Bulletin

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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. Some decisions are linked to AustLii, where available.

Stop press: EML has appealed against the decision of McCallum J in Employers Mutual Limited v Heise [2018] NSWSC 1842 (see: Bulletin no. 26).

Court of Appeal Decisions

Primary judge did not err in finding that there was no jurisdictional error – Appellant ordered to pay the defendant's costs

Vannini v Worldwide Demolitions Pty Ltd [2018] NSWCA 324 – Macfarlan JA, Gleeson JA & Barrett AJA – 17 December 2018

Background

On 6 March 2009, the appellant injured his back while employed by the first respondent. He had injured his back injury in April 2008 (different employer) and underwent surgery in August 2008. In November 2016, he gave the first respondent notice of intention to commence common law proceedings, but it disputed the degree of permanent impairment resulting from the 2009 injury. That dispute was referred to an AMS and on 11 April 2017, Dr Rosenthal issued a MAC that assessed 22% WPI, with a 0% deductible under s 323 WIMA.

The first respondent appealed against the MAC. On 31 August 2017, the MAP revoked the MAC and issued a fresh MAC, which applied a deductible of 50% under s 323 WIMA and assessed 12% WPI for the 2009 injury.

Judicial review

The appellant sought judicial review of the MAP's decision on the ground of jurisdictional error, because the MAP allegedly substituted its own view for that of the AMS without finding an error of the kind referred to in ss 327 (3) (c) and (d) WIMA and its reasons were "inadequate'.

Fagan J dismissed the summons with costs and held that the MAP's decision regarding the deductible under s 323 WIMA was *'the recognition of a demonstrable error in Dr Rosenthal's MAC (which made no such deduction)"*. The appellant then sought leave to appeal to the Court of Appeal.

Appeal

The Court **(*Gleeson JA (Macfarlan JA & Barrett AJA agreeing)*** granted leave to appeal and their reasons are summarised below.

Ground 1 - Did the Appeal Panel find error in what the approved medical specialist had done in not making a decision under s 323?

The Court rejected ground 1 and held that the MAP's reasons *"…must be read as a whole, considered fairly and without 'combing through the words with an appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law"*: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291. On a fair reading, it implicitly found that the AMS erred by not applying a deductible.

Ground 2 – Does the MAP need to expressly say that the MAC contains a demonstrable error?

The Court rejected ground 2 and held that upholding this complaint would be contrary to the admonition in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang, "…that a different mode of expression of decision may be expected of a decision made by a person with different, non-legal, expertise".* The error was apparent to the MAP as the AMS' decision to exclude contributory causation by the 2008 injury involved a false step and the conclusion that the 2008 injury caused 50% of the impairment implicitly involved a finding of demonstrable error by the AMS.

Ground 3 – Whether the error found by the Appeal Panel answered the description of a "demonstrable error?"

The Court rejected ground 3 and held that the MAP found *"a demonstrable error"* as *"…it was plainly material to the assessment of permanent impairment and was capable of being demonstrated by reference to the medical evidence before the AMS*." It was also apparent from an examination of the MAC in the sense referred to in *Pitsonis* and the 0% deduction was a constituent part of the MAC.

Ground 4 – Adequacy of reasons

The Court rejected ground 4 and held that the MAP gave sufficient reasons, which explained the actual path of reasoning by which it arrived at its opinion.

Accordingly, the Court dismissed the appeal and made a costs order against the appellant.

WCC Presidential Decisions

Exempt employer - Appellant denied procedural fairness – COD revoked, and matter remitted to another Arbitrator for determination

Elias Bader t/as Genuine Kitchens v Workers Compensation Nominal Insurer [2018] NSWWCCPD 54 – Deputy President Wood – 18 December 2018

Background

The appellant began business as a sole trader in/about 2013, but in February 2014, the worker asked the appellant for work and he began working with him for 5 days per week (although there was conflicting evidence about his starting date).

On 20 October 2014, the worker badly cut his left thumb while using a circular saw and he did not return to work for the appellant. The appellant was uninsured at that time.

On 14 August 2015, the Nominal Insurer served a notice upon the appellant under s 145 (1) WCA seeking reimbursement $30,815.82. He filed a Miscellaneous Application under s 145 (3) WCA and argued that he was an "exempt employer" under s 155AA WCA. On 2 February 2016, that dispute was resolved. The Consent Orders indicate that the appellant agreed to voluntarily repay a compromised amount to the Nominal Insurer.

On 15 January 2018, the Nominal Insurer served a further notice upon the appellant under s 145 (1) WCA seeking reimbursement of a further $70,188.02. The appellant filed a further Miscellaneous Application under s 145 (3) WCA and again argued that he was an exempt employer. He also sought reconsideration of the 2016 Consent Orders. The Nominal Insurer disputed that application.

Arbitrator Rachel Homan noted that the appellant's evidence was to the effect that before he started his business, his accountant (Mr Shenouda) told him to obtain advice from an insurance broker. He did this and was advised that he required insurance if he paid wages exceeding $7,500 per year. Based on that advice, he decided that he did not require insurance as he only intended to employ the worker for a short term of about one month and he believed that total wages would not exceed $7,500. However, the worker continued to work even after he was told that there was no more work. On 24 October 2014, he handed the worker a letter of termination of employment dated 19 October 2014.

Mr Shenouda wrote a letter in which he said that in 2014, the appellant told him that he had employed a family friend for a period of three to four weeks and that total wages would not exceed $4,000 to $5,000. The appellant relied upon that letter.

The arbitrator identified 4 issues: (1) Did the WCC have power to reconsider the COD issued on 2 February 2015; (2) If yes, should the discretion to reconsider the COD be exercised? (3) Was the appellant estopped from arguing that he was an exempt employer?; and (4) Was the appellant an exempt employer (i.e. Did the Nominal Insurer establish on the balance of probabilities that when the injury occurred, the appellant did not objectively have reasonable grounds for believing that the total amount of wages payable for the 2014/5 financial year would not exceed $7,500?).

On 1 August 2018, the arbitrator issued a COD. She declined to reconsider the Consent Orders and held that the appellant was not an exempt employer under s 155AA WCA. She stated that while Mr Shenouda's evidence appeared to corroborate the appellant's evidence, this was inconsistent with the fact that the appellant obtained insurance shortly after the injury occurred. She also expressed concern that Mr Shenouda's evidence *"was not given under oath or affirmation"* and said that she was not satisfied that this was sufficient to overcome her concerns regarding the appellant's evidence.

Appeal

The appellant appealed and alleged that the arbitrator erred: (1) by failing to make a finding that answers the correct question "as noted by the Statutory test to determine an exempt employer"; (2) in fact and law by assessing wages paid in the past and payable in the future; (3) by failing to afford him procedural fairness by rejecting Mr Shenouda's evidence without first putting the rejection to him; (4) by making findings regarding the minimum wage, applicable tax and handwritten notations without evidence; (5) by failing to take consider relevant evidence from the insurance broker and Mr Shenouda; (6) by considering irrelevant evidence (the Western Union transactions) and making the subsequent irrational finding; and (7) by mistaking the evidence of the termination letter.

Deputy President Wood determined the appeal on the papers under s 345 (6) WIMA.

The appellant sought to rely upon an affidavit from Mr Shenouda and alleged that failure to admit this would cause him substantial injustice because of the arbitrator's raised procedural fairness issues.

