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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. Some decisions are linked to AustLii, where available.

STOP PRESS

JUDGE PHILLIPS' DECISIONS IN RSM BUILDING SERVICES PTY LTD V HOCHBAUM AND TECHINCAL AND FURTHER EDUCATION COMMISION T/AS TAFE NSW V WHITTON ARE THE SUBJECT OF APPEALS. WIRO WILL REPORT ON THE COURT OF APPEAL'S DECISIONS IN DUE COURSE.

Court of Appeal Decisions

A worker with highest needs is entitled to compensation under s 38A WCA even where the amount payable under s 37 WCA is deemed to be "zero".

Hee v State Transit Authority of New South Wales [2019] NSWCA 175 – White JA & Simpson JA (Meagher JA dissenting) – 17 July 2019

Background

On 17 October 2013, the appellant injured his cervical spine at work. On 22 August 2016, the insurer agreed to make weekly payments based upon PIAWE of $1,391.35 per week, from 21 January 2014 to 31 May 2014, under ss 36 and 37 *WCA.* On 9 March 2017, a Complying Agreement evidenced 34% WPI (cervical spine) as a result of the work injury.

On 17 March 2017, the appellant claimed continuing weekly payments from 17 October 2013 under s 38A *WCA,* at the rate of $788.32 per week, as he was a worker with highest needs. However, in WCC proceedings he claimed such payments from 1 June 2014.

On 27 October 2017, the Senior Arbitrator issued a COD, which determined that the appellant resumed his full pre-injury duties on 1 June 2014 and that his actual earnings since then exceeded 95% of PIAWE (s 37 *WCA)* and that he was not entitled to weekly payments under s 38A *WCA.* He entered an award for the respondent.

The appellant appealed, but on 26 February 2018, ***President Judge Keating*** confirmed the Senior Arbitrator's determination. The appellant then appealed to the Court of Appeal.

Court of Appeal.

White JA identified the issues on appeal and expressed his conclusions as follows:

- Whether the appellant is necessarily entitled to some payment under s 38A *WCA* if he suffered a partial incapacity within the meaning of s 33 *WCA* (he not being entitled to weekly compensation benefits under ss 36 and 37)?

  His Honour agreed with Meagher JA, that the appellant was not entitled to payments under s 33, as in the case of partial incapacity a worker is only entitled to compensation under some other provision of the *WCA* that so provides.

- Whether the Arbitrator determined that the appellant was able to return to work in his pre-injury employment within the meaning of the definitions of *"current work capacity"* and *"no current work capacity"* in s 32A *WCA*?

  His Honour held that such a determination requires a finding not only that the appellant returned to his full pre-injury duties, but that he was able to do so to the same extent as he was able to fulfil those duties before his injury, and the Arbitrator did not make that determination.

- Whether the President made such a determination on appeal from the Arbitrator?

  His Honour held that the apparent finding by the President to this effect would only be relevant if he had found an error of fact, law or discretion by the Arbitrator and that no different decision should be substituted because the appellant was able to work in his pre-injury employment. The President erred in law in deciding that the Arbitrator found that the appellant had returned to his pre-injury employment.

- Whether the appeal should be dismissed because the appellant was not entitled to weekly compensation payments under ss 36 or 37 *WCA*?

  His Honour stated:

  > 90. Reading s 38A literally, it must be decided whether Mr Hee was not able to return to his pre-injury employment, meaning that he was not able to return to his full duties to the same extent as he had been able to perform them before his injury, and if so, whether the compensation payable to him under s 37 (being the relevant provision) was less than $788.32. The answer to the second question is "yes" because the amount payable to him would have been less than zero and that would be taken to be the amount.
  >
  > 91. On a literal construction, if the requisite finding of fact that Mr Hee was not able to return to his pre-injury employment were made in the Commission, then Mr Hee would be entitled to the benefits claimed under s 38A, notwithstanding that he was not entitled to weekly compensation benefits under ss 36 or 37. (Whether absence of entitlements to benefits under s 38 would preclude an entitlement to benefits under s 38A was not the subject of submissions)…

  His Honour held that nothing in the text of s 38A states that the right of a worker with highest needs to receive the amount payable under s 38A depends upon their earnings. He stated:

  > 103. Section 38A achieves the result that workers with highest needs will receive at least $788.32. if a worker with highest needs and no current work capacity were earning less than $985 (as adjusted), his or her compensation payments would be topped up under s 38A to $788.32 (as adjusted).

104. The curious results illustrated above arise because the benefits payable under s 38A are not adjusted by reference to an injured worker's other earnings but by reference to the amount of weekly payments of compensation payable to the worker. The less compensation payable, because of higher post-injury earnings, the greater are the benefits available under s 38A to a worker with highest needs. The result contended for by Mr Hee is consistent with that outcome.

105. This may well not be what Parliament intended…

107. The construction for which Mr Hee contends may well be said to give rise to a perverse outcome. But it is consistent with the perversity inherent in the statutory scheme as illustrated above…

His Honour stated that some re-writing of s 38A would be required to confine its operation to a floor of workers of highest needs who are on low wages in accordance with the stated policy, but this *"goes well beyond the legitimate scope of judicial interpretation"*.

Accordingly, he remitted the matter to the Commission, constituted by a Presidential member, to determine whether or not the appellant returned to his pre-injury employment within the meaning of the definitions of *"current work capacity"* and *"no current work capacity"* in s 32A.

Simpson AJA agreed with the orders proposed by White JA but expressed her own conclusions, as follows (emphasis added):

165. The ultimate question is the proper construction of s 38A. Unless the construction advanced by Mr Hee is correct, there is no utility in remitting the matter to the Commission. That is because it is accepted on all sides that, on the application of the formula prescribed by s 37 (2), no amount would be "payable" to Mr Hee under that subsection. If, as he asserts, an amount of "zero" is an "amount payable", then, if it is found that he had *"current [that is diminished] work capacity",* the Commission would be obliged to determine in his favour that he was entitled to a weekly payment of $788.32, regardless of his current earnings. If, on the other hand, the construction adopted by the President is correct, then, even if he is found to be a *"worker who has current [diminished] work capacity"*, s 38A does not operate to entitle him to payment. That is because there is no amount of weekly payments *"payable"* under s 37 (2).

166. ***As the Judgment of White JA demonstrates, either construction is apt to give rise to anomalies. In some respects, Mr Hee's argument is an unattractive one. If his construction of s 38A is correct, he will be the recipient of an unwarranted windfall - $788.32 per week, in addition to his current weekly earnings, in circumstances where his loss of income is not such as to entitle him to payment under s 37 (2). …***

168. The words in the Explanatory note and the Minister's Second Reading Speech are a powerful indicator that the intention was to create an entitlement that took into account the post-injury earnings of the claimant worker. ***Those words were not enacted. The task of this Court is to construe the legislation as it is enacted. The literal construction is as contended for on behalf of Mr Hee. The words omitted cannot be inserted by judicial decree.***

169. An alternative approach is to treat s 33 as a preclude to ss 36-38, which sections then amplify the entitlement and specify the method of calculation of the payments contemplated by s 33. ***But to adopt that construction would be to read into s 33 words that the legislature did not enact.***

170. The conundrum in this debate is the meaning of s 35 (2) which is, to say the least, obscure. Section 35 (2) does not provide that *"zero"* is an *"amount".* It deals with amounts that are less than zero which are then to be treated as *"zero"*. In fact, that is precisely what the application of the s 37 (2) formula to Mr Hee's pre- and post-injury earnings yields. By reason of s 35 (2), Mr Hee's entitlement is to be treated as *"zero".* That is the amount payable under s 37 (2), and the amount to be taken into account for s 38A purposes.

