committed to her and therefore exceeded her jurisdiction as she clearly determined the application on the basis of a view as to the substantive grounds raised. That required the exercise of medical expertise she did not possess in order to arrive at conclusions that she was not authorised to draw.

Accordingly, her Honour set aside all 3 of the decisions under review and remitted the matter to SIRA for determination according to law. She ordered the insurer to pay the Plaintiff's costs.

PIC - Presidential Decisions

Section 352 WIMA – Leave to appeal an interlocutory decision – s 352(6) WIMA – additional evidence admitted on appeal – s 329 WIMA – referral of matter for further assessment or reconsideration – procedural fairness – decision should be based on the issues litigated in the matter – a party must have an opportunity to deal with matters adverse to their interests

Scone Race Club Limited v Cottom [2021] NSWPICPD 33 – Deputy President Wood – 19/10/2021

On 23/05/2008, the worker injured his right knee. On 30/11/2015, he claimed compensation under s 66 *WCA* for 20% WPI and the claim was resolved by way of a complying agreement.

On/about 26/12/2017, weekly payments ceased under s 39 *WCA* and the worker claimed WIDs. That claim ultimately failed, but while it was on foot the worker received a copy of a report from Dr Isaacs (qualified by the appellant) which assessed 41% WPI. He filed an ARD seeking to have permanent impairment assessed by an AMS in order to determine whether this was greater than 20% WPI.

On 10/09/2020 ***Arbitrator Young*** issued consent orders, including an order remitting the matter to the Registrar for referral to an AMS to determine the degree of permanent impairment of the right lower extremity (right knee, peripheral nerve damage and TEMSKI).

The dispute was referred to Dr Burns and he issued a MAC, which assessed 20% WPI. However, on 17/11/2020, before a COD was issued, the worker applied for a reconsideration of the MAC under s 329(1)(b) *WIMA*. The appellant opposed that application.

The Arbitrator determined the dispute in favour of the worker, remitted the matter to the Registrar for referral to an AMS and asked the Registrar to withhold Dr Burns' MAC.

The appellant appealed and alleged that the Arbitrator erred: (1) by misconceiving his task and in the exercise of his discretion by accepting that a referral to an occupational physician was within the Registrar's power and then concluding that the "*interests of justice*" favoured a reconsideration; (2) in fact by finding that the respondent "*mistakenly*" agreed to the assessment with Dr Burns, which finding was material and central to the Arbitrator's decision; (3) by failing to afford it procedural fairness by exercising his discretion on a basis not put to him by either party, and (4) by wrongly withholding the assessment by Dr Burns from the AMS appointed to conduct the reconsideration.

Deputy President Wood determined the appeal on the papers. She was satisfied that the decision under appeal is interlocutory in nature and that the appellant requires a grant of leave to bring the appeal. She granted leave to appeal and stated, relevantly:

> 21. If leave is not granted, the matter will require assessment by an AMS and a Medical Assessment Certificate and subsequently a Certificate of Determination to be issued, before the appellant can appeal the decision. This would involve significant delay in the resolution of the proceedings, and, if the appeal was successful, the expenses and other resources utilised in conducting a medical assessment would have been wasted. I have considered the merits of the appeal and discussed those merits below. I have also weighed the factors in favour of granting leave against the public interest in the finality of litigation.

The appellant sought to adduce fresh evidence in the appeal, being a complete chain of emails passing between it, the worker and the PIC on 17/09/2020 regarding Dr Burns' appointment as AMS, in which it stated that the Arbitrator specifically requested an assessment by an orthopaedic surgeon.

Wood DP held that the first limb of s 352(6) *WIMA* was not satisfied and it is necessary to determine whether a failure to admit the documents would cause substantial injustice. The second limb of s 352(6) requires an assessment of whether the Arbitrator would have come to a different conclusion if that evidence had been before him. She noted that the worker's application for reconsideration of the MAC was based on an allegation that the Referral to Dr Burns was ultra vires of the Registrar's power. She stated:

> 37. I accept that the complete email chain paints a different picture to that conveyed by the two emails annexed to the respondent's letter seeking a reconsideration. In particular, the further email from the respondent's legal representatives to the Commission indicates that the respondent acknowledged that the referral to an occupational physician was contrary to the terms of the remitter. It further indicates that, in any event, the respondent was happy to attend Dr Burns for the assessment. There is no suggestion that this email was sent by the legal representatives without instructions from the respondent. This evidence is critical to the conclusions reached by the Arbitrator that the respondent mistakenly attended the assessment with Dr Burns and that the referral was contrary to an agreement reached between the parties that the Approved Medical Specialist was to be an orthopaedic surgeon.
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> 38. On the basis of the above, and for the reasons expressed below in respect of the merits of the appeal, I am satisfied that a failure to admit the evidence would cause substantial injustice in the case in the manner contemplated by Barrett JA in *Strickland*. The complete email chain is therefore admitted as evidence in the appeal.

