WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 63

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

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.

Decisions reported in this issue:

1. Ballas v Department of Education [2020] NSWCA 86
2. State of New South Wales v Roberts Concrete Specialists Pty Ltd (formerly Jack Harrison Home Builders Pty Ltd) [2020] NSWWCCPD 20
3. Ozcan v Macarthur Disability Services Limited [2020] NSWWCCPD 21
4. Matthew Thomas Kennedy t/as Matts Bakery Cafe v Workers Compensation Nominal Insurer and Giddens [2020] NSWWCCPD 23
5. Trustees of the Christian Brothers v Seif [2020] NSWWCCPD 22
6. Herborn v Spotless Services Australia Limited [2020] NSWWCCPD 24
7. Goh v Westpac Banking Corporation [2020] NSWWCCPD 25
8 Hutchison v Wyong Race Club [2020] NSWWCCMA 73
8. Handley v Canterbury City Council [2020] NSWWCC 117
10. Denison v Weir Mineral Australia Limited [2020] NSWWCC 116

Court of Appeal Decisions

Jurisdictional error - primary judge and Delegate of the Registrar of WCC misconstrued the role of the Registrar – the Delegate failed to consider that the AMS considered irrelevant considerations and failed to consider relevant considerations and erred in deciding that the matters relevant to the PIRS categories was a matter of discretion

Ballas v Department of Education (State of NSW) [2020] NSWCA 86 – Bell P, Payne JA & Emmett AJA – 6/05/2020

The appellant was employed by the first respondent as a primary school teacher. From 2011 to 2016, she was exposed to a series of events that resulted in a significant psychological injury. On 24/10/2016, she claimed compensation for permanent impairment. Liability was not disputed, but the dispute regarding the degree of WPI was referred to an AMS and Dr Hong issued a MAC, which assessed 8% WPI including an assessment of class 2 for "*social and recreational activities*". He noted, amongst other things, that the appellant "*[g]ambles on poker machines… spends around 1 hour at the club*".

On 8/06/2018, the appellant lodged an application to appeal against the MAC on the basis that when making the assessment for "*social and recreational activities*", the AMS made a "*demonstrable error*" and "*applied incorrect criteria*". She argued that contrary to the AMS' assessment, her social and recreational activities were "*directed to solitary activities that do not involve interactions with other people*" and that his consideration of her attendance at the RSL club monthly, to gamble on the poker machines for one hour, was not "*relevant to the assessment of social and recreational activities*". Therefore, he did not properly apply the Guidelines and made a demonstrable error and should have assessed class 3, which would have resulted in an assessment of 17% WPI.

On 17/07/2018, a Delegate of the Registrar refused the application to appeal. The Delegate held that the PIRS categories "*are generic and general in description*", and to some extent were "*overlapping*" and that the "*categorisation of which category applies is a matter within the AMS's discretion based on his or her clinical assessment*".

On 22/08/2018, an Arbitrator issued a COD under s 294 *WIMA*, which determined that the appellant suffered 8% WPI as a result of the psychological injury suffered on 24/10/2016 (deemed) and that she was not entitled to permanent impairment compensation.

The Commission refused an application to reconsider its decision to issue the COD and on 14/09/2018, the appellant sought judicial review of the Delegate's decision by the Supreme Court of NSW.

Wright J refused judicial review of that decision: [2019] NSWSC 234. He held that the Delegate had not misunderstood the appellant's submissions, nor had she failed to address them. Further, he concluded that the Delegate did not err in her observation as to the generality of the PIRS categories, and that the application of such categories in accordance with the Guidelines involved the AMS using his or her professional expertise and judgment.

On appeal the Court of Appeal identified the following principal issues: (1) Whether Wright J erred in misconstruing s 327 (4) *WIMA;* (2) Whether Wright J erred in holding that the Delegate did not err in her application of s 327 (3) *WIMA*, in respect of the assessment of WPI by the application of the PIRS categories; and (3) Whether the Court had power to set aside the COD.

The Court (Bell P and Payne JA, Emmett AJA agreeing) allowed the appeal with costs. Its reasons are summarised below:

- The Delegate misconstrued the "*gatekeeper*" nature of the task ascribed by s 327 (4) *WIMA* to the Registrar and, rather than looking to whether the appeal grounds were capable of being made out, she erred in proceeding to determine the appeal, a role which is instead to be performed by a MAP: [70]-[73] (Bell P and Payne JA); [151] (Emmett AJA).
- Wright J erred in failing to hold that the Delegate's decision was infected by jurisdictional error. The Court held that the Delegate had erred in her application of s 327 (3) *WIMA*, had conflated the concepts of "*scales*" and "*classes*" in the Guidelines, and had misconstrued the nature of the error that the appellant had identified as a "*demonstrable error*", within the meaning of s 327 (3) (d): [73], [75]-[76] (Bell P and Payne JA); [151] (Emmett AJA).
- Neither the COD issued by the WCC pursuant to s 294 *WIMA*, nor the WCC's refusal to reconsider its decision to issue a Certificate, placed the Delegate's decision beyond the Court's supervisory jurisdiction pursuant to s 69 (3) of the *Supreme Court Act*. The Court held that the Certificate of Determination and the reconsideration determination, themselves being affected by jurisdictional error, should be set aside: [104]-[105], [128] (Bell P and Payne JA); [151] (Emmett AJA).

WCC – Presidential Decisions

Apportionment of liability – ss 22 & 22A WCA – just and equitable in the special circumstances of the case – Sutherland Shire Council v Baltica General Insurance Co Ltd & Ors (1996) 12 NSWCCR 716 applied

State of New South Wales v Roberts Concrete Specialists Pty Ltd (formerly Jack Harrison Home Builders Pty Ltd) [2020] NSWWCCPD 20 – President Judge Phillips – 20/04/2020

The worker worked for the respondent as a labourer/carpenter. In about 1970, he injured his left knee when he fell from scaffolding and underwent a meniscectomy and the insurer made voluntary payments of weekly compensation and medical treatment expenses.

In 1976, the worker commenced employment with the appellant (Fire & Rescue) as a fire fighter and during the course of his employment for more than 20 years, he injured his left knee and lumbar spine. On 4/12/2013, he injured his lumbar spine while lifting a hose, and in April and September 2006, he twisted his left knee. He underwent an arthroscopy on 15/02/2007 and had a total knee replacement on 3/12/2007. In 2008, he was medically retired by the appellant and its insurer voluntarily paid weekly benefits and s 60 expenses.

In 2011, the worker claimed compensation under s 66 *WCA* for the following injuries: (1) 11/01/2007 (deemed) - aggravation of a pre-existing disease in the left knee as a result of the nature and conditions of employment with the appellant; (2) 4/12/2003 – injury to the lumbar spine; and (3) 28/04/2010 (deemed) – injury to the lumbar spine. The appellant was joined as the second respondent and the ARD was amended to plead a claim for lump sum compensation against the respondent for the 1970 injury.

On 27/02/2012, ***Arbitrator Peacock*** issued a COD, in which she noted that there was no liability dispute regarding the injuries pleaded against the appellant, and she determined that the worker injured his left knee in about 1970 while employed by the respondent. She remitted the dispute to the Registrar for referral to an AMS.

On 18/10/2012, Dr Ostinga issued a MAC, which determined that the need for the total knee replacement was an inevitable result of the 1970 accident, but that the 2007 injury may have precipitated this surgery. He assessed 20% WPI (left knee) and apportioned this 90% to the 1970 injury and 10% to the 2007 injury. He assessed 2% WPI with respect to the 2007 injury

On 8/02/2013, ***a MAP*** held that there was a demonstrable error in the application of s 323 *WIMA* to the 1970 injury and revoked the MAC. It issued a new MAC, which determined that the 1970 injury and resulting meniscectomy were the predominant causes of the left knee condition and was responsible for 80% of the permanent impairment. It assessed: (1) 1970 - 30% loss of the left leg or greater part thereof; (2) 11/01/2007 - 4% WPI (left knee); (3) 4/12/2003 - 5% WPI (lumbar spine); and (4) 28/04/2010 (deemed) – 0% WPI (lumbar spine).

On 7/03/2013, an Arbitrator issued a COD and awarded the worker compensation under s 66 *WCA* as follows: (1) 1970 injury - $6,600 for 30% loss of the leg or the greater part thereof; (2) 11/01/2007 - $5,500 for 4% WPI; and (3) 4/12/2003 - $6,250 for 5% WPI.