171. I appreciate that this result may well not be what the legislature intended. It is the consequence of what it enacted.

172. The construction to which I have come is not to be treated as any conclusion that Mr Hee is entitled to payment under s 38A. That, as indicated above, will depend on findings of fact not yet made. The analysis has been necessary to determine what order should be made following the conclusion that neither the Arbitrator nor the president addressed the case advanced on behalf of Mr Hee, and the necessary fact-finding exercise was not undertaken.

Meagher JA (dissenting) held that the President's conclusion that the Arbitrator made findings as to the appellant's capacity to return to his pre-injury employment in the context of determining his *"work capacity"* may have involved error. However, that error is not the subject of grounds of appeal 2 or 6, which are directed at securing a finding that the injury resulted in *"partial incapacity"* under s 33, entitling the appellant to the benefit of s 38A. However, any such error could not be material to the outcome of the appellant's case, which was that he was entitled to the benefit of s 38A if his injury resulted in *"partial incapacity"* and regardless of whether he was entitled to a determination under s 37 as a worker with *"current work capacity"*. He therefore held that the appeal should be dismissed irrespective of whether grounds 2 and 6 are upheld.

WCC Presidential Decisions

Duty to give adequate reasons and error in fact finding

Fairfield City Council v McBride [2019] NSWWCCPD 28 – Deputy President Michael Snell – 20 June 2019

Background

The appellant employed the worker from about 1985 to 7 January 2005 (redundancy). The worker alleged that he injured the cervical and lumbar spines, both knees and feet and both upper extremities on 26 specific dates and a disease injury (deemed date: 7 January 2005). He claimed weekly payments from 7 January 2005 to 30 June 2007, s 60 expenses and compensation under s 66 for permanent loss of efficient use of the right leg at or above the knee (injury on 31 December 1996).

Arbitrator Anthony Scarcella identified the issues as: (1) whether any of the alleged injuries occurred; (2) whether there was any resultant incapacity; (3) the extent of any incapacity; and (4) whether any treatment expenses were reasonably necessary.

On 20 December 2018, he issued a COD, which determined that the worker injured his right leg on 31 December 1996 and that he suffered consequential injuries to both knees. He found that the worker had suffered injuries on 10 later dates between 6 October 1998 and 6 February 2004 and awarded weekly payments for the period claimed (under the pre-2012 scheme) and s 60 WCA expenses. He remitted the s 66 dispute to the Registrar for referred to an AMS.

Appeal

The appellant alleged that the Arbitrator erred: (1) In fact in determining the issues of injury; (2) In fact and law in determining weekly compensation; (3) In law in determining the matter on a basis not put by or to the parties; and (4) In law in failing to give adequate reasons and in particular, in failing to properly engage with the conflicting evidence.

Deputy President Snell upheld grounds (1) and (4). He noted that the appellant argued that the reference to an aggravation on 7 January 1996 suggested that the date of injury was 31 December 1995 and, in that event, the injury pre-dated it being a self-insurer and the claim involved an insurer that was not joined to the proceedings. He stated:

> 52. …The merits of this argument were not discussed in the reasons… Additionally, the claim form did not identify which ankle was injured. A medical certificate of Dr Doust, dated 8 January 1997, gave the date of injury as "31/12/96", the diagnosis as "Fracture L ankle" (emphasis added), and the treatment as "Rest and POP back splint". The certificate certified the respondent unfit from 31 December 1996, to be reviewed on 12 January 1997. The appellant's submissions relied on this certificate. If accepted, this argument was potentially fatal to the respondent's case, that a fracture of the right ankle occurred on 31 December 1996, ultimately resulting in more widespread complaints in the right leg, including the knee. The analysis in the reasons at [82] does not deal with this issue of which ankle was injured, nor does it refer to the certificate of Dr Doust, which was direct evidence that the injury was to the left ankle…

This issue was *"critical to the contest between the parties"* and it was necessary for the Arbitrator to *"'enter into' the issues canvassed and explain why one case is preferred over another"*. However, he erred by failing to engage with the parties' competing cases involved error. The fact-finding process miscarried, which is an appealable error. Also, the reasons dealing with the allegations of 'disease' injury and the various frank incidents that were relied on did not comply with the duty to give reasons and involved an error in the fact-finding process of the kind identified in *Fitzgibbon.*

Accordingly, he revoked the COD and remitted the matter to a different Arbitrator for re-determination under s 352 (7) *WIMA.*

Appropriate standard of proof - "actual persuasion on the balance of probabilities" and not "comfortably satisfied"

Estate of Clarke v State of New South Wales (Greystanes Disability Services) [2019] NSWWCCPD 29 – President Judge Phillips – 1 July 2019

Background

On 18 March 2007, the worker injured her cervical spine, left shoulder, lumbar spine, left knee and left hip in a fall at work. She later alleged that she also injured her right lower extremity (hip) and right shoulder at that time and/or that these were consequential injuries, but the insurer disputed these allegations.

In her statement dated 27 February 2018, the worker said that she consulted her GP soon after the 2007 fall and complained of pain in her knees and hips. He was not sure whether the fall caused those problems or whether they were due to the nature of her manual work, but he diagnosed bursitis in the left hip and referred her to Dr Coffey. Dr Coffey administered steroid injections to the left hip and then performed surgery on 2 February 2009. About 2 weeks later, she slipped while using crutches and injured her left shoulder.

On 16 November 2009, the worker underwent a gluteal tendon reconstruction on her left hip. She was later referred to Dr Graham, who advised against further hip surgery.

In her second statement dated 28 May 2018, the worker stated that her injuries were the result of her accepted injuries, her altered gait and "secondary problems".

On 8 November 2018, ***Senior Arbitrator Glenn Capel*** issued a COD, which determined that the deceased did not suffer an injury to her right lower extremity (hip) arising out of or in the course of employment on 18 March 2007 and that she did not develop a consequential condition in her right lower extremity (hip) and right upper extremity (shoulder) as a result of the injuries suffered on 18 March 2007. He remitted the matter to the Registrar for referral to an AMS in relation to a threshold dispute with respect to the left lower extremity and left upper extremity and awarded s 60 expenses totalling $566.45.

However, the Senior Arbitrator issued a second COD on 17 December 2018, after receiving further submissions and records. This amended the remitter to the Registrar for assessment of the whole person impairment of the cervical spine, lumbar spine, left lower extremity (hip), left upper extremity (shoulder) and scarring (TEMSKI) due to injury sustained on 18 March 2007.

Appeal

The worker appealed and alleged that the Senior Arbitrator erred: (1) in fact in failing to find that she suffered injury to her right hip on 18 March 2007; (2) in law in doubting the veracity of her statement because it was *"completed with the assistance of her solicitor in February 2018, some 11 years after her fall"* without her being given the opportunity to respond to the inferences drawn; (3) in law in purporting to apply the principles in *Kooragang Cement Pty Ltd v Bates* and *Comcare v Martin* to the factual question whether she suffered injury to her right hip in the fall of 18 March 2007; and (4) in the factual findings that she did not suffer consequential conditions of her right hip and/or right shoulder.