Wood DP noted that the Arbitrator stated that the worker had requested a referral to a neurologist and plastic surgeon, but she had not made such a request, and that there was an agreement that there would be a referral to an orthopaedic surgeon. She stated, relevantly:

> 44. The Arbitrator pondered that, if the earlier failure to refer the respondent to a neurologist and plastic surgeon was a mistake, then the principles in Samuel did not provide a ground for reconsideration. He added that, if the argument was that he had the power to extend the terms of the referral, that power should be exercised by applying principles of procedural fairness. The Arbitrator proceeded to consider the emails dated 17 September 2020 attached to the letter requesting a reconsideration. The Arbitrator's reasoning, which is extracted at [29] above, was that:
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> > (a) the solicitor's office (probably a secretary) was made aware that the referral was to an occupational physician and not an orthopaedic surgeon;
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> > (b) this was an understandable "mistake" in a busy legal practice;
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> > (c) the appellant argued that the respondent was content to attend the appointment, and
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> > (d) it was not part of the appellant's case that the respondent's willingness to attend the assessment overcame the fact that it had been agreed that the referral was to be to an orthopaedic surgeon…

47. The Arbitrator concluded that he was not of the view that the Registrar's action in referring the respondent to an occupational physician was ultra vires, he did not have the power to direct the Registrar to do anything and there was no lack of power vested in the Registrar to make the referral. The Arbitrator said that there was simply an inconsistency between the referral and the "the parties recorded agreement."

48. The Arbitrator determined that:

> Whether the medical assessment should be performed again by an orthopaedic surgeon, is, however a different proposition. The parties were in agreement that an orthopaedic surgeon was appropriate and the Commission remitted the matter to the Registrar for referral to an orthopaedic surgeon. It is, in my view in the interests of justice (and I exercise my discretion) to remit the matter for reconsideration afresh by an AMS-orthopaedic surgeon. An additional reason for my decision in this regard is that the parties (in particular the [respondent]) were not afforded an opportunity to actively consent to any variation of the terms of the remitter and that this opportunity to fully consider the matter was not, as events unfolded, available. Merely 'copying in' by email the [respondent's] solicitor's secretary is in my view insufficient to afford justice to the [respondent].

49. The Arbitrator indicated that he proposed to refer the matter for further assessment, but recommended that the assessment by Dr Burns should not be included in the documents put before the new assessor because Dr Burns was not of the appropriate speciality.

Wood DP upheld ground (2) and stated that the Arbitrator's finding that the referral to Dr Burns was a mistake has no basis in the evidence and constitutes an error of fact.

Wood DP also upheld ground (3) and stated, relevantly:

89. The Arbitrator's conclusion that the respondent was not afforded an opportunity to consent to the variation in the specialty was clearly wrong. The consent was readily apparent from the email sent by Ms Oliver, paralegal, which was not in evidence because the respondent had not raised any issue that he had not consented or that he had not had the opportunity to consent to attend the assessment.

90. In *Chanaa v Zarour*, Campbell JA (with Bathurst CJ and Tobias AJA agreeing) said (citations omitted):

> It is indisputable that a trial judge is required to conduct the proceedings in accordance with procedural fairness. One aspect of that requirement of procedural fairness is that the decision should be given on the basis of issues that have been litigated in the course of the trial.

91. An arbitrator's finding must be based upon the evidence and a decision based on a point not raised by the parties or the Commission constitutes a denial of procedural fairness. As McHugh J observed in *Muin v Refugee Review Tribunal*:

> Natural justice requires that a person whose interests are likely to be affected by an exercise of power be given an opportunity to deal with matters adverse to his or her interests.

