Bulletin

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Independent Review Office

RECENT CASES

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

Decisions reported in this issue

1. Insurance Australia Ltd v Marsh [2022] NSWCA 31
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Court of Appeal Decisions

Jurisdictional error – s 63(3) MACA – was there a reasonable cause to suspect material error in a medical assessment – did the decision maker exceed their statutory role by declining to refer the matter to a RP – did the primary judge err by referring the matter to a RP rather than a proper officer

Insurance Australia Ltd v Marsh [2022] NSWCA 31 – Basten, Macfarlan & White JJA – 7/03/2022

The decision of Simpson AJ (*Marsh v Insurance Group Limited t/as NRMA Insurance Limited* [2021] NSWSC 619) was reported in Bulletin no. 95, However, the following summary is provided for ease of reference.

In August 2012, the plaintiff was involved in a MVA. In 2018, he claimed damages for non-economic loss and he was referred to Dr Home for assessment under s 59 *MACA* and on 17/10/2018, Dr Home issued a MAC which diagnosed an aggravation of underlying degenerative changes as a result of the MVA and assessed 5% WPI (cervical spine) as he did not detect any objective clinical signs of cervical radiculopathy. This did not entitle the plaintiff to damages.

However, the plaintiff also claimed costs of proposed treatment (cervical fusion and up to 12 GP consultations per year for the remainder of his life) and domestic assistance (60 minutes of paid assistance per week for the remainder of his life). However, the first defendant disputed the claim and applied to SIRA for assessment of the treatment dispute.

The treatment dispute was referred to Dr Truskett and on 5/02/2020, he issued a MAC, which certified that the aggravation of degenerative change would have abated over the ensuing 6 to 12 months and the ongoing neck pain is unrelated to the MVA. He also stated that the plaintiff's disabilities predominantly relate to injuries to work injuries to both shoulders and the left knee in 2010 and 2011, respectively and that the proposed treatments did not relate to injuries caused by the MVA and are not reasonable and necessary.

The plaintiff applied for a review of Dr Truskett's assessment under s 63(1) *MACA* on the grounds that it was incorrect in a material respect, namely: (1) the approach to causation; (2) denial of procedural fairness in failing to draw to his attention differences in findings made at the time of his assessment and previous findings made by Dr Home and A/Prof Kleinman in 2018; and (c) asserted illogicalities in reasoning.

On 11/05/2020, the proper officer rejected each contention; quoted from the judgment of Harrison AsJ in Insurance *Australia Limited (t/as NRMA Insurance) v Warren* [2019] NSWSC 1126 at [112]; and rejected that Dr Truskett's reasoning process was illogical. He declined to refer the application to a RP.

The plaintiff applied to the Supreme Court of NSW for judicial review of that decision.

Simpson AJ considered the substance of the plaintiff's complaint to be that the proper officer: (1) exceeded their role under s 63(3) *MACA* by declining to refer the matter to a RP; and (ii) incorrectly rejected his claim that Dr Truskett denied him procedural fairness.

Her Honour stated that the proper officer's role is that of a gatekeeper and is to determine whether a proposed challenge to a medical assessment will be permitted to proceed to a RP. In *Dominice*, Basten JA said that the role provides protection for a party satisfied with the initial assessment from frivolous or insubstantial challenges to that assessment.

Her Honour found merit in the plaintiff's argument that the proper officer mistook his function and determined the issues that would have arisen in a review by a RP and that exceeded the bounds of his authority and she stated, relevantly:

> 65. To conclude, as the proper officer did (at [14]), that Dr Truskett's opinion was open to him based on the evidence did not address the correct question. When confronted with competing opinions from practitioners specialised in their field, it is not the role of the proper officer to choose between them; that is a role for medical assessors constituting an appeal panel.
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> 66. The inevitable result, when the proper officer is confronted with conflicting opinions of medical practitioners, is that there must be reasonable cause to suspect that the medical assessment is incorrect in a material respect. The proper officer went beyond his statutory role in considering whether there was reasonable cause to suspect material error in the medical assessment and determined the asserted error on the merits. That was jurisdictional error. It was also an error that appears on the face of the record, as contemplated by s 69 (3) of the Supreme Court Act.

Accordingly, her Honour quashed the proper officer's decision and ordered that the medical assessment be referred to a RP. She ordered the first defendant to pay the plaintiff's costs. However, the insurer appealed to the Court of Appeal.

The Court identified the issues as follows: (1) whether the primary judge erred in finding that the proper officer mistook his function and determined the issue on its merits; (2) whether the primary judge erred in finding that the proper officer exceeded his bounds of authority because there was significant material before him that demonstrated significant differences of opinion among medical practitioners; (3) whether the primary judge erred in finding that when a proper officer is confronted with conflicting opinions of medical practitioners the inevitable result is that there must be reasonable cause to suspect that the medical assessment is incorrect in a material respect; and (4) whether the primary judge erred in ordering that the medical assessment be referred to a review panel.

The Court allowed the appeal for reasons that are summarised below.