The worker died on 21 February 2019, after the COD issued and this appeal had been lodged, and the appeal was conducted upon instructions from her Executor.

President Judge Phillips upheld grounds (3) and (4), but dismissed grounds (1) and (2). His reasons are summarised below.

Based upon *Elsamad* and *Drca,* his Honour held that the Senior Arbitrator erred in law by applying a higher standard of proof, but he dismissed ground (1) as it did not allege an error of law. His reasons are summarised as follows:

He noted the general principles and authorities regarding appeals that DP Roche stated in *Raulston v Toll Pty Ltd* and Sackville AJA's comments in *Northern NSW Local Health Network v Heggie.* He held that the appeal is directed to the identification and correction of error and it is not a review at large of what the Arbitrator did or the findings made and cited the decision of Keating P in *Ireland,* relevantly*:*

> 48. On analysis, I think, what their Honours said is not inconsistent with the requirement that the tribunal of fact be actually persuaded of the occurrence or existence of the fact before it can be found. On their Honours' approach, what is required is a determination of the respective probabilities of the event's having occurred or not occurred. There is nothing in that analysis to suggest that the determination in favour of probability of occurrence should not require some sense of actual persuasion.'"

His Honour held:

> 74. As is clear from the above extract from *Ireland*, the Arbitrator *"must feel an actual persuasion of the existence of that fact"*. It is clear from a consideration of the Senior

Arbitrator's decision that he was conscious that there was no contemporaneous evidence of injury to the right hip. Indeed, there was an absence of complaint and indeed even the appellant's two statements were not strong on this point. Ultimately in paragraph [124] the Senior Arbitrator reached the following view:

> Bearing in mind the principles set out in Kooragang and Martin, and having regard to the evidence overall, I am not comfortably satisfied on the balance of probabilities that the applicant suffered an injury to her right hip in the fall on 18 March 2007. (emphasis added). …

76. The distinction between the phrases *"comfortably satisfied"* and *"actual persuasion"* where there are competing hypotheses about the existence of a fact (in this case injury) have been considered by Deputy President Roche in *Drca v KAB Seating Systems Pty Ltd (DRCA)*. In *Drca* Deputy President Roche held as follows:

> Last, by saying that there was not 'sufficient evidence' for him to be 'comfortably satisfied' that Mr Drca's gastrointestinal condition arose as a result of pain-relieving medication for his accepted back injury, the Arbitrator applied the wrong standard of proof. For an applicant to succeed in a claim for compensation, he or she only has to satisfy the Commission on the balance of probabilities of the facts that establish the claim.
>
> A mere mechanical comparison of probabilities, independent of a reasonable satisfaction, will not justify a finding of fact. The fact finder must feel 'an actual persuasion of the occurrence or existence of the fact in issue before it can be found' (Redlich JA, Harper JA and Curtain AJA in *NOM v DPP* [2012] VSCA 198 at [124]; see also Dixon J in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336 and Dixon, Evatt and McTiernan JJ in *Helton v Allen* [1940] HCA 20; (1940) 63 CLR 691 at 712).
>
> Once the feeling of actual persuasion has been obtained*, 'it is sufficient for it to lead to the conclusion that the event in question is more likely than not to have occurred, with 'a probability in excess of 50%''* (McDougall J (McColl and Bell JJA agreeing) at [51] in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246).
>
> The standard of being *'comfortably satisfied'* is a higher standard than that of actual persuasion on the balance of probabilities. While the balance of probabilities standard will be satisfied if an Arbitrator is 'comfortably satisfied' that a fact exists, that is not a necessary prerequisite for satisfaction of the civil standard and the Arbitrator erred in applying that standard. The evidence only had to establish that it was more probable than not that the gastrointestinal condition resulted from the medication taken for Mr Drca's accepted back injury…

His Honour noted that Wood DP considered *"comfortably satisfied"* in *Elsamad v Belmadar Pty Ltd (Elsamad)*, and he stated:

> Had the Arbitrator decided she **was** comfortably satisfied of the occurrence of the injury, as the appellant submits, that would not amount to error. Having found she was **not** 'comfortably satisfied' is, however, a contrary consideration and indicates that the Arbitrator was applying a higher standard of proof than the circumstances required, which the appellant failed to meet. (emphasis in original)

His Honour rejected ground (2), which appeared to allege a failure to provide procedural fairness. He stated, relevantly:

> 88. Before dealing with the authorities on this issue, it is worth examining the dispute that was being dealt with by the Senior Arbitrator…The respondent addressed its opposition to these allegations and pointed to problems with the evidence. Having heard these submissions, there was no application by the appellant's lawyers for the appellant worker to give viva voce evidence. It is therefore clear that the issues in dispute were well known and the appellant worker had the opportunity to present her case and to present arguments with regards to these issues, including on her credibility, which were ultimately ruled upon by the Senior Arbitrator.

The Senior Arbitrator did not make an adverse finding of credit against the appellant, but rather considered that her evidence was unreliable due to the passage of time and the fact that it placed emphasis and reliance upon medical records and opinions of treating doctors. He stated:

> 89. …I accept that the distinction between an adverse credit finding and one of unreliability ultimately produces the same result for the appellant, namely that her version of events is not accepted. However, it is clear that by the time the appellant produced the two statements that the Senior Arbitrator has referred to, the medical evidence and the lack of contemporaneous complaint of injury to the right hip was plainly apparent to the appellant and her legal adviser. Indeed, the statements direct their attention to such passages of the medical material which were said to be supportive of the appellant's complaint of injury. It is clear that this was known to be a live issue and the appellant in her two 2018 statements attempted to address it.

The Senior Arbitrator did not infer that the worker's solicitor *"was putting words into her mouth",* but *"made an accurate statement of what transpired regarding the production of those statements"*. He was satisfied that the issues in dispute before the Senior Arbitrator were well known to the parties, both of whom were represented by counsel, and as the appellant had every opportunity to be heard on them, she was afforded procedural fairness.

In relation to ground (3), his Honour stated, relevantly:

> 101. … Rather the appeal point is directed to the Presidential decision of *Ireland* and that the Senior Arbitrator ought to have been actually persuaded that the appellant suffered injury as alleged. As discussed above (in Ground One) this formulation by the Senior Arbitrator is in fact imposing a higher standard or burden of proof than the circumstances required and has been the subject of Presidential decisions in *Drca* and *Elsamad*. Even though the appeal point is not framed, as it was properly framed in *Elsamad*, the error of law exists…

In relation to ground (4), his Honour stated, relevantly:

> 114. As stated above in respect to Ground One, *Raulston* requires that actual factual error be identified. It must be shown that the Senior Arbitrator was wrong. In this case, the appellant has submitted that there was only one doctor whose opinion touched upon the question of consequential injury, Dr Giblin, and the implication is that the Senior Arbitrator was bound to accept it, there being no other evidence. It is also said that Dr Panjratan supported this view. This submission is incorrect. Factually it is incorrect for the reasons outlined (above) but the Senior Arbitrator has carefully weighed the opinion of Dr Giblin and for the reasons identified, accorded it little or no weight. This is not a factual error.
>
> 115. However, on this issue, the Senior Arbitrator's ultimate decision can be found in paragraph [156] of the Reasons set out below:
>
> > In the circumstances, I am <u>not comfortably satisfied</u> on the balance of probabilities that the applicant has discharged the onus of establishing that she

> sustained an injury to her right hip on 18 March 2007, or that she developed a consequential condition in her right hip and right [shoulder] as a result of the accepted injuries to her back, neck, left shoulder and left hip. Accordingly, there will be an award for the respondent.