92. Deputy President Roche considered the application of these principles in the context of the Workers Compensation Commission in *Inghams Enterprises Pty Ltd v Jones* and observed:

> … [T]he Arbitrator decided the case on a basis that was never argued by the worker's solicitor and without giving the appellant the opportunity to be heard. It is a basic rule of fairness, disregard of which can be an error of law, that a party must have an opportunity to deal with any material ingredient in a Court's decision-making process (*Smith Family v Dafinis* (1991) 8 NSWCCR 9).

This principle was applied by Bathurst CJ (McColl JA agreeing) in *Workers Compensation Nominal Insurer v Al Othmani* [2012] NSWCA 45 at [75], where it was observed that a decision or award based on a point not raised by the parties or by the Commission constitutes a denial of procedural fairness and is susceptible to challenge under s 353 of the 1998 Act, which is restricted to appeals from Presidential member where a party is 'aggrieved by a decision of the Presidential member in point of law'. The same principle applies to proceedings before Arbitrators and appeals under s 352.

While I accept that an Arbitrator is not obliged to decide a case by reference only to the matters put by counsel, and that, in deciding a case, an Arbitrator is entitled to think for himself or herself (*Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 212; [1978] 3 All ER 1033 at 1037 per Lord Wilberforce; *Klein v Minister for Education* [2007] HCA 2; 232 ALR 306 at [38], 315 per Gummow, Hayne and Heydon JJ), if an Arbitrator is minded to determine a case on a basis not argued, he or she is required to give the parties an opportunity to be heard. The Arbitrator erred in failing to do so in this case.

93. The Arbitrator was not entitled to decide an entirely different issue which was not raised for his consideration, without giving notice to the parties that he proposed to take that course. Had the Arbitrator brought to the attention of the parties that he proposed to decide the matter on the basis that there had been a "mistake" in the referral and that the respondent had not had the opportunity to raise an objection to the referral, the appellant would have had the opportunity to seek to rely upon the email from Ms Oliver. That email was directed to the Commission and copied to the appellant. It advised that neither party had requested the referral be to an orthopaedic surgeon, the respondent was happy to attend the appointment, and the appointment with Dr Burns should be confirmed.

94. The information contained in the email was clearly at odds with the Arbitrator's conclusions and the appellant ought to have been provided with the opportunity to address the Arbitrator's considerations. Having failed to be afforded that opportunity, the appellant was denied procedural fairness and the real potential to achieve a different outcome.

Wood DP held that it was not necessary to consider grounds (1) and (3). She revoked the COD and remitted the matter to another Member for re-determination.

Leave to rely on fresh evidence under s 352(6) WIMA – Alleged factual error – Causation

State of New South Wales (NSW Police Force) v Nguyen [2021] NSWPICPD 34 – Deputy President Snell – 20/10/2021

The worker was employed as Principal Executive Officer at Police Headquarters at Parramatta. She commenced approved leave on 19/12/2019 and on 20/12/2019, she attended a send-off function for a Superintendent at a hotel in Parramatta. She alleged that she was sexually assaulted that night by a senior police officer, initially at the hotel and later in a park at Parramatta, and she reported the assault the next day. She was off work on sick leave until 3/02/2020.

During January 2020, the worker enquired about what was happening with the alleged assailant as they ordinarily worked at the same building. She was initially offered part-time work at Parramatta Headquarters, in a different job so that she would not be working on the same floor as that person. She stated her "boss" expressed concerns about her coming into contact with the person involved in the assault and witnesses, and she was then offered a transfer to premises at Woolloomooloo, which she agreed to. However, the tasks she was allocated at Woolloomooloo were outside her normal duties and she formed the view that many of those working at Woolloomooloo were "*injured in one way or another*", some were on return-to-work plans or were not "*operational*". She stated that the person who assaulted her was doing his normal job at Parramatta and no action was taken against him, yet her job was taken from her. Her hours increased over time to 3 days per week and she was twice offered chances to move back to Parramatta, which were then withdrawn. She perceived this to be associated with the appellant awaiting advice from the DPP about whether charges would be laid in respect of the assault. She felt she was dealt with "*inappropriately*".

On 11/06/2020, the worker said that her boss telephoned and she told him she had claimed workers compensation. However, he "*expressed his disagreement with the claim*", which she regarded as a withdrawal of support when she needed it, and she took sick leave from 15/06/2020 to 30/06/2020. On 1/07/2020, the worker accepted a position as the Manager of Woolloomooloo office and then returned to Parramatta Headquarters on 4/08/2020, but in a different role.