In relation to issue (1):

White JA (Macfarlan JA agreeing) held that the proper officer did not seek to decide the matter on its merits. Basten JA held that the proper officer's statement that a finding was "open to the assessor" provided no basis for challenging the legality of the opinion formed by the proper officer.

In relation to issue (2):

White JA (Macfarlan JA agreeing) held that the existence of significant differences of opinion between the medical assessor and other medical practitioners does not mean that the proper officer mistook his function in not being satisfied that there was reasonable cause to suspect that the medical assessor erred in a material respect. Basten JA held that the existence of conflicting medical opinions cannot, by itself, constitute a ground for referral to a RP.

In relation to issue (3):

White JA (Macfarlan JA agreeing) held that it is not correct to state that where there are conflicting opinions of medical practitioners specialised in their field, a proper officer must have reasonable cause to suspect that the medical assessment is incorrect in a material respect. Basten JA held that the existence of conflicting medical opinions, far from providing an invariable basis for referral to a review panel, cannot, by itself, constitute a ground for referral to a review panel.

In relation to issue (4):

The Court held that the conclusion that the assessment should be referred to a RP rather than the proper officer, or to another proper officer, for redetermination, followed from Simpson AJ's conclusion that because of conflicting medical opinion only one course was open to the proper officer. That conclusion was wrong.

Accordingly, the Court allowed the appeal, set aside the orders of the Primary Judge and dismissed the summons with costs.

PIC - Presidential Decisions

Death benefits claim under ss 25 & 26 WCA –Injury arising out of employment (s 4 WCA)

SB v XFPL [2022] NSWPICPD 7 – Deputy President Snell – 1/03/2022

On 7/03/2016, the deceased (MMB) died. The first, second and fourth appellants are MMB's children and the third appellant is his widow. MMB was employed by the respondent as a sales representative and business development manager. MKB (the deceased's brother) was the owner/director of the respondent and other associated companies.

The respondent contracted with ISPL to supply "signage and restorations" to a service station site in country NSW (which the respondent owned). Delays in completion of the work led to frictions between the respondent and ISPL and the deceased had meetings with CS (the manager/owner of ISPL) about the delays.

On 4/03/2016, WT (project manager for ISPL) hung up during a telephone call with the deceased, who was chasing up the works. The deceased attended ISPL's premises that day and when he returned to the respondent's premises, he told MKB that a sign would be delivered on 7/03/2016.

On 7/03/2016, CS telephoned the deceased and asked him to attend ISPL's premises, He did so and then telephoned MKB to say that a gun had been pulled on him and a shot fired when he as at ISPL's premises. MKB left the respondent's premises by car to attend ISPL and he was accompanied by SE (Operations Manager of the respondent) and TB (a brother of the deceased.

The deceased returned to ISPL's premises, where WW (CS' partner) and PW (WW's father) were present with CS. Words were exchanged and WW opened fire with a firearm. The deceased was killed and MKB and TB were wounded. Police attended and there was a siege situation, during which WW took his own life with the gun.

The respondent's insurer declined liability for the claims under ss 25 & 26 *WCA*. It denied that the deceased was carrying out "*work duties*" at the time of his death and asserted that s 9A *WCA* was not satisfied. It also denied that the death resulted from an injury within the meaning of s 4 *WCA* and it asserted that the deceased subjected himself to an abnormal risk of injury during an ordinary recess or authorised absence within the meaning of s 11(b) *WCA*.

Member Read identified the following issues: (1) Whether the deceased's death resulted from 'injury' within the meaning of s 4 *WCA* ; and (2) Whether employment was a substantial contributing factor to injury. On 14/05/2021, he issued a COD, which entered an award for the respondent.

In relation to issue (1), the Member held that a finding of injury in the course of employment involves a temporal relationship, which *"includes all the time that the worker is engaged in the performance of the duties of employment or things that are reasonably incidental to the employment*".

The Member summarised a number of authorities dealing with the course of employment, including *Bill Williams Pty Ltd v Williams* [1972] HCA 23. He said that in the case of an injury caused by a deliberate assault "*the critical issue is whether the assaulted worker was doing something that was in the course of or was reasonably incidental to his or her employment*", citing *Inverell Shire Council v Lewis* (1992) 8 NSWCCR 562. He also cited *Wheeler v Commissioner for Railways* [1962] 2 NSWR 474 and *Davidson v Mould* [1994] HCA 10, saying:

> Doing something that is not part of a worker's duties or is reasonably incidental to a worker's duties, or going to a place where it is not part of, or reasonably incidental to the worker's duties, will interrupt the course of employment. An injury sustained in such circumstances will not be one sustained in the course of employment.

The Member also referred to *Schinnerl v Commissioner of Police* [1995] NSWCC 12, saying:

> Performing an activity which is not reasonably required, expected or authorised to do in order to carry out one's duties may also take a worker outside the course of employment ...