On 1/08/2016, the appellant's solicitors wrote to the respondent's insurer, noting that the MAP attributed 80% of the current knee condition to the injury in 1970, and claimed a contribution of $272,232.15 under s 22 *WCA* for past and future compensation. On 11/12/2018, the appellant filed a Miscellaneous Application, seeking orders under ss 22 and 22A *WCA* and claiming weekly payments ($289,135.54) and s 60 expenses ($51,154.65).

On 22/01/2019, Arbitrator Beilby conducted a teleconference and recorded that weekly payments, medical expenses and lump sum benefits were still in dispute. She also noted "*interesting issues*" as follows: (1) Limitation Act; (2) Prejudice – no opportunity to redeem worker, rehabilitate worker or challenge worker; and (3) What is just and equitable for the purposes of s 22 WCA? – "*if accept 80% then take into account back so comes to 64%... but resp says can only go 6 years (limitation act)… then r says that under 1926 Act don't have to pay as much… but app says you have to pay for life… So maybe $118k goes to $100k?*"

At arbitration, the respondent conceded that the worker would continue to have a disability resulting from the 1970 injury, but did not concede that an incapacity resulted from its period of employment.

The appellant argued that the Commission has power to determine the dispute under s 22 (5) *WCA* and that *s* 22A (8) *WCA* does not apply, as there had "*previously been a dispute about the entitlement of the worker to compensation and that was formed in relation to the previous proceedings. There was a dispute about whether or not the worker was entitled to lump sum compensation*". It also argued that s 22A (8) cannot be satisfied because the precondition in s 22A (8) (b) cannot be satisfied (the respondent has been deregistered) and the *Limitation Act 1969* does not apply because s 14 (1) (d) refers to proceedings in a Court to recover money and the Commission is not a Court.

The appellant argued that s 22 (1) (a) *WCA* involves an enquiry as to whether capacity and treatment resulted from both injuries and, based upon a common-sense evaluation of the evidence, the worker has been totally incapacitated since 11/01/2007 as a result of more than one injury. Therefore, liability ought to be apportioned and the Arbitrator should exercise her discretion and find that it is "*just and equitable in the special circumstances of the case*" to apportion liability should be apportioned 80% to to the respondent under s 22 *WCA.* Further, the back injury should not have any impact on apportionment because the worker had recovered from that injury by 7/01/2004. Finally, regarding s 60 expenses, the appellant treating surgeon's recommendation about further arthroplasty and total knee replacement indicates that the surgery was reasonably necessary.

The respondent argued that the Commission's jurisdiction is not enlivened by a claim by an insurer or employer who is seeking some sort of contribution of payments from another employer or insurer and there is no facility in this application for the respondent to adduce any evidence or any opportunity for it to have the worker medically examined. Further, the claim falls foul of s 14 of the *Limitation Act 1960* to the extent that it pre-dates a period of 6 years before the application was filed (in December 2018) and this is a complete answer to a claim for recovery before 11/12/2012. It also argued that while the left knee injury occurred in 1970, the statutory test for considering incapacity with the appellant is different to the test for determining incapacity against it and the appellant failed to adduce any evidence other than a simplistic proposition about the worker's incapacity for work as a fire fighter. That evidence does not form a strong basis for any positive conclusion about the nature and extent of the worker's incapacity or whether it flows from the 1970 injury, which works against an exercise of discretion in the appellant's favour.

The Arbitrator's findings are summarised below:

- The relevant legislative preconditions were met to allow apportionment to be sought under s 22 *WCA* and, in circumstances where there is a lump sum apportionment of 80% to the respondent and there is considerable evidence of a total if not near total incapacity, it would defy common sense to find that liability could fall to both respondents for that incapacity. The crucial question being what is just and equitable.

- Based upon the decision in *Secombe v Demolon Pty Ltd*, apportionment could be applied even though liabilities arise in different forms under different Acts. Apportionment under s 22A *WCA* is to be based on the relative length of the worker's employment with each employer or on any other such basis as the Commission considers "*just and equitable*" in the "*special circumstances of the case*".
- The correspondence between the parties indicated that the appellant sought a "*contribution rather than apportionment*" under s 22 *WCA,* which is not a basis for denying jurisdiction to the Commission.
- The purpose of s 22 *WCA* was to be used in exceptional circumstances so that the section "*can embrace the notion of an incapacity partially arising from one injury and partially from another whereas the disease provisions usually cure such circumstance*". This is more appropriately enlivened when there has been a properly ventilated claim in respect of incapacity, not one where one respondent has elected to pay on its own volition payments for incapacity and medical expenses (like the present matter). This does not deny jurisdiction to the Commission, but it is pertinent to the "*just and equitable*" consideration.

The Arbitrator held that it would be against the "*principles of justice that the respondent is visited upon with a liability with no recourse*" but to follow the appellant's course of accepting the claim. The respondent was not able to test the case being put against it by way of independent medical examination or by testing the worker's evidence, which was "*highly relevant*" to the just and equitable consideration. She cited the decision in *Pickersgill v Freightbases Pty Ltd* [1983] 3 NSWLR 117 regarding the inherent danger of a respondent being unable to adduce evidence to dispute incapacity or the level of incapacity.

The Arbitrator held that the flaw in the appellant's case was that it was "*unable to quantify, without [Mr Harrison's] evidence, the level of incapacity that would flow from the earlier injury*." There was no evidence from the worker and while there was "*substantial medical material*" supporting a finding of incapacity, "*the vacuum created by the lack of evidence from the injured worker himself*" meant that there was an absence of evidence crucial to an apportionment of any capacity. Further, even if s 22 *WCA* was enlivened, the "*general prejudice to the respondent*" was insurmountable and it was "*not 'just and equitable' to apportion the payments made by the [appellant] on a voluntary basis*"". She also held that it was not necessary to determine whether the *Limitation Act 1969* applied.

On appeal, the appellant alleged that the Arbitrator erred in law: (1) In determining that no apportionment ought to be made, and (2) By denying it procedural fairness in determining an issue not notified prior to the arbitration or identified as an issue for determination but nonetheless determining that issue against it.

President Judge Phillips conducted an oral hearing. He noted that in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716 (*Baltica*), Clarke JA stated (at 732):

> if the worker satisfies the test in a case where there are a number of work injuries and apportionment is sought, the trial judge is then to apply the s 22 test and that test will be satisfied if the incapacity resulted partially from one injury (presumably the injury which led to the finding under s 33) and partly from another or other injuries.

His Honour stated that the first stage involves a determination of liability to pay compensation and the second stage involves an apportionment of liability having regard to the evidence relating to the worker's incapacity. This requires consideration of issues of causation of incapacity. If incapacity or permanent impairment results from more than one injury then liability to pay compensation is to be apportioned in such manner as the Commission determines.

The appellant bears the onus of proving that any incapacity results from the 1970 injury, but this was not a live issue in the arbitral proceedings and no findings were made.

However, before determining whether the worker's incapacity was a result of more than one injury, the Arbitrator had considered the application of s 22A (1) (a) and whether apportionment was "*just and equitable*." She held that the flaw in the appellant's case was that it was "*unable to quantify, without [Mr Harrison's] evidence, the level of incapacity that would flow from the earlier injury*" and that there was no path whereby the respondent could cross-examine the worker or test his evidence. In other words, she declined to exercise the power to apportion because she considered that it was not just and equitable in the circumstances before she determined whether incapacity resulted from more than one injury. This was an error.

His Honour criticised the Arbitrator's remark that she needed the worker's evidence as to "*his thoughts, feelings and observations*" of his pain level when he finished employment with the respondent and it would have been more appropriate to consider the available evidence of the worker's incapacity for work from time to time, which should have been led by the worker, if possible. However, if he was wrong on this issue, he found that the Arbitrator erred by overlooking relevant evidence. He identified the principles relevant to overturning an exercise of discretion as being those set out in *House v The King*, which Heydon JA summarised in *Micallef v ICI Australia Operations Pty Ltd & Anor,* as follows:

> As a result, Garling DCJ had to make a discretionary decision on a matter of practice and procedure - an extremely important one, having potentially serious consequences for the plaintiff, but a discretionary decision on a matter of practice and procedure nonetheless. Any attack on decisions of that character must fail unless it can be demonstrated that the decision-maker:
>
> (a) made an error of legal principle,
>
> (b) made a material error of fact,
>
> (c) took into account some irrelevant matter,
>
> (d) failed to take into account, or gave insufficient weight to, some relevant matter, or
>
> (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.
>
> Even though this Court might conclude that it would have exercised the discretion differently if the discretion had been conferred on it in the first instance - might have adjourned the matter so as to permit the defendants to consider the late-supplied particulars, or might have held the plaintiff to the old particulars, or might have fixed one more 'final' date for outstanding matters to be completed by - any such conclusion would be immaterial. The law committed the exercise of the discretion to Garling DCJ. The law permits interference with his exercise of the discretion in only the limited circumstances just described.