Following the appellant's death, the President directed the parties to make submissions about whether her death altered any of the orders sought or any other orders that the Commission might make. The appellant's solicitor replied as follows:

> The Applicant has already been awarded a combined 20% WPI in regard to the cervical spine, lumbar spine, left lower extremity (left hip), left upper extremity (Left shoulder) and Scarring and we were seeking additional WPI in respect of injuries to her right hip and right shoulder.
>
> We will submit that President Phillips' decision in *RSM Building Services v Hochbaum* [2019] NSWWCCPD 15 is incorrect. We say Section 39 (2) of the *Workers Compensation Act 1987* is a factual question, whether the worker was more than 20% when payments stopped. Just because the assessment has not been carried out under section 65 does not take away from that fact. That submission is bolstered by the situation in this case in which an assessment could not be carried out on a dead person.
>
> If the Applicant is successful on the Appeal, the only assessment really in play is Dr Giblin and if the applicant gets over the threshold the estate can preserve its rights.

His Honour noted that these submissions did not engage with the Direction and he stated:

> 127. The only matters on appeal before me are those constituted by the four grounds that I have dealt with. The power on appeal is that as provided for by s 352 (5) of the *1998 Act* and is limited to the correction of error. The Senior Arbitrator did not decide any issue pertaining to s 39 of the *1987 Act* as it was not argued before him. By definition, no error in approach could therefore arise. These four grounds have been decided and there is thus no power to decide any further question pertaining to the *Hochbaum* decision or indeed the construction of s 39 of the *1987 Act*.

Accordingly, his Honour remitted grounds (3) and (4) of the Appeal to a different Arbitrator for re-determination and concluded that the parties are at liberty to make such submissions as they see fit regarding *Hochbaum* and s 39 *WCA.*

Voluntary ambulance worker within the meaning of cl 16 of sch 1 WIMA – meaning of "in cooperation with the Health Administration Corporation"

Secretary, Ministry of Health v Dawson [2019] NSWWCCPD 30 – Deputy President Michael Snell – 2 July 2019

Background

The applicant was an enrolled nurse employed at John Hunter Hospital and was also a member of St John Ambulance Australia (NSW) (St John), which was to provide first aid services to the Newcastle Jockey Club on 18 and 19 September 2015. On 18 September 2015, she arrived at Broadmeadow Racecourse and in concert with a divisional Superintendent from St John, she unloaded some equipment from her car and parked. They began putting up a marquee (from which the first aid post was to be conducted) and while doing so, a wind caught the marquee, which wrapped around her legs and caused her to fall. She suffered a fracture dislocation of her right ankle, which required 2 surgeries, and she was off work until 9 March 2016. On 9 May 2016, she claimed compensation from the appellant, but it "reasonably excused" the claim on the grounds that she was performing

volunteer services and was not a paid employee of "St John Hospital". It disputed the claim on 30 August 2016, denying that she was a worker under s 4 *WIMA* and asserting that voluntary ambulance workers with St John are not covered by sch 1 *WIMA.*

On 25 July 2017, the applicant claimed compensation under s 66 *WCA* for 13% WPI. The insurer disputed the claim and denied that she was a worker employed by St John. She then filed an ARD which claimed weekly payments, medical expenses and compensation under ss 66 *WCA.*

On 20 September 2018, ***Arbitrator Philip Young*** issued a COD, which determined:

- Although the applicant was not rendering first aid when the injury occurred, erection of the marquee was a necessary preparation for the provision of first aid, which fell within the meaning of being "in connection with" the rendering of first aid. She was therefore involved in "ambulance work" at the relevant time;
- She was engaged in that work *"voluntarily and without obligation"*;
- As to whether she was engaged in *"ambulance work with the consent of or under the authority and supervision of or in cooperation with the Health Administration Corporation"* (HAC), he referred to a Government Gazette that the applicant relied upon, which indicated that St John was paid by HAC for certain work and evidenced a relationship between St John and HAC. He held:

  > I am comfortably satisfied, because of the Gazette entries, that there was a general financial relationship between St Johns and [the HAC] and that accordingly in general terms at least, the HAC consented to the presence and involvement of St Johns and its participation in providing first aid and other services to the general public. Were the situation otherwise, St Johns would be supplying first aid services to the general public without the consent of the HAC.

- Cooperation existed between St John and the HAC and the applicant's work fell within the umbrella of that general cooperation. Therefore, cl 16 of sch 1 *WIMA* applied.

Deputy President Snell stated that for cl 16 to apply, the applicant must satisfy at least one of three propositions, namely: (a) that she engaged in the work with the consent of the HAC; (b) that she engaged in the work under the authority and supervision of the HAC; or (c) that she engaged in the work in cooperation with the HAC. He noted that the Arbitrator found in her favour in relation to propositions (a) and (c).

The appellant alleged that the Arbitrator erred as follows:

> (1) by relying on the Gazette entries as evidencing a "relationship" between St John and the HAC, as those entries were not relevant to this issue;
>
> (2) by failing to consider what was required to establish "cooperation" between the applicant and the HAC, which went to the Commission's jurisdiction to make an award; and
>
> (3) by finding that the pro forma document was evidence sufficient to establish "cooperation", where the appellant's unchallenged evidence was that it did not require this document and, in any event, the form did not establish "cooperation".

DP Snell upheld ground (1) and stated, relevantly:

> 25. The initial step in the Arbitrator's reasoning was that the Gazette evidenced a financial relationship in which St John "was paid by the HAC for certain work". He reasoned that, "because of the Gazette entries", there was a "general financial relationship" between St John and the HAC. He reasoned from this that "in general

terms at least, the HAC consented to the presence and involvement of St Johns and its participation in providing first aid and other services to the general public".

The initial step in this reasoning process was flawed…

He held that the Gazette does not provide for payment by HAC to St John for certain work and it does not evidence a financial relationship between Sr John and HAC.

Grounds (2) and (3)

DP Snell upheld ground (3) and stated that it was not necessary to determine ground (2). His reasons are summarised below:

46. The basis on which the Arbitrator dealt with the issue of 'co-operation' was essentially found at [23] of his reasons. The Arbitrator said *that "co-operation existed between St Johns and the HAC and [Ms Dawson's] work fell within the umbrella of that general cooperation".* The evidence on which the Arbitrator apparently relied in making this finding was that of Ms Dawson, that a pro forma document, setting out a patient's complaints, treatment and advice was completed by St John volunteers such as Ms Dawson, and *"this document was provided to officers within the HAC and became part of the HAC's records"*. The Arbitrator said *"[t]hat arrangement in my view is powerful evidence of co-operation between St Johns and the HAC"*. …

60. In the passage of the reasons where he arrived at his view on 'co-operation' ([16] – [23]) the Arbitrator did not refer to Ms Murphy's evidence, that the provision of the pink copy of the patient record was an internal procedure of St John, not required by NSW Health, which generated its own records that were transferred with the patient. Ms Murphy was employed by the NSW Ministry of Health from 2010, and her responsibilities included *"overall leadership and strategic management of workers compensation",* and management of insurable risks other than workers compensation. It is not improbable that she would have knowledge of the paperwork associated with patient transfers and the like. There was no specific evidentiary basis for concluding that she did not have such knowledge.