The Member noted the respondent's argument that when WW fired a shot during the deceased's first attendance at ISPL "*the character of the dispute changed, and what followed had no factual connection or association with the employment*" and that what followed "*was retaliation from the ... brothers over [WW's] earlier conduct and was not connected to any employment purpose*". He held that there was "*little evidence identifying the nature and terms of the deceased's employment*" other than that from MKB. It was necessary to consider the adequacy of the association between the injury and the employment and "*whether the first respondent authorised, induced or encouraged the deceased to be at ISPL and to engage in the activity in which he was engaged at the time of his death*". He found that the deceased's second visit to ISPL on 7/03/2016 "*was related to retaliation for the earlier conduct of [WW] during the first visit and/or to support his brothers in the confrontation*".

The Member also held that "*another matter*" weakened the connection between the deceased's fatal injury and his employment, was "*the earlier events of 4 June 2016 [sic, 4 March 2016], which did not appear to have a sufficient connection to the employment*". He found that the deceased and his associate appear to have attended ISPL for the purpose of dealing with perceived disrespect shown by WT during the telephone call. On one view, this confrontation was the genesis of the escalation of the dispute, not the matters concerning delay in production of the sign. He stated:

> A further factor that disconnects the fatal injury from the employment was the lack of reporting of the serious criminal action of [WW] against the deceased. Neither the deceased nor [MKB] reported the matter to the police. This factor, in conjunction with the deceased and [TB's] threats of retaliation to [CS], supports that the deceased elected to take the matter of dealing with [WW] into his own hands.

The Member held that when MKB and SE attended ISPL on 7/03/2016 they were not attending for any work-related purpose and that they attended ISPL to check the safety of TB and the deceased, in the knowledge that WW had a gun that he had discharged earlier on 7/03/2016, and this purpose was not connected to the respondent's business or the deceased's employment.

In relation to issue (2), the Member found that it was more likely than not that the deceased attended ISPL on the second occasion for the purpose of confronting WW about his earlier conduct and/or to support his brothers in the confrontation. He was not satisfied there was any reason for his second attendance that was connected to his employment as he was not engaged in the activities of his employment at the time of his fatal injury. He held that the deceased's action in returning to ISPL was outside of the scope of his employment.

Accordingly, the Member found that there was no adequate temporal connection between the circumstances of the fatal injury and the deceased's employment.

The appellants appealed.

The third appellant asserted that the Member erred as follows: (1) in fact and law when he found that the injury did not occur in the course of employment; (2) in fact and law when he failed to properly consider whether there was a causal connection between the deceased's visit to ISPL on 7/03/2016 and his subsequent visit to the premises of ISPL; (3) in law when he failed to give proper reasons for finding that the purpose of the second attendance at ISPL was in no way connected to the employment having found that the deceased's purpose in attending was a result of the conduct of WW during the earlier work-related visit; (4) The Member erred in law when he failed to give proper reasons why there was no chain of causation between the work-related activities on 4/03/2016 and the morning of 7/03/2016 with the fatal shooting on the afternoon of 7/03/2016; (5) in fact and law when he found that the injury causing death did not arise out of employment; and (6) Such other grounds as become apparent when the transcript is available (this was not ultimately relied on.)

The fourth appellant also asserted that the Member erred as follows: (1) in law in determining that the deceased worker did not sustain an injury "*arising out of*" employment with the respondent; (2) in law when he determined there was no connection between the deceased worker's employment and his injury; and (3) in fact when he determined there was no connection between the deceased worker's employment and his injury.

The first appellant asserted that the Member also erred in law as follows: (1) by deciding the matter on bases not raised, that is, exceeding jurisdiction; (2) Denying her procedural fairness by: (i) ruling against her when objecting to the way in which the case was run by the employer; (ii) failing to provide lawful reasons for rejecting the objection; and (iii) failing to invite further submissions or evidence from the first appellant when rejecting the objection; and (iv) failing to deal with the matter in accordance with the disputes raised; and (3) Failing to provide lawful reasons concerning the objection raised.

Deputy President Snell allowed the appeal and I have summarised his reasons as follows.

The test for "*arising out of*" employment was set out by the Court of Appeal in *Badawi*:

> 73. The meaning of '*arising out of … employment*' is settled. In *Nunan v Cockatoo Island Docks & Engineering Co Ltd* [1941] NSWStRp 23; (1941) 41 SR (NSW) 119 in what is sometimes still referred to as the authoritative decision on the phrase the Court (Jordan CJ and Roper J, Nicholas CJ in Eq agreeing) adopted a common sense approach to the application of the phrase, noting that it involved a causative element. In doing so, their Honours, at 123, endorsed the comments of Lord Wright in *Dover Navigation Co v Craig* [1940] AC 190 at 199 that the Act was a remedial Act intended to give rights to workers that were more extensive than common law rights and which used non-technical language in doing so. As Lord Wright said:
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> > Nothing could be simpler than the words '*arising out of and in the course of employment*.' It is clear that there are two conditions to be fulfilled. What arises '*in the course*' of the employment is to be distinguished from what arises '*out of the employment*'. The former words relate to time conditioned by reference to the man's service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment, that is directly or indirectly engaged on what he is employed to do, gives a claim to compensation unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified.
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> 74. Their Honours also endorsed the comments of Lord Maugham at 193 in the same case in considering whether the death in that case arose out of applicant's employment:
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> > The authorities show, if authorities are needed on that point, that the words connote a certain degree of causal relation between the accident and the employment. It is impossible to define in positive terms the degree of that causal connection …
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> 75. Their Honours concluded, at 124, that a worker would have established that an injury arose out of employment:
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> > … if it appears … that the fact of his being employed in the particular job caused, or to some material extent contributed to, the injury …