His Honour held that the Arbitrator overlooked evidence regarding the cause of the incapacity, which was relevant to determining apportionment on a basis that was "*just and equitable*" in the special circumstances of the case. That evidence indicated that the need for surgery and any resulting incapacity resulted in part from the 1970 incident. However, he did not express any conclusion regarding these matters as they had not been properly ventilated. He therefore remitted the matter to another Arbitrator for re-determination and stated:

144. Whilst the appellant has succeeded under this ground and the matter will be remitted for re-determination, the outcome on appeal should not be taken as any affirmation of how the case was presented below. The appellant's case was not adequately prepared particularly in regard to the evidence on incapacity and the evidence regarding medical expenses incurred. But for the errors identified above, I would not have intervened and remitted the matter for re-determination.

His Honour stated that he did not need to consider ground (2), but ultimately rejected it because it was clear that prejudice to the respondent was a live issue in the proceedings and the Arbitrator was not required to notify the parties of the significance of the absence of the worker's evidence and/or the respondent's ability to test that evidence to her determination of the dispute.

Aggregation of permanent impairment

Ozcan v Macarthur Disability Services Limited [2020] NSWWCCPD 21 – Deputy President Wood – 21/04/2020

The appellant suffered multiple work-related injuries to her lumbar, thoracic and cervical spines and right shoulder and consequential conditions that included the upper digestive system. She claimed compensation under s 66 *WCA.*

By consent, ***Arbitrator Burge*** ordered that the dispute be referred to an AMS to determine permanent impairment as follows: (1) Injury on 14/11/2011 – cervical, thoracic & lumbar spines, right upper extremity (shoulder) & upper digestive tract; (2) Injury on 3/05/2012 – thoracic & lumbar spines & upper digestive tract; and (3) Injury on 26/09/2012 - thoracic & lumbar spines & upper digestive tract. He also stated that the AMS was to be directed to apportion impairment of the thoracic and lumbar spines and upper digestive tract resulting from the 3 separate dates of injury and to determine what pathology (upper digestive tract) relates to the accepted injuries.

On 17/06/2019, Dr Berry issued a MAC, which assessed 0% WPI (cervical spine), 3% WPI (right upper extremity due to injury on 14/11/2011); 5% WPI (thoracic spine due to the injuries in 2011 and 2012 (x 2)); and 7% WPI (lumbar spine due to the injuries in 2011 and 2012 (x 2)). With respect to the spinal injuries, he assessed 12% WPI and he apportioned 4% WPI to each injury and he therefore assessed: (1) First injury – 7% WPI; (2) Second injury – 4% WPI; and (3) Third injury – 4% WPI.

Arbitrator Wynyard issued consent orders for weekly payments and s 60 expenses and listed the matter for arbitration to determine whether the worker was entitled to compensation for the combined assessment of 15% WPI under s 66 *WCA*. He noted that the appellant sought a finding that each injury was materially contributed to by the 2011 injury and that she was entitled to compensation for 15% WPI regardless of the principles of aggregation.

The Arbitrator referred to and quoted from *Department of Juvenile Justice v Edmed*, in which Roche DP determined that for the purposes of aggregating the impairments from different events, the pathology in each injury must be identical. He noted that the appellant argued that *Edmed* did not apply and could be distinguished based on common law principles regarding the concept of "*material contribution*". The appellant argued that if it could be shown that the 2011 injury materially contributed to the impairment caused by later events, the total WPI was payable and it was not necessary to consider s 322 *WIMA.*

The Arbitrator observed that while the principle of material contribution will establish a causal connection between two injurious events, it does not concern the calculation of whole person impairment itself. He felt that there were some difficulties with the appellant's approach, including that the AMS was not asked to combine the assessments, each matter was referred to the AMS as a separate injury and the he was directed to apportion the impairment between the injuries.

The Arbitrator held that he is bound by the AMS' assessments under s 326 (1) *WIMA* and that the following matters were conclusively presumed to be correct: (1) Injury on 14/11/2011, the appellant suffered 3% WPI (right shoulder) and 4% WPI (thoracic and lumbar spines). These pathologies arose out of the same incident and can be assessed together under s 322 (3), giving an entitlement of 7% WPI; (2) Injury on 3/05/2012 – the appellant suffered 4% WPI (thoracic and lumbar spines); and (3) Injury on 26/09/2012 – the appellant suffered 4% WPI (thoracic and lumbar spines).

The Arbitrator found that the injuries to the thoracic spine could not be aggregated with the lumbar spine injuries as the pathologies were different, but the injuries to the lumbar spine could be aggregated as the pathology was in the nature of degenerative changes, which resulted in an assessment of 7% WPI. Further, the injuries on 3/05/2012 and 26/09/2012 were aggravations of degenerative changes in the thoracic spine and the pathology arising in each event was therefore the same. Therefore the impairment of the thoracic spine was 5% WPI. Therefore, the threshold in s 66 (1) *WCA* and was not satisfied and the worker was not entitled to recover compensation.

On appeal, the appellant alleged that the Arbitrator erred as follows: (1) in fact and law by failing to conclude that all of the impairments resulting from the 3 injuries are to be compensated as a single WPI; (2) in law by only considering s 322 (2) *WIMA* and not s 322 (3) *WIMA* in the context of whether her entitlement results from the injuries suffered on 14/11/2011; and (3) in fact and law when he failed to apply the terms of the MAC.

Deputy President Wood upheld ground (1). After discussing and applying relevant case law, she stated that in *Secretary, New South Wales Department of Education v Johnson* [2019] NSWCA 321 (*Johnson no 2)*, the Court of Appeal concluded that the common law principles of causation must be applied to determine whether the impairment "*results from*" the injury. Therefore, if the appellant establishes that the first injury materially contributed to the total impairment, then the total impairment is attributable to the 2011 injury. The Arbitrator formed the view that the application of those principles would conflict with the decision in *Edmed,* which involved an analysis of the meaning of ss 322 (2) and (3) *WIMA.* However, following *Edmed*, the result is that s 322 (2) allowed aggregation of impairments from different injurious events where they involved the same pathology and s 322 (3) allowed aggregation where there were injuries to different body parts in the same event. There is no conflict between the common law principles and the application of s 322 (2) *WIMA* in *Edmed* and if they were applied in *Edmed* the result would have been the same.

While the Arbitrator's determination preceded the decisions in *Le Twins Pty Ltd v* [2019] NSWWCCPD 52 (*Luo)* and in *Johnson v NSW Workers Compensation Commission* [2019] NSWSC 347 (*Johnson No 2*)*,* he erred by considering that the common law principles were not relevant to an assessment of permanent impairment and by failing to apply them in the context of s 322 *WIMA*, as set out in *State Government Insurance Commission v Oakley* (1990) 10 MVR 570; [1990] Aust Torts Reports 81-003 (*Oakley*) in determining whether the appellant's impairments could be aggregated.

Wood DP re-determined the issues in dispute in the appeal and held that the impairments of the thoracic and lumbar spines "*result from*" (in the common law sense) the 2011 injury and are to be assessed together under s 322 (2) *WIMA.* Applying the Combined Values Chart in the AMA-5 Guides, the combined impairment is 12% WPI, which entitles the appellant to $17,050 plus any additional amount payable under s 66 (2A) *WCA* in respect of a back injury.

Wood DP also upheld ground (2) and held that the Arbitrator's failure to address s 322 (3) *WIMA* was an error. However, this ground raised a further issue that required re-determination under s 352 (7) *WIMA,* namely that the impairment of the right upper extremity resulting from the 2011 injury cannot be aggregated under ss 322 (2) or (3)

WIMA. As the threshold under s 66 (1) *WCA* was not satisfied, the appellant is not entitled to compensation for that injury.

Wood DP concluded that it was not necessary to determine ground (3).