DP Wood held that while s 354 (2) WIMA permits the Commission to *"inform itself on any matter in such manner"* it thinks fit, it is obliged to comply with the rules of procedural fairness. She stated:

> 137. Failing to afford procedural fairness is an error that must be corrected unless it could not possibly have affected the outcome. A decision or award based on a point not raised by the parties or by the Commission would constitute a denial of procedural fairness and be susceptible to challenge.

She held that the appellant was denied procedural fairness. She revoked the COD and remitted the matter to another Arbitrator for re-determination.

Arbitrator erred in the construction of s 17 (1) (a) WCA in a hearing loss claim

Penrith Rugby League Club Ltd v Van Poppel [2018] NSWWCCPD 55 – Acting President Snell – 21 December 2018

Background

The worker was employed by the respondent as a bar attendant and was exposed to loud music between 1977 and 1982. She continued to work for the respondent after 1982 but she was not exposed to any loud noise. On 9 December 2016, she claimed lump sum compensation for hearing loss (13.7% BHI, which equates to 7% WPI) and hearing aids and alleged that her injury occurred on 1 January 1982.

GIO (on risk in 1982) disputed the claim and asserted that the deemed date of injury is 9 December 2016 (date of notification of the injury) and it was not on risk. It relied on the decision of Kirby ACJ in *Blayney Shire Council v Lobley* [1995-1996] 12 NSWCCR 52 *(Lobley)* at [55] and argued that this interpretation is consistent with the decisions in *GIO Workers Compensation (NSW) Ltd v GIO General Ltd* [1995] 12 NSWCCR 197 *(GIO v GIO)* and *StateCover Mutual Ltd v Cameron* [2015] NSWCA 127 *(Cameron).*

CEM (on risk from 1 July 2012 to 30 June 2017) also disputed the claim and asserted that the deemed date of injury is in 1982 and that it was not on risk. It argued that s 17 (1) (a) (ii) applies and as there is no evidence that the worker's employment from 1982 had *"the tendencies, incidents or characteristics of employment that would give rise to a real risk of deafness"*, the deemed date of injury is 1 January 1982.

Arbitrator John Isaksen found that the *"closest decision relevant to the facts"* was that of arbitrator Garth Brown in *McLean v Qantas Airways Limited* [2014] NSWWCC 421 *(McLean).* In *McLean*, the worker was exposed to noise in a workshop from 1963 to 30 June 1997, and then worked in a clerical position without noise exposure until 4 July 2005. On 18 December 2013, he claimed compensation under s66 WCA for industrial deafness and alleged that the date of injury was 30 June 1997. The arbitrator held that the date of injury was 30 June 1997 and stated (at [31]):

> I am satisfied that during the period 1963 to 30 June 1997 the applicant was 'employed in employment to the nature of which the injury was due' and the last day of that employment was 30 June 1997. I am satisfied the applicant was not employed by the respondent in an employment to the nature of which the injury was due during the period 1 July 1997 to 4 July 2015.

The arbitrator stated that this matter is distinguishable from *McLean,* but there is *'merit in Arbitrator Brown's conclusions'*, and the decision in *Lobley d*oes not entirely favour GIO's position as Kirby A-CJ stated (at [59E]):

> It is essential that the Compensation Court should focus its attention upon the 'nature' of the employment at the time of the notice of injury. If that nature was of a kind which could cause hearing loss, the burden of carrying all past hearing loss falls upon that employer.

He held (at [35]) that the last day that the applicant was employed in an employment to the nature of which the injury of hearing loss was due was a day in 1982 when the applicant worked as a bar attendant and was exposed to loud noise from disco music. As there was no specific date of last exposure, the deemed date should be 1 January 1982.

Appeal

GIO lodged a late appeal against the arbitrator's decision and required leave to proceed.

Acting President Snell determined the matter on the papers under s 354 (6) WIMA and extended the time to appeal: *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22. He also granted leave to appeal against the interlocutory decision because the issues of 'notice' and 'claim' are 'liability' issues and they were not determined before the matter was referred to an AMS. The referral did not satisfy the preconditions of ss 293 and 321 (4) WIMA and a determination is invalid if it is based on a MAC that is invalid or defective. Further, it is desirable that the appeal be dealt with so that the parties can know whether a claim under s 66 WCA is available and a further referral to an AMS should be sought when 'liability' has been determined.

AP Snell held that the uncontested facts engaged the proviso identified by Kirby ACJ in *Lobley* and s 17 (1) (a) (i) WCA applied because (using the words in *Smith v Mann*) when the appellant gave notice of her injury to the employer on 9 December 2016, she remained in its employ and her employment was or had been noisy. Therefore the deemed date of injury is the date on which notice of the injury was given and the s 66 (1) WCA threshold was not satisfied. However, the claim for hearing aids was 'available' and the non-binding opinion of the AMS could be considered in that claim under s 326 (2) WIMA. The issues regarding 'notice' and 'claim' were not yet the subject of either submissions or a decision and he allowed the parties an opportunity to address on them. He revoked the COD and remitted the matter to the arbitrator for determination of the remaining issues *"consistent with these reasons"*.

Section 17 WCA – no requirement to establish that employment was the main contributing factor to the hearing loss - s 261 (6) WIMA – when did the worker become aware of his injury? – Procedural fairness and discretion to refuse an application to cross-examine a witness

Fairfield City Council v Deguara [2019] NSWWCCPD 1 – Deputy President Elizabeth Wood – 18 January 2019

Background

The worker was employed by the appellant from approximately 1984 until August 2013. On 7 September 1992, he claimed compensation under s 66WCA for industrial deafness and resolved the claim for 1.7% BHL. On 21 April 2017, he made a further claim under s 66 WCA for 12% WPI and hearing aids, but the appellant disputed the injury and alleged that the employment did not have the tendencies, incidents and characteristics necessary to cause hearing loss and it was not the last noisy employer. It also relied upon ss 4 (b), 66(1) and 60 WCA and ss 254 and 261 WIMA.

Arbitrator Nicholas Read identified 4 issues: (1) whether the worker suffered an injury; (2) whether employment was a main contributing factor to the injury; (3) whether the claim was defeated by operation of ss 254 and 261 of the 1998 Act, and (4) whether the hearing aids were reasonably necessary. On 31 July 2018, he issued a COD, which determined that the worker suffered noise induced hearing loss and that his employment was the main contributing factor. He also found that ss 254 and 261 WIMA did not prevent recover of compensation and he held that hearing aids were reasonably necessary. He remitted the dispute under s 66 WCA to the Registrar for referral to an AMS.

Appeal

The appellant appealed against the arbitrator's decision on 6 grounds and requested an oral hearing, because the transcript was not available when the appeal was filed and were *"complex legal and factual issues"* and *"important distinguishing features associated with the appeal so far as those features relate to the authorities of the Court of Appeal relied on by the arbitrator in coming to his decision."* However, the worker argued that the appeal could be determined on the papers.

Deputy President Wood stated that while the appellant did not identify any complex issues or distinguishing features of the appeal and/or identify, discuss or refer to any decision relied on by the arbitrator. The parties *"cannot expect that a request for an oral hearing will be granted"* and an oral hearing would not normally be warranted in the circumstances, they failed to address relevant matters and they did not identify relevant Court of Appeal authorities. She held that an oral hearing was appropriate *"…to remedy the less than satisfactory state of the written submissions and to dispose of the appeal efficiently and in a timely manner…"* She also held that the decision is not interlocutory and that the monetary threshold under s 352 (3) WIMA is satisfied.