61. Ms Murphy's evidence on this topic was consistent with the notations on the Confidential Patient Record itself. The notation at the top of the pro forma document provides that the top copy is to go to "State/Territory Office", and the pink copy to the patient. One can conceive that a patient may well take his/her copy if being transported to hospital… The directions for dealing with the document (see [48] to [51] above) on their face appear to be directions emanating from St John, rather than requirements of the HAC. It does not indicate that the pink copy was provided to HAC and became part of their records. Not all patients treated at first aid would be expected to require ambulance transport. In circumstances where a patient was simply treated at first aid, the directions on the pro forma document indicate the pink copy would be given to the patient.

62. The Arbitrator did not reject Ms Murphy's evidence, it was simply not referred to. The Arbitrator did not indicate that it failed to satisfy the requirements of r 15.2 of the *Workers Compensation Commission Rules 2011* or otherwise give any reason for not considering it. In *Mifsud v Campbell* Samuels JA said:

> Accordingly, a failure to refer to some of the evidence does not necessarily, whenever it occurs, indicate that the judge has failed to discharge the duty which rests upon him or her. However, for a judge to ignore evidence critical to an issue in a case and contrary to an assertion of fact made by one party and accepted by the judge – as the defendant's denial of having consumed alcohol – may promote a sense of grievance in the adversary and create a litigant who

> is not only 'disappointed' but 'disturbed' – to use the words which appear in the New Zealand case of *Connell v Auckland City Council* (1977) 1 NZLR 630 at 634.

DP Snell held that the Arbitrator erred in failing to deal with Ms Murphy's evidence and this was an error of the type referred to in *Waterways Authority v Fitzgibbon* at [129] to [130]. The use he made of the pink copy of the Confidential Patient Record was potentially important in various ways. He attached significance to it and it appeared to be the dominant reason he reached the view he did on 'co-operation'. The erroneous finding affected the result, and involved appealable error. Ground No. 3 is upheld.

He stated that cl 16 of sch 1 *WIMA* is *"a conferring provision with a beneficial purpose"* and it should be construed beneficially and he held:

> 71. I do not accept the appellant's submission that, for the requirement of co-operation to be satisfied, it is necessary that *"mutual and enforceable obligations"* be in place. The words of the clause do not suggest such a requirement. To the contrary, the situation with which the clause deals is one where a volunteer, *without obligation*, engages in any ambulance work. It is necessary that the putative deemed worker engage in such work without obligation. There are multiple clauses in Sch 1, dealing with deemed workers, which involve contractual arrangements (by way of example see cll 1, 1A, 2, 2A and 3 of Sch 1). These contrast with the words of cl 16, which do not require the existence of enforceable obligations, and indeed specify that the ambulance work is to be carried out voluntarily and without obligation.
>
> 72. The finding that the Arbitrator made was based on co-operation. The requirement is that the ambulance work be *"in co-operation with" the HAC"*. This third scenario may be contrasted with the first two of the scenarios in subcl (1), satisfaction of which requires that the work be "with the consent of" the HAC, or "under the authority and supervision of" the HAC. The first two of the scenarios direct attention to the HAC; did it consent to the person engaging in any ambulance work, or did it exercise authority and supervision over such work. The third alternative directs attention to whether the putative deemed worker engaged in the work *"in cooperation with" the HAC. It directs attention to the relationship between the alleged deemed worker and the HAC".*

He decided that *"cooperation"* should be given its primary and natural meaning, namely *"to work or act together or jointly"* (Macquarie Dictionary Online) and concluded:

> 77. Whether the evidence established that Ms Dawson engaged in the ambulance work in cooperation with the HAC depended, at least in part, on the view that was taken of the lay evidence of Ms Dawson and Ms Murphy. The Arbitrator relied essentially on Ms Dawson's evidence dealing with the pink copy of the Confidential Patient Record, that it was "provided to officers within the HAC and became part of the HAC's records". The evidence of Ms Murphy was that the HAC had its own paperwork that was used in patient transfers, and it had no need of the pink copy of the Confidential Patient Report generated by St John. If this were accepted, it is difficult to see that the other evidence about the pink copy could lead to a conclusion that the relevant work was "in co-operation with" the HAC. 'Co-operation', in the sense of working or acting together or jointly, would not be present.

Accordingly, he revoked the COD and remitted the matter for re-determination by a different arbitrator and observed that s 67B of the *Health Services Act* may be of relevance.

Extension of time to appeal under r 16.2 (12) of the WCC Rules 2011 – exceptional circumstances – demonstrable and substantial injustice – whether proposed treatment is reasonably necessary under s 60 WCA

Broadspectrum Australia Pty Ltd v Skiadas [2019] NSWWCCPD 31 – President Judge Phillips – 5 July 2019

Background

The worker injured her back on/about 15 November 2011; she injured her neck on 9 July 2014; and also suffered injuries to those body parts as a result of the nature and conditions of her employment. In previous WCC proceedings, the employer was ordered to pay s 60 expenses including the costs of and incidental to anterior cervical discectomy surgery at the C4/5 and C5/6 levels, which Dr Al Khawaja performed on 15 April 2016. On 8 December 2017, Dr Al Khawaja sought approval for posterior fusion at those levels, but the insurer disputed that this proposed surgery was reasonably necessary.

On 7 December 2018, ***Arbitrator Rachel Homan*** issued a COD, which determined that the proposed surgery was reasonably necessary treatment pursuant to s 60 *WCA.*

Appeal

The employer sought to appeal, but its Application for Appeal did not comply with the Rules and it was lodged out of time. Therefore, it required an extension of time for the appeal to proceed. The proposed grounds of appeal were:

> (1) The Arbitrator erred in fact and law by finding that the proposed surgery was *"potentially effective…"* for relieving the respondent worker's symptoms in circumstances where there was no expert evidence to this effect and the respondent worker's expert evidence was contrary to such finding;
>
> (2) The Arbitrator erred in law in that she failed to provide any, or any adequate, reasons for the finding that the proposed surgery is *"potentially effective…";* and
>
> (3) The Arbitrator failed to properly engage with the appellant employer's submissions in the hearing in respect of the following such that the appellant employer was not provided a proper hearing:
>
> > (i) Dr Al Khawaja had not properly addressed the radiological evidence and has proposed surgery to treat complaints of pain rather than any structural deficiency; and
> >
> > (ii) that the first fusion had not been successful because it had been carried out to treat complaints of pain rather than any structural deficiency.

Extension of time

The appellant's submissions on time primarily concerned difficulties in filing a complete application due to the legal representatives and counsel being on leave over the Christmas and New Year holiday period, and the need to retain new counsel on 30 January 2019 due to health issues. The Respondent did not oppose an extension of time.

President Judge Phillips stated that r 16.2 (12) of the Rules provides to the effect that the Commission constituted by a Presidential member may, if a party satisfies them, in exceptional circumstances, that to lose the right to appeal would work demonstrable and substantial injustice, extend the time for making an appeal.