Whether discretion to admit or reject evidence was miscarried – whether material evidence was not given any or any proper consideration – whether matter determined on a basis not raised by the parties – whether or not the appeal is competent or out of time

Matthew Thomas Kennedy t/as Matts Bakery Cafe v Workers Compensation Nominal Insurer and Giddens [2020] NSWWCCPD 23 – Acting Deputy President King SC – 22/04/2020

On 1/03/2018, the worker was employed by the appellant. She alleged that she injured her left knee at work that day and claimed compensation. However, the appellant was uninsured and the first respondent paid compensation benefits. The first respondent sought recovery of the payments that it made to and on behalf of the worker.

Section 145 WCA enables an employer to contest a claim for recovery and on 22/10/2018, the appellant did so by filing a Miscellaneous Application. It asserted that the worker had suffered no injury and was not entitled to compensation and that the logical consequence was that the first respondent ought not to have made the payments and, if they were recoverable at all, they were not recoverable from it.

Senior Arbitrator Bamber conducted an arbitration on 2/04/2019, during which the appellant also sought to challenge the worker's incapacity for work (and the quantum of compensation paid). The respondents objected as this issue had not previously been raised and the Senior Arbitrator declined to consider this issue. However, she indicated that if she found that the worker had suffered injury as claimed, she would allow the issue of incapacity to be raised, with all parties on notice and given an opportunity to prepare. The appellant also sought to tender statements from 3 lay witnesses, none of which were served prior to the arbitration. The respondents objected and the Senior Arbitrator rejected the tender of 2 of the statements, but she admitted the third statement.

On 8/05/2019, the Senior Arbitrator issued a COD, which determined that the worker injured her left knee as claimed. The issue of whether the worker had been overpaid was then the subject of written submissions. She issued a second COD on 14/08/2019, which determined that there was a modest overpayment and the amount that the first respondent sought to recover was reduced to $32,340.83.

The appellant sought to appeal against the Senior Arbitrator's decision on the basis that it is against a decision dated 14/08/2019. The appeal was filed within 28 days of that decision, but the Senior Arbitrator issued 2 CODs dated 8/05/2019 and 14/08/2019. There was an issue as to whether the appeal was filed out of time, which depended on issues as to: (1) whether the first decision was final; (2) whether the appeal is exclusively a challenge to that decision; and (3) if the answers to (1) and (2) are 'yes', whether the appeal had to be filed within 28 days of it. The appellant did not seek an extension of time.

If competent, the appeal raised questions as to whether the Senior Arbitrator erred: (1) in rejecting the tender of statements of 2 lay witnesses; (2) in not giving any or any proper consideration to relevant evidence (particularly clinical records of the worker's GP); and (3) in determining the matter on a basis not put by the parties.

ADP King SC noted that ground (1) relates to a ruling made during the hearing on 2/04/2019, ground (2) relates to the first COD and ground (3) is a criticism of the Senior Arbitrator's reasoning to her first decision. Therefore, the appeal is a challenge to the first decision, which makes the issue of its competency critical in the disposition of the appeal.

The appellant sought an oral hearing, but did not provide any specific reasons for this request and he determined the appeal on the papers.

The appellant sought to adduce fresh evidence in the appeal, namely a medical report from the treating orthopaedic surgeon dated 1/06/2018 and a statement from a lay witness dated 15/05/2019. The worker opposed that application.

ADP King SC identified the following issues: (1) whether the appeal was competent; (2) whether fresh evidence should be admitted upon the appeal; and (3) whether any of the grounds should be upheld.

ADP King SC held that the decision dated 8/-5/2019 was a final decision as it finally determined injury and liability and that the decision dated 14/08/2019, was also final because it determined the amount of compensation to which the worker was properly entitled and it finally determined the monetary right and obligation of the worker and the appellant. However, this conclusion does not answer the question whether the appeal was properly brought within 28 days of the second decision or needed to be brought within 28 days of the first decision.

ADP King SC held that the appeal was competent for reasons that are summarised below:

- In *P & O Ports Limited v Hawkins* [2007] NSWWCCPD 87*,* Roche DP observed that when a final COD was issued it would be open, in that case to the employer, but plainly enough to any affected party, to challenge all steps in the proceedings that resulted in the ultimate determination complained of. He referred to a number of general law authorities supporting the proposition that where there is a right of appeal, it extends to all interlocutory or other orders which are steps in the procedure leading up to final judgment and which affected its result.
- These authorities permit the appellant to agitate the correctness of the first decision in the present appeal. That is not to say that it would not have been permissible or desirable to appeal within time following the first decision rather than wait for the second, especially given that some compensation almost inevitably was going to be held to be recoverable against the appellant so long as the first decision stood.
- Other relevant decisions are *Transley Solutions Pty Limited v Kagiorgis* [2010] NSWWCCPD 45 (*Transley)*, *Hrvat v Thiess Pty Limited* [2010] NSWWCCPD 69 (*Hrvat*) and *State of NSW v Abdul* [2018] NSWWCCPD 41 (*Abdul*).
- In *Transley*, O'Grady DP held, consistently with *Hawkins* and *Maricic v Medina Serviced Apartments Pty Limited* [2007] NSWWCCPD 196 (*Maricic*), that the decision dated 4/09/2009 was not interlocutory and whether or not the employer could have appealed against that decision, the decision dated 24/12/2009 was a final determination of the claim and an application within time following it would permit a review of all factual findings upon which it was made. He relied upon *Bunning*, having noted the difference between proceedings in the Commission and other legal proceedings.
- In *Hrvat*, Candy ADP said that the case was one, like *Transley*, in which "... *it was contented that an appeal was out of time because it was not brought until a later COD brought the proceedings to an end although there were findings in an earlier COD against which an appeal lay*". He then went on at paras [41]–[43] to say that although the first decision was final, it was also "*a preliminary step*" towards the later determination. However, this is not a correct application of *Transley*, if that case itself is a correct statement of the law. In *Transley* no extension of time was necessary because the appeal was within time following the second decision. In *Hrvat*, if the critical date was 31/12/2009, no extension of time was necessary.

- In *Abdul* a COD was issued on 12/01/2018, which articulated a decision about what injuries were caused in the workplace and the worker's capacity for work. A further COD was issued on 21/03/2018, concerning indexation of weekly payments. An appeal was filed on 18/04/2018. 53. Wood DP held that the first decision was not interlocutory, and that the appellant employer required an extension of time to appeal. It was said that in *Transley*, leave to appeal out of time was required and was granted. However, based upon ADP King SC's reading of *Transley* this is not the case as leave to appeal was required in all cases at that time. Therefore, *Hrvat* and *Abdul* appear to display a misreading of *Transley*.
- What can be taken from *Transley* is that if there are two decisions and an appeal is brought within time from the second, even though it is exclusively concerned with the first, the appeal is within time and competent and no extension of time is required.

ADP King SC rejected ground (1). He accepted the correctness of the Senior Arbitrator's exercise of discretion in rejecting the statements. Their probative value was difficult to discern, if at all, they could have been obtained in a timely fashion and they would require consideration and investigation that would have caused prejudice to the respondents if they were admitted without allowing them the time to do so. Therefore, the Senior Arbitrator did not commit any error of the type discussed in *Micallef v ICI Australia Operations Pty Ltd* [2001] NSWCA 274.

While the appellant argued that an adjournment should have been considered and granted, the transcript did not indicate that such an application was made. He stated (at [65]):

> … In other words, if this Ground is approached without regard to the fact that an adjournment was not mentioned, the necessary consequence of an adjournment, putting the respondents to additional time, trouble and expense that would have been at least reduced if the statement were produced earlier, would have constituted a sound discretionary reason for rejecting the tender. In my opinion the Senior Arbitrator's discretion did not miscarry.

He rejected the tender of the further lay witness' statement on the appeal as this could have been obtained earlier with due diligence. With respect to the "*substantial injustice*" ground, he referred to the decision in *CHEP Australia Ltd v Strickland* [2013] NSWCA 351 and held that the critical question it is whether, if added to the evidence already in front of and dealt with by the Senior Arbitrator, the fresh evidence would be likely to make a "critical difference." The critical difference must be the reversal of the decision on injury that formed the basis of the first COD. He held that the content of the statement did not make a critical difference, particularly in light of the detailed consideration of the other lay evidence and medical evidence undertaken by the Senior Arbitrator. Further, the treating specialist's report existed before the arbitration and he rejected the tender of this report as fresh evidence.