In *Nunan*, the worker was assaulted by a fellow employee in circumstances where he had ignored a request by the fellow employee to clean some paint brushes in another area after the applicant had inadvertently splashed paint on to the enamel work that the fellow employee was undertaking. There was no dispute that the injury thus sustained was sustained in the course of the employment. Jordan CJ and Roper J held that the applicant's injury arose out of the employment. In doing so, they noted that the question whether a particular injury arose out of the employment was a matter to be inferred from the facts as a matter of common sense. In doing so, they rejected the need for the employment to expose the worker to some special danger. Whether that was a necessary circumstance or not depended on the particular facts of the case. Their Honour's views, expressed by reference to circumstances in which an employee might be assaulted at work is found in the following passage, at 124:

> We have been referred to a number of cases in which there have been claims arising out of assaults on workers. These do not stand in a class by themselves, but are all instances of applications of the language of the Act to the facts of particular cases.

In *Tarry* Glass JA referred to *Nunan* saying:

> ... the injury may arise out of the employment, *even though at the time it is sustained the deceased or the [worker] is no longer in the course of his employment* ... the proper test for determining whether the injury arose out of employment has been stated by Jordan CJ in [*Nunan*], when he describes the employment as causing or contributing to the injury; by Fullagar J ... when he states the need for a causal connection between the employment and the injury and by Starke J in *South Maitland Railways Pty Ltd v James* [1943] HCA 5; (1943) 67 CLR 496 at 502, when he says '*the words 'out of' require that the injury had its origin in the employment*.' (emphasis added)

In *Scarce* Clarke JA said:

> It is now well established at common law that the test of causation is a common sense one. Any controversy on the question has been laid to rest by the decision of the High Court in *March v E and M H Stramare Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 [*March*]. What needs to be established is that the event which is sought to be linked with injury 'was so connected with the loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it'. (see *Halverson Boats Pty Ltd v Robinson,* [1993] 31 NSWLR at 7). The question is, of course, a question of fact which '*must be determined by applying common sense to the facts of each particular case*' (see, *March* at 15). In my opinion there is no reason to adopt a different approach in relation to the test of causation posed by the words '*arising out of*'. The question of fact is whether there is such a connection between the worker's personal injury and his employment that, as a matter of ordinary common sense and experience, the injury should be regarded as having arisen out of that employment. In deciding that question my preferred view is that the test laid down by Jordan CJ in *Nunan v Cockatoo Docks and Engineering Co Ltd* [1941] NSWStRp 23; 41 SR (NSW) 119 at 124 - that the fact of his being employed in the particular job caused, or to some material extent contributed to the injury - should be applied. At the very least the test requires that the employment was a contributing factor to the injury.

In *The Star Pty Ltd v Mitchison* the Court of Appeal said that it is insufficient, to show that an injury arose out of employment, "*merely to show that but for the employment, the worker would not have been at the scene of the accident*".

The Member's decision goes no further than saying that the employment activities, that represent the '*genesis*' of the causal chain, need to fall within the "*sphere or scope of the employment*". The approach taken in the reasons in the current matter, to the application of *Wheeler*, would tend to restrict the '*arising out of*' test to circumstances where each step in the causal chain also occurred '*in the course of employment*'. Such an approach is too restrictive and is inconsistent with the authorities referred to above. The decision in *Wheeler* should be considered in concert with those authorities.

The Member found that the chain of causation was broken when the deceased attended at [ISPL] on the afternoon of 7/03/2016, when he was found to be not in the course of his employment. This is inconsistent with the decision in *Tarry*. The passage from *Tarry* quoted at [79] above make it clear that an injury can arise out of employment, notwithstanding that the worker was not in the course of employment when the injury was sustained. This is not restricted to 'assault cases' but is an application of settled principles (see the passage from *Nunan* quoted in *Badawi* in the passage at [78] above).

While the Member sought to distinguish *Tarry* and *Kasim* on the basis that the workers in those cases "*were involved in work duties at the time of the assaults*", in both of those cases it was found that, prior to the injury associated with the assaults occurring, the workers had removed themselves from the course of employment. This is clear in *Tarry*, having regard to the passage quoted at [79] above. *Kasim* was a case in which the worker was a bus driver. It was found that he assaulted a passenger who had been rude to him, as he was performing his work as a bus driver. Neilson CCJ said: "*when the [worker] stood up and vehemently slapped the young man on the head he interrupted the course of his employment*". His Honour said:

> ... in my view the only inference I can draw is that this injury arose out of the employment because the only inference I can draw is that the reason for the young man's conversation with the [worker] which clearly provoked him was something that arise out of the relationship of driver and passenger.
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> His Honour referred to *Tarry* and continued:
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> > If this young man upbraided the [worker] because of the route he had taken or the way he had driven his bus then that appears to me to [a]rise out of the [worker's] employment. That is, it is causally related to it.