On 14/01/2020, the appellant disputed the claim on the basis that it did not organise or sanction the relevant function and the alleged psychological injury did not arise out of or in the course of employment and/or that employment was a substantial contributing factor.

On 10/06/2020, the worker's solicitors sought a review of that decision on the basis that the worker was "*essentially demoted after reporting the assault*" and that the "*transfer and demotion*" aggravated a pre-existing psychological injury. However, the appellant maintained its position that the reporting of the assault and subsequent investigation related entirely to the incident on 20/12/2019, which was not related to employment.

Arbitrator Homan conducted an arbitration hearing on 5/11/2020, during which the worker sought leave to amend the ARD to plead a disease injury under s 4(b)(ii) *WCA*. The appellant opposed this and the Arbitrator refused to grant leave. At a further hearing on 2/12/2020, the worker did not argue that the incident on 19/12/2019 was a work function, but she relied upon how the appellant treated her after the assault and argued that being returned to a different workplace made her feel that she was being punished for reporting the crime.

On 3/02/2021, the Arbitrator issued a COD, which found that employment between 4/02/2020 and 5/07/2020 was the main contributing factor to an aggravation or exacerbation of a psychological condition under s 4(b)(ii) *WCA* and awarded weekly payments for partial incapacity from 29/02/2020 to 5/07/2020.

The appellant appealed and asserted that the Arbitrator erred in fact and law as follows: (1) in finding that there had been an aggravation injury; and (2) in finding that the respondent's incapacity for work flowed from the aggravation injury rather than the events of 20/12/2019.

Deputy President Snell determined the appeal on the papers. He noted that the appellant sought to rely upon fresh evidence, being a statement from Assistant Commissioner Fitzgerald dated 24/02/2021 (the "*boss*" referred to in the worker's statement). This statement dealt with the viability of the worker's position as Chief Executive Officer, regardless of the assault on 20/10/2019 and associated events, the events surrounding her placement at Woolloomooloo, the circumstances in which the alleged assailant came to continue working at Parramatta headquarters during 2020 and the worker's return to work at Parramatta headquarters.

The appellant argued that failure to grant leave to admit the fresh evidence would result in substantial injustice as if this was admitted the result would be different. It argued that one of the attachments confirms the worker's "*acceptance of her return-to-work arrangements*" and that the evidence demonstrates the efforts made by the Assistant Commissioner to accommodate her. It was required to balance the rights of the worker against the rights of all its other employees and argued that if the fresh evidence was considered, the Arbitrator "*may have given less weight*" to the worker's evidence.

However, the worker argued that the appellant did not raise a defence under s 11A *WCA* and its arguments dealing with reasonableness are "*misconceived*", as the 'injury' dispute did not turn on the reasonableness of the appellant's action or on the Assistant Commissioner's attempts to accommodate her. She alleged that she would be prejudiced if the further evidence was admitted because it raises "*extraneous and irrelevant matters … which seek to broaden the dispute*" and there is no explanation about why this was not adduced previously.

Snell DP noted that in ground (1) the appellant challenged the finding of an aggravation injury based on an alleged error in Arbitrator's analysis of the medical evidence and the weight given to the opinions of different doctors, but it does not argue that she applied an incorrect test on the issue of injury. Ground (2) goes to how the Arbitrator dealt with causation, whether incapacity resulted "*not from the aggravation injury but rather from the alleged sexual assault*". However, the additional evidence is asserted as being relevant to the causation question.

Snell DP held that as the appellant did not challenge the test applied by the Arbitrator, the additional evidence could not lead to a different result, which means that the second limb of the threshold test identified in *Strickland* is not satisfied. That evidence clearly could have been available for use at the arbitration and he refused to admit the fresh evidence in the appeal.

Snell DP rejected ground (1). He held that the finding of an aggravation injury due to work duties after 20/12/2019, was available on the evidence overall. To the extent that there was inconsistency in the medical evidence, the Arbitrator dealt with her preference for the opinions of Dr Bennett and Dr Takyar. Accordingly, he held that the appellant has not identified appealable error within the meaning of s 352(5) *WIMA*.

Snell DP also rejected ground (2). He stated that the appellant's argument that incapacity "*flowed not from the aggravation injury but **rather** from the alleged sexual assault*" (emphasis added) asks the wrong question. It assumes an "either/or" approach, which is inconsistent with authority. An argument that incapacity results from the alleged sexual assault is not necessarily inconsistent with the proposition that incapacity also results in the relevant sense from the '*aggravation injury*'. The relevant question is whether the '*aggravation injury*' caused or materially contributed to the relevant period of incapacity. There was ample evidence to support this proposition.