Ground 1 - The arbitrator erred in law in considering that s 17 of the 1987 Act had application in respect of the question of injury (as opposed to it being a deeming provision in respect of liability

The appellant argued that arbitrator erred by considering s 17 WCA in determining the issue of injury and this provision *"simply provides a mechanism for determining a deemed date of injury and for fixing liability"* and the issue is determined solely by reference to s 4 WCA. This caused the arbitrator to wrongly distinguish between loss of hearing and further loss of hearing (there is no such distinction) and determination of the issues required a consideration of the alleged injury (bilateral hearing loss). Also, as ss 15, 16 and 17 WCA are exceptional provisions and there is no difference between diseases within the meaning of ss 15 and 16 WCA (i.e. skin cancer or a back injury) and noise induced hearing loss. s 4 WCA must be satisfied before s 17 is considered.

The worker argued that his claim in 1992 established that his employment was noisy. He continued to work in it until he retired on 16 August 2013 and he then noticed a deterioration in his hearing and became aware that his hearing loss was work-related. The deemed date of injury is the date that he last worked with the appellant and both ss 4 and 17 WCA are "in play" and the arbitrator did not err.

DP Wood rejected ground 1. She noted that the arbitrator quoted the relevant passage from *Lobley,* applied it to the facts and found that the available evidence satisfied the test. She held (citations excluded):

184. Section 17 does not simply provide "a mechanism for determining a deemed date of injury and [fix] the date of injury", as asserted by Fairfield. It creates a series of fictions and presumptions on which a worker's entitlements are based. It dispenses with the need to establish causation. As observed by Sheller JA, where there is a loss of hearing that is of such a nature to have been caused by gradual process, s 17 (1) provides that it is taken to be an injury.

Ground 2 - (2) The arbitrator erred in fact and law in his consideration and determination of the issue of main contributing factor

The appellant argued that the worker bears the onus of proof and that he failed to discharge it because the available evidence indicates that his employment was not the main contributing factor to the hearing loss. However, in oral submissions it conceded that Dr Seymour opined that employment was the main contributing factor.

The worker argued that s 17 WCA stands apart from ss 15 and 16 WCA and "main contributing factor" is irrelevant because of the test in *Lobley.* Based upon *Lobley*, there is no need to prove a causal connection and the arbitrator did not need to address *"main contributing factor".* Further, the evidence supports a finding that employment was the main contributing factor to the aggravation: *Murray v Shillingsworth.*

DP Wood rejected ground 2 and held that s 17 WCA does not require employment to be the main contributing factor to, or aggravation of, the hearing loss and it was therefore not necessary for the arbitrator to consider that issue.

Ground 3 - The Arbitrator erred in fact and law in his consideration and determination of the issues under ss 254, 260 and 261 of the 1998 Act, including by reversing the onus of proof and making a finding which is against the weight of the evidence

The appellant argued that the arbitrator mis-stated its position (by stating that it was common ground that the claim made on 21 April 2017 satisfied the requirements of ss 260 & 261 WIMA, when its position was that the claim contravened those provisions) and mis-stated the evidence about when the worker consulted a lawyer. It was common ground that he did so on 15 August 2016 and it argued that he became aware of the relevant time limits on that date, if not before. It argued that the worker first became aware of his injury in 1993 and was aware that he had an injury by 14 July 2008, and the finding that he first became aware of the injury on/about 28 February 2017 is not supported by the evidence.

The appellant also alleged that the arbitrator reversed the onus of proof by deciding that he was not persuaded that he could draw an inference that the worker was aware of his injury at an earlier date and that the audiology report in August 2016 was sufficient to give him the necessary "awareness" of his injury: s 261 (6) WCA (although it conceded that it was not prejudiced by the failure to give notice). Further, the arbitrator's suggestion that there was *"some relevant lack of qualification on the art of the audiologist"* was: (a) not supported by the evidence; (b) not the subject of submissions; and (c) not raised by the arbitrator during the arbitration, and it was denied procedural fairness.

The worker argued that the appellant did not allege that the notice of claim was defective and that it was open to the arbitrator to accept that he was not aware of any time limits. There is no contradictory evidence and the matters raised by the appellant do not go to his knowledge of the time limits. Also, the authorities of *Lapa, Jones and Petrevska* are all apposite and he relied upon them.

DP Wood rejected ground 3. She stated that if the arbitrator erred by finding that the worker failed to give notice of injury because he was not aware of it, there was no actual prejudice to the appellant and absence of prejudice is a special circumstance that removes the bar to recovery of compensation under s 254 WIMA. She held that the allegation that the arbitrator erred in considering s 260 WIMA is unfounded and that the notation regarding s 261 WIMA was not material and it did not infect his reasoning process and ultimate determination. The deemed date of injury is the last date of employment in August 2013, and it would be a nonsense to say that the worker was "aware" of it before it crystallised.

DP Wood set out the principles relevant to the WCC's power to disturb a finding of fact DP Roche summarised in *Raulston v Toll Pty Ltd* and held that it was open to the arbitrator to accept that on 12 August 2016, the audiologist suggested to the worker that his hearing loss may have resulted from noise exposure at work. She stated:

> 231. On the basis of the above, it cannot be said that other probabilities so outweigh that chosen by the Arbitrator that the decision is wrong. Nor can it be said that material facts have been overlooked or given undue or too little weight in deciding the inference to be drawn, or the available inference in the opposite sense to that chosen by the Arbitrator is so preponderant that the Arbitrator's decision is wrong.

Ground 4 - The Arbitrator erred in law in making a distinction between loss of hearing and a further loss of hearing

The appellant relied upon its submissions regarding ground 1 and argued that the evidence does not suggest that the injury is an aggravation.

DP Wood rejected ground 4. She referred to the decision of McColl JA in *Sukkar* and stated:

> … The effect of s 17 (1) (a) of the 1987 Act was to operate in the worker's favour, as Barwick CJ explained in *Bain* (at 257), to create a fictional date of injury which could found a compensation claim, even though 'the condition is a product of past events'. It also created a fictitious 'incident' for the purposes of causation, that being the 'one blow' to which Barwick CJ also referred.
>
> That fiction was perpetuated by the inclusion in s 17 (1) of the words 'or further loss' which enabled the worker to make a further claim for compensation in relation to a further deemed injury arising from a deemed incident, despite hearing loss resulting from the same pathology. Indeed, it is not apparent that the current claim is based on the same pathology as the primary judge recorded (at [54]) that the current claim is for 'a series of micro traumata between 29 August 1996 and 2012'.

She held that the 1992 hearing loss injury is separate to that claimed on 21 April 2017, and if this is a disease the further exposure can only be considered an aggravation. If s 4 (b) (ii) WCA applied, the worker would succeed.

Ground 5 - The Arbitrator erred in fact and law in his consideration of the advice given to the appellant by Hearing Aid Services Australia on 12 August 2016

The appellant argued that the arbitrator erroneously elevated the word "suggestion" to a significance it does not have, which diminished the state of the worker's awareness, and reversed the onus of proof. The evidence indicates that he was aware of the injury as at 12 August 2016. He also reversed the onus of proof.

DP Wood rejected ground 5, for the same reasons as those in relation to ground 3.

Ground 6 - The Arbitrator erred in denying Fairfield procedural fairness.

The appellant argued that it was denied procedural fairness because of the arbitrator refused to allow it to cross-examine the worker's solicitor (it asserted that he did not consider this application and that cross-examination was 'critical' to its case) and by querying the audiologist's qualifications.