Snell DP held that an injury can arise out of employment notwithstanding that a worker has removed him or herself from the course of employment. He accepted the third appellant's argument that it is not necessary that each link in the causal chain be work-related.

It is appropriate to also have regard to what the deceased did on the second attendance at ISPL on 7/03/2016. The question of whether there was injury arising out of employment involves a consideration of whether, adopting a common-sense approach, there was a causative element to the relationship between the deceased's employment and the fatal injury. Did the employment cause or to some material extent contribute to the fatal injury?

The Member asked the wrong question, which constituted error, and his attempt to distinguish the decisions in *Tarry* and *Kassim* (and *Davis*) also constituted error, which affected the result.

Accordingly, Snell DP set aside the COD and found that the deceased suffered injury on 7/03/2016, arising out of his employment with the respondent, that resulted in his death. He remitted the matter to a different Member for determination of remaining issues.

PIC – Medical Appeal Panel Decisions

MA erred in assessing impairment under PIRS by failing to consider Ballas v Department of Education (State of NSW) – MAC revoked

Marciano v State of New South Wales (Ambulance Service of NSW) [2022] NSWPICMP 26 – Member Moore, Dr M Hong & Dr P Morris – 18/02/2022

The appellant suffered a work-related psychological injury (deemed date: 10/06/3029).

On 9/11/2021, Dr Andrews issued a MAC, which diagnosed PTSD and Opioid use disorder – in remission and assessed 8% WPI, which did not entitle the appellant to compensation under s 66 *WCA*.

The MA took a history that the appellant joined the respondent in September 1998, and became an intensive care paramedic in 2004. In 2013 he injured his back at and was prescribed opiate analgesics, which he misused and he developed an opiate use disorder. In 2016, he was accused of stealing Fentanyl from the ambulance, leading to criminal charges, which were dealt with under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (allowing for diversion to mental health care without conviction), but he was required to resign.

The appellant complained that his psychological symptoms probably commenced before 2010, as he was stressed by the intensive care training and the associated increased responsibilities. He was often required to attend jobs on his own, adding to the stress, and he was exposed to repeated scenes of trauma involving death and serious injuries of others. When he injured his back in 2013, he took time off, allowing him to reflect on his stress levels. He found that medically prescribed opiates reduced his work-related anxiety and distress. He sought medical support and was diagnosed with opiate use disorder and, later, PTSD.

The appellant appealed against the MAC under s 327(3)(c) *WIMA* and the appeal was referred to a MP.

The MP determined that it was not necessary to re-examine the appellant.

The MP It noted that the MA assessed Class 2 for self-care and personal hygiene. However, the appellant argued that he should have been assessed in Class 3, as assessed by A/Prof. Robertson and Dr Takyar. It held that the Class 2 assessment was consistent with the MA's findings on examination.

The MP noted that the MA assessed Class 2 for social and recreational activities, but again the appellant argued that he should have been assessed in Class 3. The MP held that a Class 3 assessment is more appropriate and it stated, relevantly:

> 44. Mr Marciano has clearly significantly reduced his recreational activities, as documented in his statement and indeed by the MA, and, consistent with a Class 3 rating, "*Rarely goes out to such events…*".
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> 45. The solitary nature of Mr Marciano's activities is noted throughout the MAC. Mr Marciano also made it clear that his various symptoms have not abated to any major extent. For example, he said that he occasionally goes out to dinner or a café *with his family or a friend (*our emphasis). He only goes to movies every one or two months, and goes during the day *because there are few patrons* (our emphasis). He also on occasions may meet up with an ex-work colleague, *usually someone in a similar situation* (our emphasis).
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> 46. In *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86 (6 May 2020) (*Ballas*) the court held that events described as either solitary, that is, that do not involve interactions with other people or shared with a single trusted person only could not be described as 'social' within the PIRS category of social and recreational activities.
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> 47. In addition, social and recreational activities are not akin to travel or social functioning. It is apparent from a reading of the table that the category of "social and recreational activities" is directed to the kind of activities that involve interactions with other people.
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> 48. In other words, *Ballas* emphasises the social aspect of this category.

Accordingly, the MP assessed PIRS impairments as Classes 2, 3, 2,2,3 & 4, respectively, which resulted in 17% WPI. It revoked the MAC and issued a fresh MAC.

Psychological injury – MA failed to refer to GP's clinical notes which diagnosed anxiety & depression & indicates anti-depressant medication was prescribed 6 weeks prior to injury – Held: a 1/10 deduction is applicable under s 323 WIMA – MAC revoked & fresh MAC issued

Mayo Private Hospital v Radnidge [2022] NSWPICMP 28 – Member Rimmer, Dr M Hong & Dr P Morris – 24/02/2022

On 15/01/2013, the worker suffered a psychological injury at work.

On 23/11/2021, Dr Baker issued a MAC, which assessed 15% WPI, but he did not apply a deductible under s 323 *WIMA*.