Accordingly, Snell DP confirmed the COD dated 3/02/2021.

PIC – Medical Appeal Panel Decisions

Medical assessor erred in the preparation of the Table annexed to the MAC – MAC revoked

Skewes v SP Allen Pty Limited [2021] NSWPICMP 198 – Member Moore, Dr B Noll & Dr M Burns – 20/10/2021

On 17/03/2000, the appellant injured her back and suffered consequential injuries to both legs. On 22/07/2021, Dr O'Toole issued a MAC, which assessed 8% WPI (lumbar spine), 15% WPI (right lower extremity) and 15% (left lower extremity), but he applied a deductible of 50% to the lower extremity assessments on the basis that the appellant suffered from significant pre-existing osteoarthritis in both knees.

In the Table annexed to the MAC, the AMS assessed 0% WPI for the back on the basis that 20% permanent impairment of the back had previously been awarded. He also assessed 5% WPI due to the injury on the basis that 5% of the right leg at or above the knee had previously been awarded and 0% WPI of the left leg on the basis that 10% "right leg" at or above the knee had previously been awarded.

The AMS stated that his opinions are consistent with those of the other assessors, but the impact of bilateral knee replacements and the pre-existing factors in their requirement have been explored further to more accurately assess the appellant's current entire impairment.

The appellant appealed against the MAC under s 327(3)(d) *WIMA*. The Respondent accepted that the Table to the MAC contained errors, but argued that no other errors were made by the AMS.

The MAP noted that the appellant was referred to the AMS for 2 assessments: (1) assessment of losses under the table of disabilities for the back and both legs; and (2) assessment of WPI of the lumbar spine and both lower extremities. It found that the AMS incorrectly completed the Table by referring to and including prior assessments made by Dr Oates (AMS) on 17/12/2007.

The MAP accepted the appellant's argument that the AMS failed to consider the effect of bilateral knee surgery on the loss of use of each leg at or above the knee and it found that an assessment of 20% was appropriate. The MAP also noted that the appellant had undergone bilateral hip replacements, which would impact on the functioning of her legs and knees.

With respect to the WPI assessments, the MAP held that the AMS' deduction of 50% under s 323 *WIMA* for both lower extremities was appropriate having regard to all of the evidence.

Accordingly, the MAP revoked the MAC and issued a new MAC, which assessed: (1) combined 22% WPI, comprising 8% (lumbar spine), 8% (right lower extremity) and 8% (left lower extremity); and (2) 20% permanent impairment of the back, 10% permanent loss of efficient use of the right leg at or above the knee and 10% permanent impairment of the left leg at or above the knee.

AMS failed to disclose his path of reasoning – Re-examination conducted – MAC revoked

Lifestyle Solutions (Aust) Ltd v Van den Berg [2021] NSWPICMP 184 – Member Wynyard, Dr N Glozier & Dr M Hong – 29/09/2021

On 13/09/2017 (deemed date), the worker suffered a psychological injury. On 7/01/2021, Consent Orders were issued under which the dispute under s 66 WCA was referred to an AMS for the assessment of permanent impairment.

On 8/04/2021, Dr Baker (AMS) issued a MAC, which assessed 17% WPI.

However, the appellant appealed against the MAC under ss 327(3)(c) & (d) *WIMA*.

The ***MAP*** conducted a preliminary review and determined that the worker should be re-examined because adequate reasons were not given by the AMS. Dr Hong re-examined the worker on 3/08/2021 and provided a report, which the MAP adopted.

The MAP referred to the decision in *Ferguson v State of New South Wales* [2017] NSWSC 887, in which Campbell J considered the assessment of a psychiatric disorder in circumstances where the MAP had revoked the MAC on the basis that the finding by the AMS had been glaringly improbable. His Honour held that the MAP had fallen into jurisdictional error and he stated (at [23]):