However, the worker argued that there was no procedural unfairness. There is no right to cross-examine a witness in the Commission and the arbitrator considered the relevant matters in exercising his discretion. The matters likely to be the subject of cross-examination would be subject to legal professional privilege, and as his solicitor's knowledge is not relevant to the dispute it is difficult to see how allowing the cross-examination would have changed the outcome. In any event, the arbitrator's comments about the audiologist's qualifications were 'mere observations'.

DP Wood therefore rejected ground 6. She described the arbitrator's comments about the audiologist's qualifications as 'observations', which did not infect his reasoning process. She held that there was no possibility of a different outcome if he allowed the appellant an opportunity to call evidence or make submissions on that matter. Regarding the denial of leave to cross-examine the worker's solicitor, she held that there is no legal right to cross-examine in the WCC. She cited the decision of Bryson JA in *Aluminium Louvres & Ceilings Pty Ltd v Zheng* [2006] NSWCA 34 and stated that to disturb the arbitrator's decision not to allow cross-examination, the appellant must establish that he erred in respect of the exercise of his discretion and that he: (a) acted upon a wrong principle; (b) took into consideration extraneous or irrelevant matters; (c) mistook the facts, or (d) failed to take into account a material consideration.

DP Wood noted that the arbitrator was not satisfied that the cross-examination would clarify or test the solicitor's evidence and in making that decision, he considered the application, applied the correct principles and decided that the solicitor's evidence was 'simply a procedural history of the claim' and that cross-examination would not assist. Also, this traversed areas that may have attracted legal professional privilege and the appellant was aware well before the arbitration that the witness was not available.

Accordingly, she confirmed the COD.

Alleged factual error – weight of evidence and test of causation

Megson v Staging Connections Group Ltd [2019] NSWWCCPD 2 – Deputy President Michael Snell – 24 January 2019

Background

The appellant twisted his left knee at work on 10 August 2015. The insurer accepted the claim and paid weekly payments for 2 days (11 & 12 August 2015) and medical treatment costs. He then suffered an aggravation because of an incident that occurred at home in June 2017. Surgery was recommended but the respondent disputed that this was reasonably necessary because of the work injury.

On 9 August 2018, ***arbitrator Rachel Homan*** entered an award for the respondent. She noted that it was common ground that the Commission lacked jurisdiction to order payment of the cost of the surgery by operation of s 59A WCA and if the appellant succeeded, the approach in *Flying Solo Properties Pty Ltd v Collet* should be followed.

The arbitrator referred to the decision of Kirby P in *Kooragang Cement v Bates* and the review by DP Roche in *Murphy v Allity Management Services Pty Ltd* in relation to the issues of causation. She noted that the medical records regarding the 2015 injury were "sparse" and did not indicate a discrete diagnosis, but she was satisfied that the appellant suffered a significant twisting injury to his left knee on 10 August 2015, but she was not comfortably satisfied that the patella was dislocated. She found that the incident on 10 August 2015, either made the pre-existing degenerative condition symptomatic or aggravated the pre-existing pathology.

The arbitrator also noted inconsistencies in the medical evidence regarding the 2017 injury and followed the approach of Basten JA in *Mason v Demasi* and exercised caution in dealing with apparent inconsistencies in histories given to health professionals. She found that the worker's evidence *"stands apart the histories taken by all the medical practitioners".* She was not satisfied that the left knee merely gave way, as alleged, and found that there was *'sort of twisting action or awkward landing that was contributed to by the wet tiles at home'*. She concluded that she was not satisfied to the standard referred to in *Nguyen* that the 2015 injury has materially contributed to the present need for surgery.

Appeal

The appellant appealed against the arbitrator's decision and alleged that she: (1) ignored the relevance of the material contribution question of the appellant's unchallenged evidence that the consequences of the 2015 injury had not ceased to exist by the time of the 2017 injury; and (2) failed to afford him procedural fairness by failing to deal with a substantial, clearly articulated argument put on his of the appellant. His case was not properly engaged with and determined.

DP Snell decided that it was appropriate to determine the appeal on the papers under s 354 (6) WIMA and that the threshold requirements were satisfied.

He rejected ground (1) and adopted the approach taken by DP Roche in *Murphy:*

> 57. ... even if the fall at Coles contributed to the need for surgery, that would not necessarily defeat Ms Murphy's claim. That is because a condition can have multiple causes (*Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Pyrmont Publishing Co Pty Ltd v Peters* (1972) 46 WCR 27; *Cluff v Dorahy Bros (Wholesale) Pty Ltd* (1979) 53 WCR 167; *ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]; [2009] HCA 28; 237 CLR 656). The work injury does not have to be the only, or even a substantial, cause of the need for the relevant treatment before the cost of that treatment is recoverable under s 60 of the 1987 Act.
>
> 58. Ms Murphy only has to establish, applying the common-sense test of causation (*Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796), that the treatment is reasonably necessary 'as a result of' the injury (see *Taxis Combined Services (Victoria) Pty Ltd v Schokman* [2014] NSWWCCPD 18 at [40]– [55]). That is, she has to establish that the injury materially contributed to the need for the surgery (see the discussion on the test of causation in *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 12 NSWCCR 716).

The arbitrator adopted that approach and gave clear reasons for deciding that the appellant failed to discharge his onus of proof and that decision was available to her on the evidence.

DP Snell also rejected ground (2). He noted that the appellant argued that *Government Insurance Office of NSW v Aboushadi* applied and that the 2015 injury caused instability and pain in his left knee and left him with a higher risk of further injury and instability that became a reality in 2017. The damage caused by the 2017 injury was greater because of the 2015 injury and the 2015 injury is a causative factor in the need for the surgery. The arbitrator denied him procedural fairness by failing to address this matter.

DP Snell noted that *Aboushadi* (and the decisions it applied) concerned the recovery of common law damages and it did not consider the statutory test on causation applied in *Kooragang*. He stated (citations excluded):

> 96. I am unaware of any Presidential decisions that have applied or dealt with *Aboushadi*, *Fishlock* or *Oakley*. In *Ogilvie v QANTAS Airways Ltd*, a matter involving lump sum compensation and aggregation, Arbitrator Nicholl was referred to *Oakley*, but considered the aggregation issues before her should be approached applying *Department of Juvenile Justice v Edmed*, rather than *Oakley* and some associated decisions to which she was referred. In *Byrne v Northern Sydney Central Coast Area Health Service* Arbitrator Phillips SC was referred to *Oakley* but dealt with the causation issue before him largely by reference to *Kooragang Cement*, without specific reliance on *Oakley.* In *Andersen v J & M Predl Pty Ltd* Arbitrator Bamber concluded, as a factual matter, that *Oakley* (to which she was referred) did not assist the worker…
>
> 98. Whether *Aboushadi* should apply in such circumstances, as a matter of law, was not argued by the parties before the Arbitrator, and accordingly not addressed by the Arbitrator. The appellant, on appeal, argues the Arbitrator erred in not specifically dealing with *Aboushadi*. The respondent resists Ground No 2 on a factual basis. It does not argue that application of these principles was unavailable on a legal basis.

He held that *Aboushadi* can *"in appropriate factual circumstances"* have application to the determination of causation issues, but the arbitrator was clearly aware of the appellant's argument as she summarised it in her reasons. He concluded:

> 109. The Arbitrator's decision was clearly based on a failure by the appellant to satisfy his onus of establishing the necessary causal link. The Arbitrator said that she was not satisfied the 2015 injury "materially contributed" to the need for surgery, and that she was not satisfied the need for surgery "arose 'as a result of' the injury". It follows, from the above, that the Arbitrator dealt with the causation issue, which included the appellant's argument based on *Aboushadi*.