The appellant appealed against the MAC under ss 327(3)(c) & (d) *WIMA* and argued that the MA failed to refer to the GP's clinical notes, which indicated that 6 weeks prior to the work injury, he diagnosed anxiety & depression and prescribed anti-depressant medication. This was clear evidence of a pre-existing injury, condition or abnormality and the MA should have applied a deductible under s 323 *WIMA*.

Following a preliminary review, the MP decided that it was not necessary to re-examine the worker.

The MP referred to the decision of Campbell J in *Ryder v Sundance Bakehouse* [2015] NSWSC 526:

> 38. What s 323 requires is an inquiry into whether there are other causes, (previous injury, or pre-existing abnormality), of an impairment caused by a work injury. A proportion of the impairment would be due to the pre-existing abnormality (even if that proportion cannot be precisely identified without difficulty or expense) only if it can be said that the pre-existing abnormality made a difference to the outcome in terms of the degree of impairment resulting from the work injury. If there is no difference in outcome, that is to say, if the degree of impairment is not greater than it would otherwise have been as a result of the injury, it is impossible to say that a proportion of it is due to the pre-existing abnormality.
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> 39. In *Marks v Secretary, Department of Communities and Justice (No 2)* [2021] NSWSC 616 (*Marks*) at [29] where Simpson AJ noted the following:
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> > I have therefore concluded that Guideline 11.10 of the Workers Compensation Guidelines is, to the extent that it excludes, in the application of s 323(1) of the WIM Act to any psychiatric or psychological impairment, consideration of any contribution made to the impairment by a pre-existing but asymptomatic condition, inconsistent with s 323(1) and invalid.
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> 40. *Marks* confirmed that Guideline 11.10 of the Guidelines is to be applied unless the assessment is that of a pre-existing but asymptomatic condition.

The MP held that the MA made a demonstrable error in incorrectly recording in the MAC that the worker had no prior psychiatric or psychological history and by not providing reasons as to whether a deduction under s 323 *WIMA* should or should not be made. It was satisfied that the worker was not asymptomatic before the work injury and that the pre-existing condition resulted in some impairment. However, it held that the pre-injury impairment level could not be assessed on the evidence and it was therefore appropriate to apply a 1/10 deduction.

Accordingly, the MP revoked the MAC and issued a fresh MAC, which assessed 14% WPI as a result of the work injury. This does not entitle the worker to recover compensation under s 66 *WCA*.

PIC – Member Decisions

Workers Compensation

Respondent sought to dispute liability after s 66 dispute was referred to a MA – Member refused to grant leave under s 298A(4) WIMA - Mateus v Zodune Pty ltd t/as Tempo Cleaning Services applied

Thornton v Coles Supermarkets Australia Pty Ltd [2022] NSWPIC 74 – Member Perry – 22/02/2022

On 14/07/2021, the worker claimed compensation under s 66 *WCA* for 28% WPI (lumbar spine).

The insurer accepted liability and paid weekly payments and s 60 expenses. On 4/08/2021, it filed a Reply, which indicated a quantum dispute and that it had offered compensation for 21% WPI and that the only dispute was whether the threshold for a WIDs claim was satisfied.

The PIC referred the s 66 dispute to Dr Meakin for assessment. However, following the referral, the insurer issued a s 78 notice, which sought to dispute liability on all grounds. The respondent required leave to rely upon this dispute notice under s 298A *WIMA*.

Member Perry refused to grant leave to the insurer under s 298A *WIMA*. He referred to the decision in *Mateus v Zodune Pty ltd t/as Tempo Cleaning Services* and noted that there was a substantial delay between the date of injury and the date of dispute and that this delay was largely unexplained. That factor militates against the respondent's case that the discretion to allow the dispute to be raised should be exercised, but that is not solely determinative. He stated that the respondent has not explained the circumstances surrounding how and why it came to be aware of concerns about general liability in the matter from on/about 14/10/2021, why and how such matters were not able to be discovered before then or what triggered its late flurry of activity.

The Member also stated:

> 81. The merit and substance issue in this case is both very important and problematical. The respondent submits there are two aspects to its application: whether the incident occurred in the manner alleged or at all; and the question of whether there was a causal connection between the alleged incident and the injury. In one sense, the s 78 notice does raise the causation point, in the context of a "catch all" set of "reasons for disputing liability, including denial of liability under ss 4, 9A,15 & 16 (disease), 33 (weekly payments) and 59A & 60 of the 1987 Act". But under the heading "Issues relevant to the decision", the reasoning really only deals with the question of whether the incident occurred in the manner alleged or at all.
>
> 82. An employer's obligations under s 78 of the 1998 Act are not satisfied by a document that leaves "the worker to work out exactly which issues are disputed" (*Mateus* at [45]; *Fairfield City Council v Arduca* [2015] NSWCA166 at [35]). That is not to say that I will not consider the respondent's "causation" submission. The "issues relevant to the decision" particularised by the respondent amounts to the respondent inferring that the applicant has not "sustained a compensable lower back injury arising out of an incident said to take place on 24/07/2014 – 'based on the above information'". That information essentially related to the applicant's reporting of the "work incident" and the surrounding circumstances between 24 July and 5 August 2014 including attending on Dr Saad that day, a physiotherapist on 27 November 2014 and Dr Stephenson on 1 October 2014 – when "you advised the injury occurred whilst lifting two crates at a time with a colleague ... reportedly took place on the second lift". The s 78 Notice then sets out the statements provided by Messrs Naidu and Fraser, particularly those parts relating to the allegations the applicant had stated (to Mr Naidu) that "he fell down the stairs at home" and (to Mr Fraser) that the applicant "said that he had sneezed and he felt a pain in his back ... (and) do not have any recollection of the ... incident…
>
> 83. So, a close reading of the s 78 notice shows that the dispute is underpinned by the issue surrounding the alleged (by the applicant) incident. Still, both the incident and causation issue will be dealt with because the words "do not consider you sustained a compensable lower back injury arising out of an incident" appear.
>
> 84. In my opinion, the merit and substance of the issue to be raised is significant, particularly given the *Naidu* and *Fraser* statements. Whether the incident occurred, or did so in the manner alleged by the applicant, is a fundamental issue going to the question of whether the respondent has any liability…
>
> 86. The particular circumstances of this case result in the merits and substance factor being bound up with another *Mateus* factor - complexity and difficulty. I believe the following matters would, if leave were granted for the respondent to rely upon s 78 notice, make any determination significantly complex and difficult.
>
> 87. In essence, both the *Naidu* and *Fraser* statements give rise to the respondent taking the position that the incident did not occur, at least in the manner alleged by the applicant. In the circumstances, this amounts to the allegation that he fabricated the incident (if not expressly, clearly enough by inference). Such an allegation is a serious one. Such an allegation, or subsequent finding, requires a high degree of satisfaction, and not by reasonable satisfaction based on "inexact proofs", indefinite testimony or indirect inferences (*Briginshaw v Briginshaw* [1938] HCA34; 60CLR336 (*Briginshaw*) per Dixon J (at [361-362])).

The member held that another matter going to the merits and substance, as well as complexity/difficulty, if leave was granted is the unexplained absence of any material from two persons who might have been thought to be important witnesses. He stated that these factors do not advance the respondent's case regarding injury. He concluded that in the interests of justice, leave to rely upon the unnotified matters must be refused.

Accordingly, the Member ordered that the referral to the MA be supplemented by additional documents filed in the matter.

Section 11A WCA – Held: While many aspects of the respondents disciplinary procedure was exemplary, prohibiting the worker from communicating with medical practitioners in the practice was not reasonable – award for the worker

Kassabian v IPN Medical Centres t/as Sonic Health Group [2022] NSWPIC 75 – Member Sweeney – 23/02/2022

Prior to 28/05/2021, the worker was employed by the respondent as the practice manager of its medical centre at Edgecliff. ASCC (another medical practice that the respondent owned) operated from the same premises and both businesses shared a reception desk.

On 26/05/2021, the respondent's business manager informed the worker that ASCC's business manager and 2 former employees of the respondent had made allegations of inappropriate conduct against her.

On 28/05/2021, the worker was advised by letter that there would be an investigation into the allegations and she was given a summary of the allegations – that she acted inappropriately towards the complainants in breach of the workplace behaviour policy. The worker provided details of the confidential complaint to 9 doctors at the medical centre, despite the respondent advising her that she was required to maintain confidentiality.

On 4/06/2021, the worker received written advice that additional allegations of misconduct had come to light and that she would be provided with full details by 9/06/2021. She was suspended on full pay pending the conclusion of the investigation.

The worker sought immediate medical treatment and was certified unfit for work until 1/12/2021. She claimed compensation, but the insurer disputed her claim under s 11A *WCA*.

Member Sweeney determined the dispute at Arbitration. He cited the statement of law made by Sackville AJA in *Northern New South Wales Health Services v Heggie* [2013] NSWCA 255 (*Heggie*), as follows:

> The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:
>
> > (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
> >
> > (ii) Nonetheless, for s 11A (1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.
> >
> > (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
> >
> > (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
> >
> > (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.
> >
> > (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.

(vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.

In *Irwin v Director-General of School Education* (unreported, 18 June 1998) Geraghty J, stated:

> The question of reasonableness is one of fact, weighing all the relevant evidence. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of "reasonableness" is objective and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances by a question of fairness.

In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss J, stated:

> In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected.

The Member held that the decision in *Heggie* casts some doubt on whether it is always necessary to consider the rights of the employee. Obviously, it will be necessary to undertake that task in many cases: c.f. *Pirie v Franklins Ltd* [2001] NSWCC 167 (10 September 2001). However, the case law also establishes that a finding that an employer has not proven that a disciplinary action is reasonable is not a finding that it is unreasonable. But reasonableness does not require the employer's actions in respect of discipline to be flawless.