In exercising this discretion, the Commission must have regard to the principles discussed by Mc Hugh J in *Gallo v Dawson*, which were summarised by Roche DP in *Allen v Roads and Maritime Services,* as involving the need to have regard to: (a) the history of the

proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties of the grant or refusal of the application for the extension of time; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the respondent has a vested right to retain the judgment unless the application for extension of time is granted

His Honour noted that in *Land Enviro Corp Pty Ltd v HTT Huntley Heritage Pty Ltd,* the Court of Appeal held that the primary considerations on an application for leave to extend time within which to appeal are: (a) the extent of the delay and the reasons therefor; (b) the prejudice to the applicant if the application were to be refused; (c) the prejudice to the defendant from the delay if the application were to be granted; (d) the prospects of success on the proposed appeal.

In *Yacoub v Pilkington (Australia) Ltd* Campbell JA stated:

> (a) Exceptional circumstances are out of the ordinary course or unusual, special or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [1999] UKHL 4; [2000] 1 QB 198 (at 208).
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] EWCA Crim 1; [2000] I WR 1262; [2000] 1 All ER 907 (at 1268; 912-913).
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).
>
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

His Honour held that it is also necessary to bear in mind the system objectives and procedure before the Commission in determining whether exceptional circumstances are present. However, the appellant's submissions did not specifically address this issue and nothing in the history of the proceedings, the conduct of the parties or the nature of the litigation was relevant one way or the other. However, he concluded that if an extension of time was granted, the appeal would not succeed on its merits and there is no prejudice to the appellant if its application for an extension is refused. His reasons for this decision are summarised below.

His Honour rejected ground (1), noting that this attacked a factual finding that the proposed surgery was *"potentially effective".* Based upon *Raulston*, it is not sufficient that the Arbitrator may have preferred one view over another – her conclusion must be wrong. However, the medical evidence failed to substantiate the appellant's argument that this finding had no evidentiary basis as the purport of the opinions of Dr Al Khawaja and Dr Patrick was that the surgery was "potentially effective". Based upon the decisions in *Rose* and *Diab*, this is a relevant consideration for a finding of reasonableness under s 60 *WCA.*

His Honour rejected ground (2), which alleged that the Arbitrator failed to provide any or any adequate reasons for finding that the proposed surgery was "potentially effective". He noted that the principles regarding the adequacy of reasons were recently considered by DP Snell in *Fairfield City Council v McBride,* which he summarised as follows:

> (a) McColl JA in *Pollard v RRR Corporation Pty Ltd* said that *"[t]he extent and content of reasons will depend upon the particular case under consideration and the matters in issue"*.
>
> (b) Her Honour said:
>
> > *The reasons must do justice to the issues posed by the parties' cases. Discharge of this obligation is necessary to enable the parties to identify the basis of the judge's decision and the extent to which their arguments had been understood and accepted … it is necessary that the primary judge 'enter into' the issues canvassed and explain why one case is preferred over another. (citations omitted)*
>
> (c) Her Honour said that *"[b]ald conclusionary statements should be eschewed"*

His Honour stated, relevantly:

> 110. At Reasons [51] and [53], the Arbitrator was reviewing two leading cases in the area of determining whether medical treatment is reasonably necessary, namely *Diab* and *Bartolo*. In both of those cases Deputy President Roche outlined the approach to determining if medical treatment is reasonably necessary and set out a number of matters that the Court will have regard to, one of which is the potential effectiveness of the treatment.
>
> 111. The finding at Reasons [59], when properly understood, is merely the Arbitrator's application of Deputy President Roche's approach to the evidence that had been reviewed. The Arbitrator concluded that the proposed surgery was potentially effective and there is support for this finding in both Dr Al Khawaja's evidence and in Dr Patrick's evidence (referred to above).
>
> 112. It is clear that the Arbitrator, in accordance with the comments of McColl JA in *Pollard*, did indeed "enter into" the issues canvassed and explained why she preferred the opinions of Dr Al Khawaja and Dr Patrick. This is not a "*bald conclusionary statement"* that is warned against, rather this is a finding coming at the end of a process of reasoning and weighing of evidence. The Arbitrator undertook an appropriate analysis of the evidence.

His Honour rejected ground (3), which alleged that the appellant was not provided with a proper hearing and held, relevantly:

> 120. It is well accepted that a party is generally bound by the conduct of their case. The Arbitrator determined the matter on the basis of the arguments that were advanced. The appellant cannot now attempt to reagitate matters in a manner that is not consistent with the conduct of the case at first instance.
>
> 121. There is no basis to the allegation that the Arbitrator failed to afford the appellant a proper hearing on these issues. The first issue which is complained about was succinctly made to the Arbitrator and is the subject of detailed findings. There is no basis to say that the Arbitrator *"failed to properly engage"* with this submission. This submission in fact is clearly incorrect. Secondly, the manner of complaint raised by the appellant was not raised below and it is unfortunate that it is alleged that the Arbitrator was somehow said to have failed to engage with an argument that was not made.

122. This appeal ground, which is advanced ostensibly as a complaint about not being given a proper a hearing, is in reality a complaint with respect to an adverse factual finding which was, on the evidence, available for the Arbitrator to make. There was no error in this approach.

Accordingly, he determined that the appeal did not have any prospects of success and he refused the application for an extension of time.

WCC – Medical Appeal Panel Decisions

AMS applied incorrect assessment criteria in assessing permanent loss of efficient use of the sexual organs under the Table of Disabilities

Schrader v Forestry Corporation of NSW [2019] NSWWCCMA 83 – Arbitrator Marshal Douglas, Dr R Mellick & Dr J Dixon Hughes - 18 June 2019

Background

On 12 July 1991, the appellant injured his back at work and suffered right-sided sciatica. On 26 December 1991, he underwent a laminectomy at the L5 level. On 16 December 1995, he suffered a flare-up of back symptoms and on 2 September 1996, he underwent bilateral foraminotomies at the L4/5 level. On 29 April 2003, the parties consented to awards under s 66 *WCA* for 30% permanent impairment of the back, 20% permanent loss of efficient use of the left leg at or above the knee, 15% permanent loss of efficient use of the right leg at or above the knee and 10% permanent loss of use of the sexual organs.

On 30 March 2016, the insurer gave the appellant notice under s 39 *WCA,* based upon an assessment from Dr Breit (6% WPI). However, on 7 May 2018, the appellant's solicitors served medical reports from Dr Hopcroft and Dr Lowy and alleged that he was "a worker with high needs" and that as a consequence of s 39 (2), s 39 did not apply.

On 4 June 2018, the appellant's solicitors gave notice of a further claim under s 66 *WCA*, for an additional 70% permanent loss of efficient use of the sexual organs.

Following a teleconference on 22 January 2019, ***Arbitrator Gerard Egan*** remitted the matter to the Registrar for referral of both a medical dispute and an impairment dispute to an AMS. In the medical dispute, the AMS was instructed to assess the degree of whole person impairment of the lumbar spine, cerebral and neurological nervous systems (neurological sexual impairment). In the impairment dispute, the AMS was instructed to assess the back and sexual organs under the Table of Disabilities.

On 14 March 2019, the AMS issued a MAC, which attached both assessments, and this was apparently amended on 4 April 2019, as follows:

> (a) The impairment dispute - 30% permanent impairment of the back, 20% permanent loss of use of the left leg at or above the knee, 15% permanent loss of use of the right leg at or above the knee and 0% permanent loss of use of the sexual organs. The latter assessment was based upon the absence of a cauda equina syndrome.
>
> (b) The medical dispute –16% WPI.