Accordingly, he confirmed the COD.

WCC - Medical Appeal Panel Decisions

AMS opined that the worker was affected by the circumstances of the accident and physical impairment and not emotional and behavioural deficits because of his brain injury – Correct assessment criteria applied

Kearns v All Time Towing [2019] NSWWCCMA 3 – Arbitrator Ross Bell, Dr Michael Fearnside & Dr Sophia Lahz – 14 December 2018

Background

The appellant was injured as a result of an accident on 21 January 2016, and there was no dispute that suffered a fractured skull and extradural haematoma over the left cerebral hemisphere, which required emergency draining. On 31 August 2018, an AMS (Professor Fitzsimons) issued a MAC, which she assessed 0% WPI based upon the Clinical Dementia Rating (CDR).

Appeal

On 27 September 2018, the appellant appealed against the MAC under ss 327 (3) (c) and (d) WIMA. He alleged that the AMS incorrectly applied the CDR tool in assessing permanent impairment and he sought a further examination by a member of the MAP.

The Registrar referred the appeal to a MAP, which decided that a further examination was not required and that the appeal should be determined on the papers.

CDR assessment tool

The appellant argued that AMA5 refers to the method for using the CDR being *"adapted from the 1988 Berg paper"* and that the Berg paper includes an additional direction for the CDR calculation (not included in paragraph 13.3d) that directs:

> When M=0.5, CDR=1 if at least three of the other categories are scored 1 or greater. If M=0.5, CDR cannot be 0; it can only be 0.5 or 1. If M=0, CDR=0 unless impairment (0.5 or greater) in two or more secondary categories, in which case CDR=0.5.

He argued that this extract forms part of the method that must be applied in assessing a CDR and the assessment should be CRD = 0.5.

The MAP stated, relevantly:

> 32. The Appellant submits that because there is a clear reference to Berg's paper in paragraph 13.3d the above extract forms part of the method that must be applied in assessing a CDR, with the result that the assessment should be CDR=0.5.
>
> 33. In *Gill*, relied on by the appellant, the Panel was of the view that it is consistent with the Interpretation Act 1987 (NSW) and the relevant authorities for extrinsic or supporting material such as the Berg 1988 paper to be considered by an AMS where appropriate in conjunction with the criteria and methods provided in AMA 5 and the Guidelines. However, that Panel did not consider that the stipulation in the Berg 1988 paper is mandatory for all CDR assessments, but considered the question depends on the circumstances of each case…

The MAP noted that the AMS generally found that the appellant presented with "*cognitive function that was largely unaffected apart from mild memory issues"* and held:

> 42. The reproduced CDR in Table 13-5 is described in paragraph 13.3d *"as an example of how to evaluate cognitive change in light of ADL impairment".* The Panel also notes that the CDR was devised originally for tracking Alzheimer's disease, not for the assessment of traumatic brain injury, as noted in *Gill*. In some instances, a traumatic brain injury will not neatly fit the CDR model, in which it is anticipated that there will be overlap between the activities of daily living listed in the CDR in the progression of Alzheimer's disease.
>
> 43. There are numerous background references throughout AMA5 listed at the end of each chapter. However, it is the Panel's view that it is not sound or reasonable for an assessor to trawl through these references for additional criteria to be applied in addition to the those set out explicitly in AMA5 and the Guidelines (per paragraph 1.8 of the Guidelines). This is particularly so in this matter where there is no imperative, such as a perverse outcome.

It held that this ground was not made out as the AMS clearly stated her findings and the outcome is consistent with the evidence and her general findings, which she comprehensively explained. She applied correct assessment criteria were applied and made no demonstrable error.

Failing to assess WPI for emotional and behavioural disorders

The MAP rejected this ground as the MAC clearly indicated how the AMS formed her opinion that there were no assessable emotional and behavioural deficits because of the brain injury.

Neuropsychological testing

The appellant argued that the AMS erred by not requesting that he undergo neuropsychological testing. However, the MAP noted that on 23 May 2016, Dr Stewart reported that he had undergone extensive neurocognitive testing the previous day and *"did quite well with no significant spatial deficits"*. There is no requirement for an AMS to refer matters to the Registrar for neuropsychological testing and the AMS was clearly able to conduct the assessment without them. Therefore, this ground was not made out.

Accordingly, the MAP confirmed the MAC.

Section 323 WIMA - AMS erred by not considering evidence of pre-existing impairment

Yoogalu Pty Limited v Divko [2019] NSWWCCMA 6 – Arbitrator Catherine McDonald, Dr Phillippa Harvey-Sutton & Dr Brian Noll - 2 January 2019

Background

The worker injured his lumbar spine because of driving long distances at work and he suffered pain in his back and right leg while exiting his vehicle at his hotel on 22 February 2017. He later underwent surgery. He claimed compensation under s 66 WCA and the dispute was referred to an AMS (Dr Bodel). On 10 September 2018, he issued a MAC that 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) and (d) WIMA and the Registrar referred the appeal to a MAP, which found that a further medical examination was not required.

The appellant argued that the worker suffered prevoius pain in his back and right leg, for which he claimed compensation, and both qualified specialists applied a 1/10 deductible under s 323 WIMA. However, the worker did not file any submissions in opposition.

The MAP referred to the decision in *Vitaz v Westform (NSW) Pty Limited,* in which of the Court of Appeal concluded that there should be no deduction under s 323 WIMA if there were no symptoms from a pre-existing condition before the work injury. Basten JA (with whom the other justices agreeing) stated:

> That opinion contained a legal assumption which is inconsistent with the approach adopted by this Court in, for example, *D'Aleo v Ambulance Service of New South Wales* (NSWCA, 12 December 1996, unrep) (quoted by Giles JA, Mason P and Powell JA agreeing, in *Matthew Hall Pty Ltd v Smart* [2000] NSWCA 284; 21 NSWCCR 34 at [30]-[32] and, more recently, by Schmidt J in *Cole v Wenaline Pty Ltd* [2010] NSWSC 78 at [13]). The resulting principle is that if a pre-existing condition is a contributing factor causing permanent impairment, a deduction is required even though the pre-existing condition had been asymptomatic prior to the injury. In the absence of any medical evidence establishing a contest as to whether the pre-existing condition did contribute to the level of impairment, the complaint about a failure to give reasons must fail. An approved medical specialist is entitled to reach conclusions, no doubt partly on an intuitive basis, and no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available.

The MAP held that the AMS's decision regarding a deductible was based upon the worker's history, but the evidence indicated that he was not completely pain-free before the 2017 injury occurred. The AMS did not consider that evidence and he should have done so and balanced it against the history he obtained. He therefore fell into error.

The MAP decided that it was appropriate to apply a deductible of 1/10 under s 323 WIMA. It revoked the MAC and issued a fresh MAC that assessed 14% WPI.

Multiple injuries – AMS' deductible of 50% under s 323 WIMA upheld

Simmons v Dora Creek and District Workers Co-operative Club Ltd [2019] NSWWCCMA 7 – Arbitrator William Dalley, Dr John Ashwell & Dr Phillippa Harvey-Sutton – 7 January 2019

Background

The appellant suffered two injuries to her lumbar spine in 2009 and 2010 (while employed by a different employer) and a neurosurgeon recommended surgery, which she declined to have. On 30 September 2011, she entered into a Complying Agreement and received compensation under s 66 WCA for 6% WPI with respect to the 2009 injury. On 7 June 2014, she re-injured her lumbar spine whilst working for the respondent. She consulted a neurosurgeon and ultimately underwent surgery on 17 October 2016.