The Member held that the allegations support the respondent's action in establishing an enquiry. After the worker ceased work, it was ascertained that boxes of a Schedule 4 medication were in the bottom drawer of the worker's desk and other staff complained of inappropriate treatment by the worker. He stated, relevantly:

> 76. The allegations ranged from cancelling employee shifts or reducing their hours for failing to follow instructions, including to come to work when sick, to suggesting that an employee not tell the truth during the investigation that was underway. While some of these allegations are trivial, others are quite serious. Undoubtedly, the respondent was obliged to investigate these allegations. Equally, given the substance of the allegations, it was reasonable that the respondent suspend the applicant on full pay. The allegations included the assertion that the applicant had spoken openly about the investigation and attempted to influence a potential witness.
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> 77. It must be borne in mind, that the disciplinary action taken by the respondent in this case is the initiation of the investigations, its conduct, and the suspension of the applicant from employment. The respondent did not make a finding misconduct or breach of its policies as the applicant did not return to work after receipt of the letter of 28 May 2021. There is, therefore, no question of any inappropriate penalty or punishment. The actions with respect to discipline which were causative of the applicant's psychological injury were the entirety of the disciplinary actions up to and including 4 June 2021. The respondent must prove that these actions considered as a whole were reasonable.

The Member held that the prohibition on speaking to the complainants is understandable, but the prohibition on speaking to any company employee is a restriction on the worker's right to obtain evidence that might be relevant to the allegations made in the 2 letters from Miss Carpenter. If she could not speak to any employee of the company, she would not be able to ascertain whether other employees supported her version of events. It is necessary to consider the disciplinary process as a whole in reaching a conclusion as to reasonableness, and as Spigelman CJ stated in *Department of Education & Training v Sinclair* [2005] NSWCA 465 at [97]:

> His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation "reasonable action with respect to discipline". In my opinion, a course of conduct may still be "reasonable action", even if particular steps are not. If the "whole or predominant cause" was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine

whether the whole process was, notwithstanding the blemishes, "reasonable action". For this alternative reason the appeal should be allowed.

Based on the decision in *Sinclair*, the Member held that the respondent's blanket restriction on the worker communicating with its employees in this case is difficult to justify on the basis of principle. The allegation that she had breached the respondent's Safe & Quality Use of Medications Policy is a very serious one and potentially, it could lead to her dismissal from her employment with serious consequences for her career as a Practice Manager. He stated:

> 86. Clearly, the doctors who obtained these samples and provided them to the applicant may have been in a position to provide evidence which may assist the applicant to defeat or mitigate the allegation made against her. To prevent the applicant from obtaining evidence from these medical practitioners by communicating with them in writing or over the telephone severely handicapped her right to defend herself.
>
> 87. I have little doubt from the context of the matter that the prohibition on the applicant communicating with the employees was intended to cover these medical practitioners. Ms Carpenter considered it to be a breach of confidentiality when the applicant obtained letters of support from doctors at the practice in respect of the first allegation. The infringement of such an essential right, in my opinion, leads to the conclusion that the respondent cannot prove that its actions with respect to discipline were reasonable. I stress that this is not a determination that the employer's actions were unreasonable. In many respects the investigation was conducted in an exemplary manner. However, the right to reasonably contest an allegation made by an employer is fundamental and its restriction in this case goes to the very heart of natural justice.

Accordingly, the Member found that the worker's injury was not wholly or predominantly caused by reasonable action taken by the respondent with respect to discipline and he entered awarded weekly benefits under s 37 *WCA* from 24/09/2021 to 1/12/2021.

Psychological injury – dispute under s 60 WCA – s 11A WCA defence rejected

Marmara v Transdev NSW South Pty Ltd [2022] NSWPIC 84 – Senior Member Haddock – 1/03/2022

The worker was employed by the respondent as a bus driver. He alleged that on 2/05/2021, he suffered a psychological injury as a result of a disagreement with a train attendant, who refused to allow him to use the station toilets and ushed him on the back of his left shoulder and hurt his neck.

The respondent disputed the claim under ss 4, 4(b), 9A & 11A *WCA*. The worker commenced PIC proceedings, which alleged that on 2/05/2021, he suffered an aggravation, exacerbation or deterioration of a disease and he claimed s 60 expenses totalling $4,140.

Senior Member Haddock identified the issues as: (1) whether the worker sustained injury arising out of or in the course of his employment with the respondent; (2) whether employment was a substantial contributing factor to the injury; (3) whether employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease; (4) whether medical or related treatment is reasonably necessary as a result of injury, and (5) whether the respondent has a defence to the claim, pursuant to section 11A of the 1987 Act, as any injury was wholly or predominantly caused by its reasonable action taken or proposed to be taken with respect to discipline.

The Senior Member held that the worker suffered a psychological injury which was an aggravation of a pre-existing disease on 2/05/2021 and that employment was the main contributing factor. She stated that it was not necessary to consider s 11A *WCA,* but if it had been necessary to do so, she did not consider that she had sufficient evidence to establish that the respondent's actions with respect to discipline were reasonable, considering that it bears the onus.

In relation to the dispute under s 60 *WCA,* the Senior Member applied the decision of Roche DP in *Diab* and she noted that the evidence as to the worker's need for treatment was all one way. She held that the proposed treatment (from a psychologist) was appropriate, has the potential to be effective and allows the worker to maintain his employment. Accordingly, she made a general order under s 60.