Medical Appeal

On 3 April 2019, the appellant appealed against the MAC under ss 327 (3) (b), (c) and (d) *WIMA.* The Registrar referred the dispute to a MAP, which held that the impairment assessment MAC was based on incorrect criteria and contained a demonstrable error, because the AMS mistakenly believed that cauda equina dysfunction was required to

explain the loss of sexual function before there could be a permanent loss of use of the sexual organs.

The AMS should have considered whether the worker's loss of ability to engage in sexual activity resulted from his back injury. It assessed 20% permanent loss of efficient use of the sexual organs as a result of the back injury, revoked that MAC and issued its own MAC. However, it confirmed the medical dispute MAC.

Impairment apportioned between injury referred to the MAC and later events – 50% apportionment was not against the weight of the evidence

Temelkov v Sydney Trains [2019] NSWWCCMA 86 – Arbitrator Grahame Edwards, Professor N Glozier & Dr M Hong – 21 June 2019

Background

The appellant commenced employment with the Respondent in June 1967. and from 1969, he was a Station Assistant at Wynyard Railway Station. On 1 December 2014, a new Customer Service Manager was appointed as his immediate manager. The appellant alleged that his manager frequently called him into his office and questioned about his attitude and also criticised him about his work performance. On 20 March 2015, he alleged that his manager assaulted him by kicking him in the leg while he was sitting at a ticket barrier at Wynyard station. However, the manager denied this and said that he lightly tapped the appellant's foot *"to wake him up"*. Soon afterwards, the manager gave him a letter requiring him to attend a formal counselling session *"for allegedly sitting at ticket barriers for extended periods of time while appearing to be asleep."*

After a formal counselling session on 24 March 2015, the appellant was issued with a Performance/Conduct Improvement Plan. He lodged a complaint with the respondent about his manager and the alleged assault and on 2 April 2015 and the General Manager advised him by email that his allegations would be investigated. On 4 May 2015, he ceased work as a result of an unrelated right knee condition and on 20 May 2015, he reported the alleged assault at Kogarah Police Station. On 25 May 2015, the Investigations Service Manager invited him to provide any further information before the matter was finalised. He replied on 24 August 2015, but he did not receive any response.

On 20 October 2015, the respondent advised the appellant that his substantive position had been abolished and formally offered him voluntary redundancy. He accepted this on 21 October 2015 and his exit date was to be 13 November 2015. In early 2015, he and his wife went to Wynyard station to return his uniform, but was told that staff were too busy to itemise the uniform items. It then deducted $400 from his redundancy package.

On 8 January 2016, the appellant's GP referred him to a psychiatrist and in June 2016, the psychiatrist diagnosed an adjustment disorder with depression *"as a result of stresses at work".* On 4 July 2016, he gave notice to the respondent that he had suffered a psychological injury as a result of alleged bullying and the assault. The respondent disputed liability and the appellant filed an ARD, which claimed compensation under s 66 *WCA* for permanent psychological impairment and s 60 expenses.

On 8 February 2019, ***Arbitrator Burge*** issued a COD, which found that the worker suffered a psychological injury as a result of the incident on 20 March 2015 and *"perceived harassment and bullying"*, which caused, aggravated, accelerated, exacerbated and/or precipitated that injury. He made an award under s60 *WCA* and remitted the s 66 dispute to the Registrar for referral to an AMS.

On 19 March 2019, Dr Ng (AMS) issued a MAC that assessed 19% WPI, but he apportioned this equally between the 2015 injury and the redundancy and, after rounding, he assessed 10% WPI due to the 2015 injury.

Medical Appeal

On 15 April 2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The Registrar referred the appeal to a MAP.

The appellant alleged that the AMS' conclusion that the redundancy contributed to 50% of the permanent impairment is against the weight of the evidence and is not supported by forensic medical reports, and that the AMS has created a second injury arising out of the redundancy. He argued that the AMS failed to set out findings of material facts and did not explain why he "*severed"* the impairments between the 2015 injury and the redundancy.

However, the MAP held that the AMS had not, in effect, created a second injury arising out of the redundancy. Rather, he observed that the psychiatrists' reports indicated some disagreement about the nature of the appellant's psychiatric condition and whether it was strictly work-related and that the impact of the redundancy was highlighted in several reports. He held that significant weight must be given to the objective evidence and stated:

> …There was a subsequent injury, namely Mr Temelkov's redundancy which he perceived as forced rather than voluntary. This clearly caused some distress and was quite significant. In terms of time-line of seeking help, the approximate factor of the redundancy cannot be overlooked. It would appear that Mr Temelkov began seeking mental health assistance soon after the redundancy rather than the March 2015 injury. In my opinion, both factors are of equal importance… the redundancy was responsible for 50% of the whole person impairment.

The MAP agreed with the AMS' comments about the psychiatric evidence and held that the 50% deduction for the effects of the redundancy is not against the weight of the evidence. The AMS did not need to consider if the redundancy aggravated the 2015 injury, because determination of injury is for the Commission only, but there was no evidence that the redundancy formed part of a chain of causation from the accepted injury on 20 March 2015 to the current whole person impairment. It concluded:

> 99. The Appeal Panel finds the AMS disclosed his reasoning path and provided more than adequate reasons to conclude that the proportion of the permanent impairment contributed to by the redundancy is 50%, and can find no error in this.

Accordingly, the MAP confirmed the MAC.

Arbitrator Decisions

Applicant not a rural worker within the meaning of s 5 and sch 1 cl 5 WIMA

Ferguson v Central Coast Council [2019] NSWWCC 206 – Arbitrator Anthony Scarcella – 11 June 2019

Background

The applicant provided services to the Respondent through its Shelly Beach Coast Care Program. On 17 May 2017, he injured his mouth and teeth while he was providing services at that site and claimed compensation and alleged that he was a deemed worker under sch 1 cl 3 *WIMA* as he was doing *"rural work".* However, the insurer disputed the claim and asserted that: (1) the volunteer services were not considered as *"work"* because there was no exchange of money or other benefits; (2) Shelly Beach was not a rural area; and (3) the applicant was not a contractor within the meaning of sch 1 cl 3 *WIMA.*

Arbitrator Anthony Scarcella identified the dispute as being whether he applicant was a deemed worker under sch 1, cl 3 *WIMA ("rural work"*). As the applicant relied upon sch 1 cll 3 (1) (b) and 3 (2) *WIMA,* he needed to prove that: (a) he was involved in the work of cutting scrub; (b) that the respondent, in the course of its trade or business, entered into a contract, agreement or arrangement with him under which he agreed to carry out scrub cutting work and that he did not sublet any part of the work or employ a worker or performed some part of the work himself; and (c) that the work that he undertook was *"rural work".*

It was necessary to determine whether: (a) the parties entered into a contract, agreement or arrangement whereby the applicant agreed to carry out scrub cutting work for the respondent; and (b) whether the work was *"rural work".*

(a) The contract issue

The Arbitrator held that where there is no intention between the parties to create legal relations, there can be no contract and the worker bore the onus of proving that there was an intention to enter legal relations and an agreement supported by real consideration. He stated (citations excluded):