The appellant claimed compensation from the respondent under s 66 WCA and the dispute was referred to an AMS, who issued a MAC that applied a 50% deductible under s 323 WIMA and assessed 6% WPI because of the 2014 injury.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) WIMA and the Registrar referred the appeal to the MAP. The MAP held that the MAC was based upon correct assessment criteria and that consideration of the material before the AMS led to the conclusion that radiculopathy was not present at the time of the examination. It also held that there was no demonstrable error on the face of the MAC. It confirmed the MAC and stated:

> 35. No error is demonstrated with respect to the issue of radiculopathy. The only evidence before the AMS at the time of his examination of the appellant was the complaint of symptoms by the appellant. Paragraph 4.28 of the Guidelines provides: "Radicular complaints of pain or sensory features that follow anatomical pathways that cannot be verified by neurological findings (somatic pain, non-verifiable radicular pain, do not alone constitute radiculopathy." …
>
> 57. The Panel is satisfied that the conclusion of the AMS that the assessed impairment of the lumbar spine was due in significant measure to the pre-existing condition was not in error. The AMS noted that, although the assessment of a deduction under section 323 was "difficult or costly to determine", a deduction of 10% of the assessed impairment was at odds with the available evidence. (section 323 (2)).
>
> 58. That conclusion was open on the evidence. The appellant's submission that the appellant "was able to return to full duties in her occupation as a bar attendant for a period almost 4 years prior to 7 June 2014" was not made out on the evidence. The appellant's statements and the reports of Dr Ferch provided a strong basis for the conclusion that a deduction of 10% was at odds with the available evidence and no error was demonstrated. The conclusion of the AMS that the appropriate deduction pursuant to section 323 (1) was one half.

WCC – Arbitrator Decisions

Section 38A WCA - Reasoning in Vostek Industries Pty Limited v White is binding upon Arbitrators

Waters v Tutola Pty Limited (Deregistered) [2019] NSWWCC 6 – Arbitrator Philip Young – 11 December 2018

Background

The worker claimed continuing weekly compensation from 30 March 2016 under s 38A WCA. There was no dispute that she is a worker with highest needs and/or that she suffered more than 30% WPI and the issues for determination were: (1) The calculation of compensation under s 38A WCA; and (2) Whether the arbitrator was bound by the Presidential decision in *Vostek Industries Pty Limited v White (Vostek)*. The parties agreed that the transition rate is $788.32 per week (as adjusted).

The worker relied upon President Keating's decision in *Vostek*, which provides that the language of s 38A WCA is clear and unambiguous and that it *"…is intended to provide a minimum amount of compensation, if the terms of section 38 (1) are met"*. The President had earlier outlined a 3-step approach in relation to an entitlement under s 38A WCA in *Hee v State Transit Authority of NSW.*

The respondent argued that a proper construction of s 38A is to consider the worker's actual earnings from 30 March 2016 and to reduce the entitlement to weekly payments accordingly and that *Vostek* was incorrectly decided.

Arbitrator Philip Young stated:

> 13. Senior Arbitrator Capel in his Certificate of Determination in *Vostek* outlined a number of reasons why Mr White in that matter was entitled to receive the figure for weekly payments identified in section 38A in addition to his earnings. In *Vostek* the President (at [27]) outlined the three components necessary (by reason of *Hee*) to establish an entitlement to section 38A weekly payments. The first component is a determination of the weekly compensation payable in accordance with section 38 (7) of the 1987 Act. The applicant in this matter has current work capacity after the second entitlement period. The second consideration is the amount of compensation "payable". There were no submissions in this matter concerning those precise figures and I take it that they are not problematic for the applicant's case and this would appear to be supported by the schedules referred to by the respondent's solicitor.
>
> 14. The third consideration to be made is whether the amount of compensation payable is less than the prescribed rate (as adjusted from time to time) under section 38A. There was no issue seriously pressed that the amount of compensation payable to the applicant following a section 38 (7) calculation was less than the prescribed rate, as adjusted, at all material times since 30 March 2016.
>
> 15. The central and only issue in the President's decision in *Vostek* is set out at [33], namely whether the Senior Arbitrator was in error by *"misconstruing section 38A of the 1987 Act by finding that it authorises the payment of weekly compensation of $788.32 (as adjusted) to a worker with highest needs, without taking into account the worker's earnings"*. After reviewing at length the relevant legislation and principles of statutory construction, the President noted (at [115]):

> …broadly speaking, it may be accepted that sections 36-38 quantify the compensation payable taking into account a proportion of the worker's PIAWE less the amount of the worker's earnings or ability to earn. However, section 38(A) of the 1987 Act operates differently, in that, the worker's PIAWE calculated 'in 4 accordance with this subdivision' is only relevant to determine if the provision is triggered. Once it is triggered, contrary to the appellant's submission, the worker's PIAWE becomes irrelevant to the quantification of the compensation payable.
>
> 16. The nub of President Judge Keating's decision in *Vostek* is that the applicant's earnings ought not to be taken into account in deciding the applicant's entitlement to weekly payments of compensation at the rate prescribed by section 38A of the 1987 Act. As I have earlier concluded, this was the "central and only" issue in *Vostek*. That being so, I conclude that the President's decision is ratio decidendi to that effect, not merely obiter dicta. It is therefore appropriate for this Commission by reason of principles regarding stare decisis and in deference to a superior tribunal to be bound by the President's reasoning in *Vostek* and to make an award in favour of the applicant in this matter.

The arbitrator awarded the worker continuing weekly payments from 30 March 2016 at the rate of $788.32 per week (as adjusted) under s 38A WCA, with credit to the respondent for payments made.

Section 11A WCA defence successful as the respondent's recruitment processes were "broadly compliant with applicable statutory requirements and guidelines"

Albao v State of New South Wales (Department of Justice) [2019] NSWWCC 7 – Arbitrator Rachel Homan – 12 December 2018

Background

The worker was employed by the Respondent as a WH&S Officer. On 7 July 2017, she claimed compensation for a psychological injury and alleged that this was caused by workplace discrimination, bullying and isolation and not being given equal employment opportunities. The insurer did not dispute injury, but it relied upon s 11A WCA (transfer and/or promotion and/or provision of employment benefits to workers). On 6 February 2018, it maintained that dispute upon review.

Arbitrator Rachel Homan identified the factual issues as: (1) Whether events comprising workplace discrimination, bullying, isolation and not being given equal employment opportunities caused a psychological condition? (2) whether any injury was wholly or predominantly caused by reasonable action by or on behalf of the employer pursuant to s 11A (1) WCA? and (3) the amount of any entitlement to weekly payments.

The arbitrator held that the respondent's recruitment processes broadly complied with the acceptable statutory requirements and guidelines and that the worker was not denied roles for reasons other than comparative suitability or merit. There was no concealment or deliberate withholding of information about upcoming roles and many of the vacancies that she complained about were not required to be filled after advertisement or expression of interest. These were strong indicators that its actions were reasonable. She also held that the worker did not have a clear understanding of the reasons why the recruitment actions proceeded in the way they did and that where positions were being filed from talent pools, I there was no reasonable obligation upon the employer to give feedback to persons outside the talent pool as to why they were not offered a position. She also stated:

> 129. As I have indicated above, the applicant has identified a range of other behaviours in the workplace, particularly involving Ms O'Keefe and to some degree Ms Baker, which she perceived as isolating and exclusionary. I accept that there were real events in the workplace of this nature that were perceived unfavourably by the applicant, whether or not those perceptions were rational, reasonable or proportionate. I also accept that these contributed to the applicant's psychological injury. I am not satisfied, however, that these diminished the predominant role played by the respondent's actions with regard to transfer, promotion and /or provision of employment benefits, in causing the applicant's psychological condition.