> By reference to *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36, the Appeal Panel directed itself that in questions of classification under the PIRS:
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> > … the pre-eminence of the clinical observations cannot be underrated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face.
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> 24. The Appeal Panel accepted that intervention was only justified: if the categorisation was glaringly improbable; if it could be demonstrated that the [MA] was unaware of significant factual matters; if a clear misunderstanding could be demonstrated; or if an unsupportable reasoning process could be made out. I understood that all of these matters were regarded by the Appeal Panel as interpretations of the statutory grounds of applying incorrect criteria or demonstrable error. One takes from this that the Appeal Panel understood that more than a mere difference of opinion on a subject about which reasonable minds may differ is required to establish error in the statutory sense.
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> 25. The Appeal Panel also, with respect, correctly recorded that in accordance with Chapter 11.12 of the Guides 'the assessment is to be made upon the behavioural consequences of psychiatric disorder, and that each category within the PIRS evaluates a particular area of functional impairment': Appeal Panel reasons at [37]. The descriptors, or examples, describing each class of impairment in the various categories are 'examples only': see Jenkins v Ambulance Service of New South Wales . The Appeal Panel said 'they provide a guide which can be consulted as a general indicator of the level of behaviour that might generally be expected': Appeal Panel reasons at [37]."

The MAP held that the relevant matters to consider when an assessment is said to be erroneous are (to use the reference by Campbell J in *Ferguson*):

> (a) whether the categorisation was glaringly improbable;
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> (b) whether it could be demonstrated that the MA was unaware of significant factual matters;
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> (c) whether a clear misunderstanding could be demonstrated, or
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> (d) whether an unsupportable reasoning process could be made out.

The MAP adopted Dr Hong's findings on clinical examination and his aggregate score impairment of 8% WPI, but applied a deductible of 1/10 under s 323 *WIMA* and issued a MAC that assessed 7% WPI.

PIC – Member Decisions

Workers Compensation

Multiple injuries suffered in 2006 (including injury to the right thumb) – A Deed executed in 2011 provided for payment of substantial damages to the worker and it referred to the right thumb injury – In 2021, the worker incurred medical expenses totalling $825 for treatment to his right thumb but the respondent denied liability under s 151A WCA – Worker is a resident of Queensland – Held: the matter was between a State and a resident of another State within the meaning of s 75(iv) of the Constitution and the PIC lacks jurisdiction.

Ritson v State of New South Wales [2021] NSWPIC 409 – Member Harris – 20/10/2021

Between 21/12/2001 and 10/03/2011, the worker was an attested police officer who suffered multiple compensable injuries, including an injury to his right thumb on 22/01/2006.

On 22/11/2011, the parties entered into a Deed of Release, which referred to the payment of substantial damages in full and final settlement of various proceedings, complaints, requests and any claims and entitlements, including the right thumb injury.

In 2021, the worker claimed $825 for fractional ablative laser treatment of his right thumb. However, the respondent disputed the claim under s 151A *WCA*.

Member Harris noted a preliminary jurisdictional issue, namely that if this was a matter between a resident of Queensland and the State of New South Wales, s 75(iv) of *the Constitution* requires it to be determined by a court of a State. There was no dispute that the worker resided in Queensland.

The Member stated that neither the WCC nor the PI is not a court: *Orellana-Fuentes v Standard Knitting Mills Pty Ltd; Mahal v State of New South Wales (No 5)* and he stated, relevantly:

> 15. As was accepted by the Chief Justice in *Attorney General for New South Wales v Gatsby* when referring to the observations of Kenny J in *Commonwealth of Australia v Anti-Discrimination Tribunal (Tas)*, the "absence of security of tenure" was an important matter in the characterisation of whether a member was a judge and whether the relevant tribunal was properly characterised as a Court. Whilst members of the Commission exercise an independent decision-making function, they have limited tenure in accordance with their appointment by the Minister.
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> 16. Whilst further reasons are unnecessary, s 26 of *the PIC Act* shows a clear intention by Parliament that matters of federal jurisdiction should be heard by the District Court. The obvious reason for that section is that the District Court has the power to hear matters arising under s 75(iv) of *the Constitution*, whereas the Commission does not.
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> 17. In these circumstances it is necessary to emphasise that, as a member of a Tribunal, I cannot decide issues of interpretation of the Constitution nor "pronounce authoritatively on the limits of its own jurisdiction" and I am limited to forming and expressing an opinion on the issue.
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> 18. In those circumstances the respondent's brief reference to the requirement that there be a provision of notices to the various Attorney-Generals under s 78B of the Judiciary Act does not arise because the cause is not before a court of a State.

Accordingly, the Member concluded that the PIC lacks jurisdiction to determine the dispute.