ADP King SC held that ground (2) amounted to "*having a second go at an issue of fact upon a question which was the sole one for decision*". While this would not matter if the submissions demonstrated error by the Senior Arbitrator, but they did not do so. The Senior Arbitrator's review of the evidence was comprehensive and accurate and no error has been shown.

ADP King SC rejected ground (3). Regarding the appellant's allegation that the Senior Arbitrator denied it procedural fairness, as her analysis of the medical certificate (set out at para 105) was not the subject of any submissions and was not brought to the parties' attention, he stated:

> 93. To say that these submissions are terse in the extreme might be thought to be an understatement. In response to them, the second respondent's submissions in para [11.1]–[11.7] of her written submissions extract paras [105], [112] and [116] of

the Senior Arbitrator's reasons in full, adding some short submissions which I think can be fairly reduced to an overarching proposition, that is, that the medical records were available to all the parties, who had the opportunity to consider them and reflect on their implications. The emptiness of the boxes on the WorkCover certificates was stressed by the appellant both in oral submissions in chief and further oral submissions in reply to the submissions of the respondents. It was a feature of the evidence that had been agitated and had to be dealt with. It was dealt with.

94. I take the gravamen of the appellant's argument on this ground to depend at bottom upon the import to be attached to the fact that the boxes were left empty of markings or ticks. This aspect of the evidence was dealt with by the Senior Arbitrator and her conclusion articulated in para [105] of her reasons seems to me to be not just open but eminently reasonable. Far from being persuaded that the appellant has shown error on the Senior Arbitrator's part in how she viewed the empty boxes, I think her view is correct.

95. Moreover, I accept the submission for the second respondent as I understand it, namely that the documents including the WorkCover certificates were available to the representatives of the parties for consideration and evaluation. I do not think it can be fairly be said that one explanation for the emptiness of the boxes which constituted an answer to the appellant's submission was not obvious. It is that the doctor, no doubt busy, overlooked them. In any event, the Miscellaneous Application before the Senior Arbitrator was the appellant's application, and although there was some debate before the Senior Arbitrator as to who carried the onus, the appellant must have carried it. It was for the appellant to clear this question up in his favour if possible, and the need to do so should have been apparent before the hearing.

Accordingly, ADP King SC confirmed the CODs dated 8/05/2019 and 14/08/2019.

Credit finding – application of Malco Engineering Pty Ltd v Ferreira – alleged factual error – medical evidence – application of Paric v John Holland (Constructions) Pty Ltd – drawing of inferences

Trustees of the Christian Brothers v Seif [2020] NSWWCCPD 22 – Deputy President Snell – 22/04/2020

The worker injured his right knee at work on 21/11/2016 and 28/11/2016, after which he underwent an arthroscopic meniscectomy in March 2017. He claimed compensation, but the insurer disputed the claim. That dispute was resolved on 6/09/2017 and by consent, the appellant paid compensation for a number of closed periods and s 60 expenses up to $6,500. There were also consent findings that there was no incapacity after 25/03/2017, no need for medical treatment after 1/09/2017 and that the worker had recovered from the effects of the work injury by that date.

The worker alleged an aggravation of his right knee injury on 20/09/2017, as a result of a long period of standing, walking and going up and down stairs at work. the insurer disputed the allegations of injury and quantum and relied on the previous consent findings. On 27/11/2017, he underwent a further arthroscopic meniscectomy and resumed pre-injury duties in term 1 of the 2018 school year.

On 15/10/2019, ***Senior Arbitrator Capel*** issued a COD, in which he found that: (1) the worker injured his right knee at work on 20/09/2017; (2) his employment was a substantial contributing factor to that injury; (3) he was incapacitated and was paid sick leave on various dates from 20/09/2017 to 11/09/2018; (4) he required medical treatment and the surgery on 27/11/2017 was reasonably necessary as a result of the injury on 20/09/2017. He ordered the appellant to pay s 60 expenses, but made no order for weekly compensation, although he gave liberty to the parties to apply within 28 days.

The appellant appealed and alleged that the Senior Arbitrator erred in fact and law as follows: (1) in failing to properly deal with its credit argument and in accepting the worker's factual account regarding the occurrence of the events alleged to have caused the injury; (2) in accepting Dr Bodel's opinion on the issue of injury; (3) in failing to give sufficient weight to the opinion of Dr Nagamori dated 3/07/2018; (4) in finding that the worker suffered a meniscal tear on 20/09/2017; and (5) in finding that the worker's employment was a substantial contributing factor to the injury.

Deputy President Snell rejected ground (1). He agreed with the decision in *JB Metropolitan Distributors Pty Ltd v Kitanoski* [2016] NSWWCCPD 17 in which of Roche DP stated:

> Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined (*New South Wales Police Force v Winter* [2011] NSWCA 330 from [81]).

Snell DP noted that the appellant faintly argued that its lay witnesses provided evidence that the worker would not have performed the tasks alleged in his statement dated 19/06/2019, but the Senior Arbitrator decided not to ascribe any weight to it. He held that the Senior Arbitrator dealt with that evidence and was critical of the lack of its probative weight and he drew an inference pursuant to *Jones v Dunkel* regarding the appellant's failure to adduce evidence from other witnesses. His fact finding in this regard was not challenged in the appeal. He stated:

> 58. The appellant submits that, the "most recent account as to the cause of the injury" having been rejected, "all prior accounts [given] should have been scrutinised". The appellant refers to no authority in support of this submission. It could be an attempt to raise principles referred to in *Malco Engineering Pty Ltd v Ferreira* [1994] 10 NSWCCR 117, a case where a worker gave perjured evidence on a specific topic. Handley JA, dealing with how this should be taken into account dealing with other evidence of the worker, said:
>
> > This did not necessarily require the trial Judge to reject the whole of his evidence. Nor on the other hand was the trial judge entitled to simply accept the whole of his evidence except those parts that the respondents had established was false.
> >
> > In my opinion the *perjury by the worker* required the trial Judge to carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of his evidence may have been acceptable because it was confirmed by other independent or objective evidence. However where the worker's evidence was not independently supported it clearly had to be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings. (emphasis added)
>
> 59. In *Brines v Westgate Logistics Pty Ltd* [2008] NSWWCCPD 43, Keating P described the position:
>
> > Where a worker has given *untruthful evidence* the Arbitrator must carefully assess the rest of his evidence in order to determine its honesty and reliability. Some of the evidence may have been acceptable because other independent or objective evidence confirmed it. However, where a worker's evidence was not independently supported it clearly must be assessed with great care to determine whether it could properly be accepted as proof of any matter that was in issue in the proceedings (see *Malco Engineering Pty Ltd v Ferreira and*

others (1994) 10 NSWCCR 117 and *Divall v Mifsud* [2005] NSWCA 447). (emphasis added)

In this matter, there was no finding that the worker's evidence was perjured or untruthful or that there was any attempt to deceive, therefore the matter is not analogous to that in *Ferreira*. He rejected the appellant's submission that "*his evidence should simply not be accepted*" and held that these were without merit and the Senior Arbitrator's approach in identifying the mechanism of injury was open on the evidence and did not involve error.

Snell DP rejected ground (2). He stated that in *Onesteel Reinforcing Pty Ltd v Sutton* [2012] NSWCA 282 McColl JA, referring to *Paric*, said that it "*was a question of fact whether the case hypothesised was* ***sufficiently like*** *that proven so as to render the experts' opinions of any value"* (emphasis added). In *Paric v John Holland (Constructions) Pty Ltd* [1985] HCA 58*,* the High Court specifically stated that the principles "*do not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based*". Their Honours referred to the application of "*both principle and common sense*".

Snell DP noted that s 354 (3) *WIMA* required the Senior Arbitrator (and himself on the appeal) to act "*according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms*". He held that the matters accepted by the Senior Arbitrator were "*sufficiently like*" that part of Dr Bodel's history that there was a fair climate for the expression and acceptance of that opinion.