Accordingly, she entered an award for the respondent.

Consent orders set aside 'in the interests of justice' – threshold dispute referred to an AMS

Clarke v State of New South Wales (Greystanes Disability Services) [2019] NSWWCC 11 – Senior Arbitrator Glenn Capel - 17 December 2018

Background

On 18 March 2007, the worker injured her left hip, left shoulder, cervical and lumbar spines at work. On 3 September 2009, she made a claim under s 66 WCA for 20% WPI, based upon assessments of Dr Matalani (5% WPI cervical spine, 5% WPI lumbar spine, 2% WPI ADLs, 1% WPI scarring, 4% WPI left lower extremity (hip) and 5% WPI left upper extremity (shoulder)). On/about 25 November 2010, the parties entered into a Complying Agreement based upon those assessments.

On 13 June 2018, the worker claimed compensation under s 66 WCA for 37% WPI (with credit for payments made) based upon assessments from Dr Giblin (5% WPI cervical spine), 7% WPI lumbar spine, 1% WPI scarring, 10% WPI left lower extremity (hip), 6% WPI right lower extremity (hip), 6% WPI left upper extremity (shoulder) and 8% WPI right upper extremity (shoulder). However, the insurer disputed the claim.

Senior Arbitrator Capel conducted a conciliation conference on 31 October 2018, during which the deleted her claims for s 60 expenses and domestic assistance and, by consent, the respondent agreed to pay an amount under s 60 WCA. He stated:

> 8. It was agreed that if the applicant succeeded in the dispute regarding the allegation of an injury to her right lower extremity (hip) on 18 March 2007 and/or the consequential condition in her right lower extremity (hip) and right upper extremity (shoulder), her claim should be referred to an AMS. However, if she failed in her claim regarding these body parts, there should be no order.
>
> 9. Despite the agreement between the parties, I determined that it was appropriate to remit this matter to the Registrar for referral to an AMS for assessment of the whole person impairment of the applicant's left lower extremity (hip) and the left upper extremity (shoulder) due to injury sustained on 18 March 2007, and for the AMS to combine his assessment with the previously agreed assessments. In doing so, I granted the parties leave to file and serve written submissions.

On 8 November 2018, he issued a COD, which determined that the worker did not suffer an injury to her right hip arising out of or in the course of her employment on 18 March 2007 and that she did not develop a consequential condition in her right hip and right shoulder as a result of injuries to her cervical spine, left shoulder and left hip on 18 March 2007. He entered awards for the respondent with respect to those injuries. The remaining issue concerned the terms of the referral to the AMS.

The worker argued that the left hip and left shoulder should be referred to an AMS for assessment in addition to the body parts that formed part of the previous settlement so that a combined WPI assessment could be obtained.

However, the respondent argued that the parties agreed that if adverse findings were made regarding the right hip and right shoulder, there would be no need for a referral to an AMS and as COD fulfilled the condition precedent to that agreement and there was no longer any medical dispute. In the alternative, it argued that there was an obvious error in Dr Giblin's report regarding the left lower extremity and that he failed to convert the lower extremity impairment to WPI. Once that error is corrected, the assessment of WPI for that body part is identical to that in the 2010 agreement and there is no evidence of deterioration. Therefore, the referral to the AMS should be for the left shoulder only and the AMS should be directed to combine his assessments for the cervical spine, lumber spine and left upper extremity with 4% WPI (left lower extremity) and 1% WPI (scarring).

The Senior Arbitrator held that the true character of the "dispute", based upon the principles discussed in *Hine*, is whether the worker has more than 20% or 30% WPI and the legislation directs that an assessment by an AMS is required unless the insurer is satisfied that the degree of permanent impairment is likely to be more than 20% or 30%. He stated (citations excluded):

> 44. Unfortunately, when the legal representatives agreed at the arbitration hearing that the applicant's claim should not proceed to an assessment by an AMS if she failed in the dispute regarding the allegation of injury to her right lower extremity (hip) on 18 March 2007 and the allegation of a consequential condition in her right lower extremity (hip) and right upper extremity (shoulder), they overlooked the fact that the nature of the application was for a threshold dispute for the purposes of ss 32A and 39 of the 1987 Act.
>
> 45. In his submissions, Mr Michael opposed a referral to the AMS because of the agreement between the parties. However, this overlooks the dispute that was raised by the insurer and the threshold dispute. It has been suggested that this oversight could be addressed by the "slip rule", but that concept only relates to an inherent power or a court to vary an order, if it does not properly express the intention of that order. There is no provision that equates to a "slip rule" in the Commission, apart from s 294 (3) and s 325 (3) of the 1998 Act, which give the Registrar the power to correct an obvious error in a COD or a Medical Assessment Certificate.
>
> 46. Whilst a mistake by a legal representative will not normally be considered an appropriate ground for reconsideration, Deputy President Roche held in *Atomic Steel Constructions Pty Ltd v Tedeschi* that in exceptional circumstances, consent orders can be set aside in the interests of justice. In that matter, consent orders were set aside because counsel had resolved a matter for an amount that exceeded his instructions, which was in excess of the worker's full potential entitlements.

The Senior Arbitrator held that the worker would suffer greater injustice than the respondent if the threshold dispute is not assessed in accordance with the WCA and WIMA and he was satisfied that interests of justice require that the threshold dispute should be referred to an AMS under s 321 WIMA. He therefore remitted the matter to the Registrar for referral to an AMS for assessment of impairment of the cervical spine, lumbar spine, left lower extremity (hip) and left upper extremity (shoulder) due to injury suffered on 18 March 2007 for the purposes of a threshold dispute under ss 32A and 39 WCA.

Section 39 WCA - work capacity decision - Worker entitled to weekly payments for a closed period under s 38 (6) WCA – Kennewell applied

Gillard v G and H Harris and M. E. Jarret – [2019] NSWWCC 22 - Senior Arbitrator Capel – 21 December 2018

Background

On 30 April 2002, the worker (a shearer) injured his back while employed by the respondents. He claimed compensation and the insurer accepted liability. On 23 August 2010, an AMS (Dr Lahz) assessed 11% WPI with respect to the lumbar spine.

On 27 June 2013, the insurer made a work capacity decision that the worker had no current work capacity, which transitioned him onto the current benefits scheme from 27 September 2013, and his entitlement to weekly payments was assessed at $750.64 per week under s 38 WCA.

On 14 February 2017, Dr Bosanquet (for the insurer) assessed 14% WPI, but on 19 October 2017, the worker made a claim under s 66 WCA for 22% WPI based upon assessments from Dr Oates (14% lumbar spine, 7% WPI left lower extremity and 2% left upper extremity). However, on 27 October 2017, the insurer disputed that the worker satisfied the threshold of 21% WPI and it ceased weekly payments on 26 December 2017 under s 39 WCA.

On 30 November 2017, the worker's gave notice of claim and particulars under ss 281 and 282 WIMA to the insurer. However, on 11 December 2017, he advised the insurer that Dr Mobbs had recommended surgery, but he could not have this until he lost some weight and he requested that weekly payments be continued under cl 28C of Schedule 8 of the Regulation because maximum medical improvement had not been reached.

On 12 December 2017, the insurer replied that weekly payments could not be made until he was assessed by an AMS as a worker with high/highest needs. It disputed the allegations of injury to the left lower extremity and left upper extremity but consented to the dispute regarding permanent impairment of the lumbar spine being referred to an AMS. On 5 February 2018, that dispute was remitted to the Registrar for referral to an AMS, but the liability issues were not dealt with at that time.

On 2 March 2018, Dr Lahz re-examined the worker and certified that maximum medical improvement had not been reached.

On 12 March 2018, the parties lodged Consent Orders that discontinued the proceedings on the basis that the worker was entitled to receive weekly payments until the degree of permanent impairment was fully ascertainable. The worker requested the payment of arrears of weekly compensation (before 2 March 2018) but the insurer refused.

During a teleconference on 14 December 2018, ***Senior Arbitrator Capel*** allowed the worker to amend the AARD to claim weekly payments from 26 December 2017 to 1 March 2018 under s 38 WCA and the allegations of injury to the lower extremity, upper extremity and scarring were withdrawn. He noted that the parties agreed that the liability issues could be determined in future proceedings. He identified the following issues: (1) Whether the WCC has jurisdiction to make orders for the payment of weekly compensation after 260 weeks and before the MAC issued (ss 38 & 39 WCA)? (2) Whether the worker is entitled to be paid weekly compensation after 260 weeks and before a MAC confirmed that the degree of permanent impairment was not fully ascertainable (ss 38 and 39 WCA)? and (3) Quantification of the entitlement to weekly payments (s 38 WCA).

The Senior Arbitrator determined the matter on the papers based upon written submissions. He held that the clear and unambiguous language used in s 38 (2) WCA confirms that the insurer is responsible for assessing a worker's capacity after the second entitlement period and it made a work capacity decision on 27 June 2013 and determined that the worker had no current work capacity. He held, relevantly:

> 78. The section also removes the power of the Commission to make a decision that is inconsistent with an insurer's work capacity decision. However, it only prevents the Commission from making a determination **inconsistent** with the work capacity decision, not from making a determination that is **consistent** with the work capacity decision (my emphasis).
>
> 79. Therefore, I am satisfied that I can make an order pursuant to s 38 of the 1987 Act, provided that it is not inconsistent with the work capacity decision of the insurer. Whether the applicant has an entitlement in the period of the claim is another matter.

He stated that the work capacity decision made in June 2013 remained in force and the insurer's actions in continuing to make payments under s 38 WCA indicated that it accepted that the worker continued to have no current work capacity and that this was likely to continue indefinitely. Regarding whether cl 28C of Sch 8 of the Regulation was satisfied, the worker relied upon the decision of Arbitrator Sweeney in *Kennewell*, but the respondent relied upon the decision of Arbitrator McDonald in *Taumololo.*

The Senior Arbitrator applied the reasoning in *Kennewell* and stated:

> 127. Upon review of the language used in the clause and the context, it seems that the proper and most logical construction is that an assessment is "pending" because the AMS has already conducted the examination and has declined to assess a worker for the relevant reasons. That is a one step process, rather than the two-step approach of a worker waiting to have the assessment and then finding out that the permanent is not fully ascertainable.
>
> 128. It seems to me that the only reason why the assessment is pending is because the AMS has said that an assessment cannot be provided, not the reverse situation. This is consistent with the interpretation suggested by Dr Lucy and adopted by Arbitrator Sweeney in *Kennewell*.

He held that *"…once all of the criteria in cl 28C of Pt 2A of Sch 8 f the 2016 Regulation have been satisfied, s 39 of the 1987 Act does not apply."* He distinguished *Taumalolo* as the arbitrator was not satisfied that the insurer had made a work capacity decision and decided that she lacked power to make any order under s 38 WCA. He awarded weekly payments from 26 December 2017 to 1 March 2018 under s 38 (6) WCA.

Section 39 WCA – 20% WPI threshold satisfied after weekly payments ceased – Kennewell applied – worker entitled to weekly payments during disputed period

Whitton v Secretary, Department of Education [2019] NSWWCC 27 – Arbitrator Josephine Bamber – 7 January 2019

Background

The worker injured her right wrist at work on 2 November 1999. She underwent arthroscopic surgery on 10 July 2000, after which she attempted to perform suitable duties. She cased work completely in/about 2001/2002. She received weekly payments for all periods of incapacity.

On 4 November 2013, the insurer made a work capacity decision, that the worker had no current work capacity, which transitioned her claim onto the current scheme of weekly payments.

On 10 August 2017, Dr Harbison (qualified by the insurer) assessed 13% WPI. On 16 August 2017, the insurer issued a s 39 notice to the worker advising that weekly payments would cease on 25 December 2017.

The worker filed an ARD and a threshold dispute was referred to an AMS (Dr Mastroianni). On 18 June 2018, a MAC was issued that assessed 32% WPI.

On 19 July 2018, the worker served the MAC and Certificates of Capacity from 26 December 2017 to 11 October 2018 upon the insurer and requested weekly payments. The insurer resumed payments from 18 June 2018, but it declined to make payments from 26 December 2017 to 18 June 2018.

During a telephone conference on 3 October 2018, the arbitrator ordered the parties to file written submissions, with the dispute to then be determined on the papers.

The respondent argued that the Commission does not have jurisdiction to determine the dispute and that ss 38 and 39 WCA, as a matter of statutory construction, are intended to be the exclusive domain of the insurer (or employer). It relied upon the decisions of Keating P in *Lee v Bunnings Group Ltd* and *Paterson v Paterson Panel Workz Pty Limited*, in which he stated that an entitlement to compensation under s 38 must be assessed by the insurer and not the Commission. It also relied upon the decision of arbitrator McDonald in *Taumololo,* where she declined to make an award in similar circumstances.

The arbitrator noted that in *Taumololo* there was no evidence of a work capacity decision and in this matter, a work capacity decision was made on 3 November 2013. In *Robert Birch v Olympic Aluminium Pty Ltd* [2016] NSWWCCPD 54, Keating P held (at [137]):

> There is nothing in s 43 (3) WCA that commands or directs the Commission to make an order in the terms of a work capacity decision if there are valid reasons, as in this case, not to do so.

The Commission may make an order consistent with a work capacity decision and the arbitrator stated that if the worker's interpretation of section 39 is accepted, then the Commission has jurisdiction to order the payment of weekly compensation in the period claimed, because that would be consistent with the insurer's work capacity decision. She confirmed that she is not bound to apply a decision of another arbitrator and rejected the approach in *Taumololo.* She held:

> 52. I agree with and adopt the reasoning of Arbitrator Sweeney that the language of section 39 does not have a temporal component. It does not contain temporal embargoes such as appear in other parts of the workers compensation legislation, for example in sections 59A (2), (3) and (4) of the 1987 Act. Had the Parliament wished to limit payments to workers such as Ms Whitton from week 260 until after they had an assessment of greater than 20^ WPI, the Parliament could have so provided.

She entered an award from 26 December 2017 to 18 June 2018 *"at the applicable rate for a worker with no current work capacity."*

FROM THE WIRO

If you wish to discuss any scheme issues or operational concerns of the WIRO office, I invite you to contact my office in the first instance.

Kim Garling