Snell DP also rejected ground (3). With respect to Dr Nagamori's opinion, he noted that it was apparent that the Senior Arbitrator did not conclude that it could be inferred, in the absence of direct evidence, that the incident on 20/09/2017 did not, in Dr Nagamori's opinion, play a causal role. The appellant's submissions on Ground No. 3 therefore constitute a challenge to the Senior Arbitrator's failure to draw that inference in its favour. He stated:

> 97. *In Bradshaw v McEwans Pty Ltd* [1951] 217 ALR 1, the High Court said:
>
> > In questions of this sort where direct proof is not available it is enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is a mere matter of conjecture (see per Lord Robson, *Richard Evans & Co Ltd v Astley* [1911] AC 674 at 687). But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then, though the conclusion may fall short of certainty, it is not to be regarded as a mere conjecture or surmise: cf per Lord Loreburn, above, at 678.
>
> 98. The above passage from *Bradshaw* was described as "*the test to be applied*" in *Luxton v Vines*. In *Jones v Dunkel* Dixon CJ, after referring to *Bradshaw* and *Holloway v McFeeters*, said:
>
> > ... the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.

Snell DP held that the unsatisfactory opinion evidence from Dr Nagamori did not form "*a reasonable basis for a definite conclusion affirmatively drawn*" and the Senior Arbitrator's conclusion was that the doctor's ambiguous opinion represented inadequacy in the reporting process in the circumstances and required clarification. It was not enough if he drew a different inference on appeal and it must be shown that the Arbitrator was wrong. He held that there was no error of this type.

Snell DP rejected ground (4) and held that the Senior Arbitrator's finding regarding injury was properly open in the circumstances and was not made in error. He also rejected ground (5) on the basis that the other grounds failed.

Accordingly, Snell DP confirmed the COD.

Section 59A (6) (a) WCA – whether a bone graft, pedicle screws and interbody cage to be implanted in surgery involving lumbar decompression and spinal fusion constitutes an "artificial aid" – Thomas v Ferguson Transformers Pty Ltd & Pacific National Pty Ltd v Baldacchino considered & applied

Herborn v Spotless Services Australia Limited [2020] NSWWCCPD 24 – Deputy President Wood – 24/04/2020

The appellant initially injured his lumbar spine in 1990 while self-employed. He underwent a lumbar laminectomy in 1991, after which his sciatic symptoms resolved but he suffered occasional lower back pain. In 2009, he commenced work with the second respondent as a handyman. In October 2010, he suffered a further lower back injury, which was treated conservatively. Shortly afterwards, he ceased work with that employer because of a downturn in work. In mid-2011, he commenced employment with the first respondent. On 11/11/2011, he suffered a further lower back injury and was certified unfit for work. In accordance with Consent Orders dated 12/12/2012, he received voluntary weekly payments from the insurer, which continued for 260 weeks (when s 39 *WCA*) applied.

On 19/04/2012, the appellant underwent a lumbar discectomy, but his symptoms continued and deteriorated. On 2/02/2015, A/Prof Davies recommended a "*re-do" lumbar laminectomy, pedicle screw internal fixation and fusion*" and the appellant sought approval from both respondents. That claim was initially denied on the basis that the surgery was not reasonably necessary, but at arbitration the dispute related to whether this was a claim for the provision of "*artificial aids*" in accordance with s 59A (6) (a) *WCA.* If so, the preclusion under s 59A *WCA* does not apply. If not, the appellant was not entitled to recover the costs of the proposed surgery from the respondents.

Arbitrator Wynyard determined that the "*artificial aids*" in this case were designed to assist the surgeon to complete the surgery, but he did not accept that the legislation goes so far as to say that once the hardware is inserted and served its purpose, then the surgery will have ameliorated the appellant's condition and not the hardware, which played only a part in that process. Therefore, s 59A prevented him from ordering the respondents to pay for the surgery.

In making that determination, the Arbitrator considered the Court of Appeal's decision in *Pacific National Pty Ltd v Baldacchino* [2018] NSWCA 281*,* and Macfarlan JA's discussion of what constituted "*artificial aids*" in which he referred to the Court's earlier decision in *Thomas v Ferguson Transformers Pty Ltd*. He noted that *Baldacchino* concerned a total knee replacement and that *Thomas* concerned the provision of modifications to a motor vehicle and he also referred to his previous decision in *Xayamongkhoun v Fairfield City Council*, in which he found that a spinal stimulator satisfied the criteria defined in those cases and was considered to be an artificial aid. He noted that the appellant argued that: (1) the pedicle screws and cage, which were to be inserted to keep the bone graft in place, were no different to an artificial tooth insert (which was exempt from operation of s 59A *WCA*); (2) their only purpose was to facilitate the graft and they were only used surgically for the benefit of the patient; (3) this type of operation was specifically tailored to the needs of a particular person; and (4) if a spinal stimulator could be considered an artificial aid, then so should the insertion of a bone graft.

However, the Arbitrator held that these arguments did not overcome the respondents' arguments, which quoted from the decision of Macfarlan JA in *Baldacchino*, as follows:

> I should not be taken to be adopting a general rule that the cost of surgery is always a cost of *'[t]he provision of ... artificial aids*', as there may be cases where the insertion of material into a person's body is only an incidental part of major surgery. Each case must be decided on its own facts.

The Arbitrator explained that the distinction between this matter and a case of a total knee replacement or spinal cord stimulator was that the insertion of those aids shared the common purpose of ameliorating the worker's suffering. The appellant argued that the Arbitrator presumably said that the purpose of inserting the pedicle screws and interbody cages was not to ameliorate the appellant's back pain, but were rather an incidental part of the major surgery and were used to secure the bone in place. The respondents accept that inference as to what the Arbitrator said. While he noted the respondents' concession that there was no evidence that the hardware would be subsequently removed, he considered, based upon his experience as an Arbitrator in relation to similar cases, that it was open to him to infer that after the bone graft solidified and mended, the hardware would be removed.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) in law by misapplying the comments made by Macfarlan JA in *Baldacchino*, when finding that the insertion of the pedicle screws and cage was merely an incidental part of the major surgery; (2) in law by failing to consider his argument that a bone graft supported by hardware itself constituted an "*artificial aid*"; (3) in fact by finding that the hardware to be inserted in the spinal fusion could be removed when there was no evidence to support that fact; and (4) in law by considering: (a) whether or not the hardware would eventually be removed, and/or (b) whether the hardware would eventually be removed was relevant to the determination.

Deputy President Wood allowed the appeal, revoked the COD and redetermined the matter and her reasons are summarised below:

- In relation to ground (1), she did not accept that the benefit from the procedure can be so segmented as to exclude the insertions of the pedicle screws and cage from being an integral part. The aim of the surgery was to alleviate the appellant's pain and disability and a necessary part of that was the consequent need to ensure stabilisation of the spine;
- She rejected the Arbitrator's conclusion that the purpose of the hardware was simply to assist the surgeon to complete the procedure and it was therefore incidental to the surgery. This was based on a misapplication of the principles in *Baldacchino.*
- In relation to ground (2), she held that a failure to consider a submission that is material to a point in issue is an error of law. In *Wang v State of New South Wales* [2019] NSWCA 263, McCallum JA (Macfarlan & Meagher JJA agreeing) stated (citation missing):

  > The submission invoked the decision of the High Court in *Dranichnikov v Minister for Immigration & Multicultural Affairs* in which it was stated that a failure to respond to a substantial, clearly articulated argument relying on established facts was a constructive failure to exercise jurisdiction. The decision is not authority for the proposition that any failure to refer to any argument put to a trial judge amounts to error. It is necessary to engage with the nature and materiality of the argument in the context of the issues in the proceedings.

- The Arbitrator gave no consideration as to whether or not the bone graft itself could be considered an artificial aid or whether the bone graft, in concert with the pedicle screws and cage, were designed together to alleviate the appellant's disability. The appellant's submissions on this issue were material to the matters requiring determination and the Arbitrator's failure to address these was an error of law.
- In relation to ground (3), she held that s 59A (6) (a) *WCA* does not qualify the term "*artificial aid*" by using the word "*permanent*" and that the Arbitrator erred by regarding the permanency or otherwise as being a matter for consideration.
- It was not necessary to consider ground (3).
- The first issue is whether the proposed aid is intended to enable the effects of the disability to be overcome (*Thomas*). The purpose of the insertion of the pedicle screws and interbody cage were clearly intended to alleviate the appellant's disability, where the outcome was to maintain stability of the spine and thus reduce the disability.
- The surgery must be considered in its entirety, without any artificial distinction between the decompression procedure and the spinal fusion. The surgery as a whole was intended to at least provide a degree of relief of the appellant's symptoms and the bone graft, pedicle screws and interbody cage together form an aid that, when fixed to the appellant's spine, operate together to achieve that purpose. This is consistent with Macfarlan JA's observation in *Baldacchino* that an artificial aid can comprise a number of materials.
- Therefore, these items together constitute an artificial aid for the purpose of s 59A (6) (a) *WCA* and the appellant is entitled to have the cost of and incidental to the surgery met by the respondents.

Section 11A (1) WCA - Reasonable action with respect to performance appraisal and/or discipline

Goh v Westpac Banking Corporation [2020] NSWWCCPD 25 – Acting Deputy President King SC – 29/04/2020

The appellant alleged that he suffered a psychological injury as a result of bullying and harassment at work. The respondent disputed the claim and asserted, inter alia, that the injury was wholly or predominantly caused by reasonable action taken or proposed with respect to performance appraisal and/or discipline.

Arbitrator Burge issued a COD, which determined that respondent had established that its actions were reasonable and he entered an award for the respondent.

The appellant appealed and alleged that the Arbitrator erred: (1) by failing to properly assess the evidence of Declan Egan when he found that his evidence was only evidence "*relayed to him from (the appellant)*"; (2) by not giving weight to the contemporaneous emails of the appellant to the HR department; (3) in weighing up the evidence of reasonableness of the respondent's actions towards the appellant; (4) in accepting that complaints by clients were made about the appellant when no direct evidence of such complaints existed; (5) by failing to properly apply the burden of proof in assessing the evidence that gave rise to the respondent's s 11A defence; and (6) in finding for the respondent.

ADP King SC determined the appeal on the papers. He noted that grounds (3), (5) and (6) effectively stated the same proposition, that the Arbitrator erred in holding upon the evidence that the respondent had discharged its onus. He dismissed the appeal and upheld the Arbitrator's decision, for reasons that are summarised below:

- The Arbitrator considered the medical evidence and found that beyond the point of establishing that the appellant had suffered a psychological injury caused by events that occurred at work, the evidence was not material. Expressions of opinion about whether the respondent's conduct was or was not reasonable exceeded the doctors' proper role. He agreed with the Arbitrator's view in relation to this case.
- He described the totality of the appellant's evidence as a detailed account of bullying and harassment at work, exclusively or in chief by Ms Beirne. However, the appellant conducted his case on the basis that his injury was caused by the respondent's conduct with respect to performance appraisal and/or discipline.
- He considered the lay evidence of the respondent's witnesses and Mr Egan and expressed the view that Mr Egan's evidence: put the onset of the appellant's problems more or less chronologically at the time the improvement program was imposed upon him; was concerned with the appellant's reaction to it; and was derived almost exclusively from conversations that he had with the appellant. He also held that some paragraphs of Mr Egan's statement support the respondent's case.
- He noted that ground (2) was not advanced before the Arbitrator and he accepted that there was nothing to suggest that the way the respondent dealt with the appellant's grievance relevantly affected the performance appraisal or disciplinary action which the performance improvement plan constituted.
- He rejected ground (4) and found that an email from Ms Crowe was not the totality of the evidence of complaint about the appellant's performance from stakeholders. Ms Beirne and Ms Bansal referred to reports from staff about dissatisfaction with the appellant's performance and while the appellant complained that this evidence is hearsay, the Commission is not bound by the rules of evidence and the manner in which this evidence emerged before the Arbitrator does not involve any serious question of its cogency or reliability.
- He rejected ground (3) and held that the Arbitrator considered the reasonableness of the respondent's action, why it was implemented and how it was implemented. He stated:

> 62. To the extent that a rolled up consideration of Grounds three, five and six requires consideration of the merit of Ground three, in my view, it fails and therefore does not assist the appellant in respect of any cumulative impact of these three grounds.
>
> 63. The balance of the appellant's argument may be dealt with shortly. As abovementioned, it was common ground that the onus lay upon the respondent. As I read the appellant's written submissions, what is put in paras [1]–[4] of his written submissions under Ground five is that in effect the Arbitrator, by not apparently saying more clearly in his reasons where the onus lay, did not apply the onus correctly and that his treatment of the evidence shows that in fact his decision-making process involved a reversal of the onus of proof.
>
> 64. Again, with all respect to the appellant, I can see nothing in the Arbitrator's reasons to justify this criticism and I think the response of the respondent in para [35] of its written submission, which was in essence that the Arbitrator understood that the respondent bore the onus of proof and was satisfied it had been discharged by the respondent, puts the position correctly. Thus this ground, considered individually, fails.
>
> 65. Ground six of the Grounds of Appeal adds nothing to Grounds three and five, and for the reasons given above, when these grounds are rolled up and considered collectively, they must fail.

WCC – Medical Appeal Decisions

Allegations of a denial of procedural fairness do not constitute either the application of incorrect assessment criteria or a demonstrable error

Hutchison v Wyong Race Club [2020] NSWWCCMA 73 – Arbitrator Moore, Dr R Crane & Dr G McGroder – 15/04/2020

The appellant was employed as a groundsman and barrier attendant. The Registrar issued a referral to an AMS to assess the degree of WPI with respect to the cervical spine, lumbar spine, right upper extremity (shoulder) and digestive system as a result of injuries suffered on 8/06/2011.

On 8/01/2020, Dr Truskett issued a MAC that assessed 0% WPI of the cervical spine (DRE category I), 0% WPI of the lumbar spine (DRE category I), 8% WPI for the right upper extremity (not work-related) and 0% WPI for the digestive tract. He noted that the appellant described himself as being severely incapacitated and said that he had used a walking stick for 18 months and has significant physical restrictions. He also noted that the appellant "*appeared incredibly distressed*" throughout the interview, with much groaning and puffing and he walked with a waddling wide-based gait in a very slow fashion with a limp involving his right leg. However, he stated that this was in considerable contrast to his normal gait while walking to the interview. He asked the appellant to clarify this matter and stated that he "*had no explanation*". He stated:

> …Patients are taught to use a stick in the hand opposite to support the impaired lower limb. This is almost instinctive. I asked why he did not use his pain free left upper limb to hold his walking stick. He had no explanation. He climbed on and off the examination couch with the aid of his walking stick and sat incredibly awkwardly in a most uncomfortable fashion on the corner of the bench. I would describe this behaviour as marked illness behaviour…

The AMS also noted complaints of sensory loss over the right side of the chin, neck and right shoulder, which is non-anatomical, and inconsistency on straight leg raising and his movement and mobility seemed "*incredibly restrained without any convincing evidence of radiological abnormality*". Based upon the evidence of the treating shoulder specialist, he expressed the view that the current right shoulder impairment occurred after the injury in June 2011. While the NTS diagnosed a frozen shoulder on 6/09/2012, he reported a full recovery of right shoulder movement on 18/03/2013, and as "*frozen shoulder*" does not recur, any current limitation of right shoulder movement is not related to the injury in June 2011 and that impairment should be fully deducted. He also referred to the available evidence, including the assessment of Dr Bolin (7% WPI for upper digestive tract), but stated that as there is no evidence of upper digestive tract disease, that assessment cannot be supported.

The appellant appealed under ss 327 (3) (c) and (d) *WIMA.* With respect to the right shoulder, he argued that the AMS' conclusion of "*full recovery of range of movement*" was unavailable and it is illogical and unreasonable to find that he had fully recovered and that the current range of movement resulted from a later, unrelated pathology. He complained that the AMS denied him procedural fairness and that the AMS' opinion and findings regarding the right shoulder were "*manifestly deficient and did not constitute compliance with the minimum obligation of his delegated statutory power*".

The MAP held that the AMS' finding regarding the right shoulder was open to him and there was ample evidence to support it. The appellant's arguments focussed on the AMS' alleged failure to bring "*discrepancies*" or "*inconsistencies*" in the evidence to his attention, but that is not the task of an AMS. In any event, the AMS repeatedly asked him about various inconsistencies, for example, the use of a cane in his right hand despite his apparent severe shoulder pain and his gait, and he had no explanation.

The MAP stated:

> 42. Allegations of a denial of natural justice and procedural fairness do not constitute neither (sic) the application of incorrect criteria nor (sic) a demonstrable error. The task of the Approved Medical Specialist is simply to carry out an examination and make an assessment of impairment (if any).

The MAP held that the ground of appeal regarding the cervical and lumbar spines was misguided and the AMS' assessment was based on the absence of muscle guarding, the absence of neurological signs, the absence of any loss of motion or segment integrity and the absence of any fractures or bony injury. Accordingly, the appellant's arguments reflect mere disagreement with the AMS' opinion and assessments, which is not a proper basis for appeal.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Hearing loss – operation of s 261 WIMA – worker aware of injury in about June 2015 (IME report received) – claim made more than 3 years after that date – no evidence of serious & permanent disablement

Handley v Canterbury City Council [2020] NSWWCC 117 – Arbitrator Burge – 15/04/2020

The worker was employed as a pool attendant from 1987 to 3/07/1998, and there was no dispute that he was exposed to significant noise at work. On 13/02/2019, his solicitors duly made a claim under s 66 *WCA* for 9.7% BHL and the cost of hearing aids based upon an assessment from Dr Scoppa dated 5/06/2015. However, the respondent disputed the claim under ss 253 and 261 *WIMA*.

Arbitrator Burge conducted an arbitration and on 15/04/2020, he issued a COD that entered an award for the respondent. He stated, relevantly:

> 14. Section 261 (6) provides that a worker's injury is taken to have been received when the worker first became aware they had suffered an injury. In this matter, that was at the earliest in or about June 2015, when the applicant was assessed by Dr Scoppa, who then provided a report to the applicant's solicitors.
>
> 15. If the applicant is found to have had knowledge from that time, the three-year limitation period arguably expired in or about June 2018. On another view, the applicant at the latest had knowledge of the injury on 29 October 2015, which was the date his solicitors forwarded an email confirming the last date he was employed with the respondent, namely 3 July 1998.

The Arbitrator noted that the worker stated that from the time that Dr Scoppa's report was received until the claim was made on the respondent, he was unclear about which employer the claim should be made upon. He was not given specific advice about this by his solicitor and he believed that further investigation was required.

The Arbitrator identified the relevant issue as being when the worker can be said to have had awareness of his injury (s 261 (6) *WIMA*). He stated:

> 18. "*Awareness of injury*" is awareness of "*injury*" as it is defined by the legislation, not merely awareness of a physical problem: *Heatcraft Australia Pty Ltd v Lapa* [2007] NSWWCCPD 27 (*Lapa*) at [37]; also, *Roads and Traffic Authority of NSW v McNally* [2006] NSWWCCPD 359 (*McNally*) at [35]-[40]. In this context, injury includes a disease (*section 4 Workers Compensation Act 1987 (the 1987 Act)*).
>
> 19. In *Inghams Enterprises Pty Ltd v Jones* [2012] NSWWCCPD 17 (*Jones*), Roche DP discussed the test for awareness of injury in cases of boilermaker's deafness (see [85]-[92]).

20. The Deputy President stated that, in a claim for boilermaker's deafness, awareness of injury arises when the worker is aware of two things: first, that he has sensorineural hearing loss (hearing loss of such nature as to be contracted by a gradual process); and second, that his hearing loss has been contributed to by his employment (at [90]).

20. The Deputy President noted that:

> [b]ecause of the insidious nature of boilermaker's deafness, and lack of general knowledge in the community of its cause, awareness that a worker has received a s 17 injury will usually require specialised knowledge that will normally come from an appropriate expert in the field. (at [89])

21. Accordingly, the worker's awareness of hearing loss, and having worked in a noisy place, are not sufficient: "*[i]t is neither appropriate nor reasonable to expect workers to 'put two and two together'*" (at [86]), as was put to the worker in cross examination in that case. Nor does the worker have to be aware that they have "*a watertight case that is bound to succeed*" (at [87]). The test is an objective one, based on the individual worker's knowledge at the relevant time, and each case will turn on its own facts. *Jones* was considered and applied in *Unilever Australia Ltd v Saab* [2013] NSWWCCPD 2 at [34]-[35], and *Unilever Australia Ltd v Petrevska* [2013] NSWWCCPD 3 at [41] (*Petrevska*).

The Arbitrator held that the worker had knowledge of his injury, as that term has been interpreted in cases such as *Petrevska,* from the time he was made aware of the contents of Dr Scoppa's report. As the Court of Appeal noted in *Petrevska*, the cause of a worker's gradual hearing loss will ordinarily be a fact of which the worker is not "*aware*" until he or she receives medical advice. The worker may have an opinion or belief that the hearing loss is related to the worker's employment, but that is not sufficient. The "*high level of assurance required for 'awareness' of its correctness will ordinarily require expert advice*" (at [25]). That medical advice in this matter was received in or about June 2015 and s 261 (6) *WIMA* deems the date of injury to be the date of awareness.

Accordingly, the applicant's claim has been brought outside three years of his gaining awareness of the injury at issue and he must satisfy s 261 (4) (b) *WIMA* and establish that his injury resulted in serious and permanent disablement.

The leading cases on this issue are *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 (*Kuhna*) and *Gregson v L & Mr Dimasi Pty Ltd* [2000] NSWCC 47; (2000) 20 NSWCCR 520 (*Gregson*). Their effect is that the disablement that afflicts an injured worker must, in the context of section 261 (4), affect their ability to carry out employment (see Cripps JA in *Kuhna* at 127). In *Gregson*, Burke CCJ said:

> In this matter the question becomes whether Mr Gregson suffers a serious and permanent disablement. Does he have a disability, is it serious, is it permanent, does it impinge adversely upon his capacity to work? If all questions were answered in the affirmative then he would satisfy that requirement. The basic question then presenting is the degree of the applicant's incapacity and losses before a considered answer to those previous questions is available. (at [78])

There is no question that hearing loss can cause serious and permanent disablement (see *BHP Billiton Ltd v Eastham* [2013] NSWWCCPD 34 (*Eastham*)). However, the nature of the evidence in *Eastham* starkly contrasts with this matter as the worker has ruled out his subsequent employment as being noisy. There was no evidence from the worker addressing serious and permanent disablement and the Arbitrator found that he had not satisfied his onus of proof.

Accordingly, the Arbitrator entered an award for the respondent.

Award for respondent in prior SOR because wrong date of injury pleaded – Prior SOR identified correct date of injury – claim defended on grounds of 'credit' – Held: Respondent is estopped from raising issues decided in earlier SOR

Denison v Weir Mineral Australia Limited [2020] NSWWCC 116 – Arbitrator Wynyard – 15/04/2020

The worker claimed weekly payments and a declaration that proposed surgery was reasonably necessary. In prior proceedings, the Arbitrator entered an award for the respondent as an incorrect date of injury was pleaded, but he made observations that the injury occurred on 3/07/2015. That date of injury was pleaded in these proceedings.

On 15/02/2019, the respondent disputed injury, incapacity and the need for medical treatment and, inter alia, asserted that the worker had not given notice of, or made a claim in respect of an injury on 3/07/2015.

The Arbitrator identified the following issues: (1) Was the respondent duly notified of the injury as required by s 254 *WIMA*? (2) Was a claim duly made as required by s 261 *WIMA*? (3) Was the worker injured as alleged? (4) If so, did he suffer any incapacity? (5) If so, what is the measure of that incapacity? and (6) Is the proposed surgery reasonably necessary?

The Arbitrator referred to his SOR in the previous proceedings, in which he held that the evidence was consistent with the worker's statement that an event occurred at work on 3/07/2015. He noted that the respondent did not appeal against that determination and that a number of issues that were decided have been revisited by the respondent.

The Arbitrator rejected the respondent's denial of liability under ss 254 and 260 *WIMA.* He held that those grounds were raised in the previous proceedings and that the authors of the dispute notice and Reply were aware of the further incident on 3/07/2015, as Dr Bodel mentioned it in his report dated 19/12/2016, and the worker mentioned it in his statement dated 28/02/2017.

With respect to s 254 *WIMA,* the Arbitrator held that the respondent had not shown any resulting prejudice and the previous proceedings were defended on the precise issue that was now before him: the incident on 3/07/2015 caused the worker's current condition. He held that the worker had reasonable cause as it was his decision that altered both the worker and the respondent of the inaccuracy of the accepted notice of injury. With respect to s 260 *WIMA,* he held that the worker's failure to make a claim in accordance with the guidelines was occasioned by the reasonable cause of the previous determination.

The Arbitrator also held that the respondent was estopped by the previous SOR from asserting that the 2014 injury caused the worker's current condition, but if he was wrong on this issue, the respondent's argument was rejected for the reasons stated previously in his decision.

The Arbitrator found that the worker had some current work capacity for 15 hours per week and was able to earn $30 per hour, and he awarded the worker compensation under ss 36 and 37 *WCA.* However, he found that no entitlement under s 38 *WCA* was established. He held that the proposed surgery is reasonably necessary and he ordered the respondent to pay the costs of and associated with that surgery.