> 44. In *Australian Woollen Mills Pty Ltd v Commonwealth* the High Court of Australia held *"[i]t is of the essence of a contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty"*. Applying this authority, Roche DP held (at [91]) in *Secretary, Department of Family and Community Services v Bee* (*Bee*) that, to be legally enforceable, there must be, among other things, real consideration *"for the agreement"*. There must be a quid pro quo. Where there is no intention between the parties to create legal relations, there can be no contract. In Bee, Roche DP said:
>
> > The authorities are clear that the question of an intention to create legal (contractual) relations requires an objective assessment of the state of affairs between the parties (*Ermogenous* at [25]). *'Intention' describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened (Ermogenous* at [25]).
>
> 45. In *Teen Ranch*, the applicant worked as a volunteer with a non-profit Christian organisation that ran camps for teenagers. He received meals, accommodation and use of the camp's facilities but no wages…The New South Wales Court of Appeal determined that, as there was no intention to enter legal relations, there was no contract. Handley JA concluded that an intention between the parties to enter into legal relations was essential to the existence of the suggested contract. The meals, accommodation and use of the camp's facilities received by the volunteer worker did not amount to real consideration. The work was not done to earn those benefits.
>
> 46. In *Harris*, the applicant was permitted to live on the respondent's airfield in return for acting as the caretaker of the airfield. He was injured testing a glider. Nielson CCJ found that there was an intention to enter legal relations, and that there was consideration from both parties. *Teen Ranch* was distinguished on the basis that in this case the applicant was not acting as caretaker out of altruism but *"to secure a necessity of life shelter"*.
>
> 47. In *Birkett*, the applicant was a student at an agricultural college. As part of her course, she had to undertake work experience, and she was accordingly placed at the respondent's property. There, she was injured while performing general farm duties. Truss CCJ found that there was no intention to enter into legal relations. The provision of meals, accommodation and travel expenses could not be regarded as

consideration for services provided by the applicant since she was only there to complete the practical requirements of her course. There was no mutuality of obligation.

48. In *Spackman*, Mr Spackman was an experienced abattoir worker who had ceased that work and was on a disability pension. He agreed to assist his friend slaughter a bullock in return for half the meat. On three occasions, they slaughtered bullocks. There was about 200 kg of meat in each beast, valued at around $500. On the last occasion, Mr Spackman was injured in the course of slaughtering the beast. Mr Spackman was found to be a deemed worker within the meaning clause 2 of Schedule 1 of the 1998 Act and was entitled to workers compensation benefits. Walker CCJ found that the facts established that there was an intention to create legal arrangements consistent with the principles in Harris. Just because the parties were friends did not mean that there could be no binding arrangement. Mr Spackman was, therefore, found to be a party to a contract to perform work. The work exceeded $10 in value since the value of the slaughtered beast was about $500. Consideration for a contract to perform work may be in kind as well as in cash. In this case, the meat was consideration for the arrangement, not for the friendship.

49. In *Dowton v The Salvation Army* [2003] NSWWCCPD 24, the applicant was an alcoholic who voluntarily entered into an alcohol rehabilitation program run by The Salvation Army. The program included some counselling, trips to Alcoholics Anonymous, room and board and work at The Salvation Army shop. He was not paid for this work, and his DSS payment went to The Salvation Army. He worked 9.00 am to 5.00 pm as an off-sider on The Salvation Army's truck, picking up and delivering donations. He was injured while working on the truck. He was found not to be a "worker" … The decision was confirmed on appeal…

51. In *Sekuloska*, under the heading *"The correct approach",* Roche DP said at [85]-[86]:

> 85. It is trite contract law that consideration must move from the 'promisee' (Carter, Peden and Tolhurst, Contract Law in Australia, 5th ed, 2007 [6]–[19], citing Coulls v Bagot's Executor & Trustee Co Ltd [1967] HCA 3; 119 CLR 460). The 'promisee' is the person to whom a contractual promise was made. In the present case, the argument is that Mr Sekuloski, the promisor, promised to do work for Mrs Sekuloska, the promisee, in return for payment by her of $200 per day. That argument is fundamentally flawed because Mrs Sekuloska never agreed to pay Mr Sekuloski. She only agreed to draw down on an account for which Mr Sekuloski had a joint liability. In no sense could it be said that any consideration moved from Mrs Sekuloska. Mr Stockley's primary submission was correct, Mr Sekuloski was paying himself, and the Arbitrator erred in finding to the contrary.
>
> 86. To prove a contract, it must be established that the *'statement or announcement which is relied on as a promise was really offered as consideration for doing the act, and that the act was really done in consideration of a potential promise inherent in the statement or announcement'* (Australian Woollen Mills at 456). In other words, there must be a quid pro quo. That is missing in this case. Other than the bald assertion that it was 'agreed' that Mrs Sekuloska would keep a record of the times Mr Sekuloski worked on the house and that they 'would equal that to $200 a day', there was no quid pro quo. On any objective view of the arrangement, Mr Sekuloski did not do the work in consideration of a payment of $200 per day. He did the work to improve an asset that he jointly owned with his wife. Mrs

> Sekuloska offered nothing in return for the work Mr Sekuloski was to do and did not in fact pay anything. The consideration did not come from her but from a loan account for which Mr Sekuloski and Mrs Sekuloska were jointly liable, and which Mr Sekuloski repaid from his earnings as a truck driver.

The Arbitrator held that the applicant performed land care work as a volunteer. There was no intention to enter legal relations and the applicant misconceived the effect of the formalisation of the relationship and the manner that the work was to be performed and the documentation did not change their relationship and did not transform his status from a volunteer to an individual engaged in a legal relationship where there was real consideration – a quid pro quo. It did not place him in the position of a contractor with the respondent as the principal. He also found that the provision of personal protective equipment and land care training to the applicant was not real consideration by way of upskilling and there was no mutuality of obligation. Rather, the respondent required the applicant to satisfy it that it was in the community interest to have him performing land care activities at the site and it did no by providing the training it considered necessary and the direction to achieve it. Accordingly, the applicant was not a deemed worker under sch 1 cl 3 *WIMA.*

(b) Rural Work

The Arbitrator stated that cl 3 of sch 1 *WIMA* requires that the work performed be rural work, which must be carried out in the country rather than in towns and cities: *Holland No 1*; affirmed in *Holland v Annovazi* (*Holland No 2*). In those cases, an independent contractor carrying out tree services in a suburban backyard was held not to be a deemed worker by the equivalent of cl 3 of Sch 1 (in effect at the time).

In *Holland No 2*, the New South Wales Court of Appeal noted that the heading to clause 3, *"Rural work"*, was available by reason of the combined operation of ss 35 (5) and 34 (1) of the Interpretation Act 1987, *"to confirm the ordinary meaning of cl 3 or to resolve any ambiguity or obscurity in its provisions…"* In *Holland no. 1*, Truss CCJ considered the equivalent of sch 1 cl 3 *WIMA* and stated:

> 11. Cl 3 of Sch1 is essentially a re-enactment of s 6 (5) of the 1926 Act. This subsection had been amended frequently and the history of the various amendments is referred to at 173 - 175 of *C.P. Mills Workers Compensation (New South Wales) 2nd ed* (1979) and was also recounted by Kitto and Windeyer JJ in *McNamee v Partridge* (1959) 101 CLR 384. At 399 Kitto J stated that he considered that subsection referred only to contracts for recognised forms of work done in the country or on the outskirts of cities….

Accordingly, he held that the worksite fell well short of fitting the dictionary definition of *"rural"* and it could not be described as being located in the country or on the outskirts of cities as stated by Kitto J in *McNamee* and Truss, CCJ in *Holland No 1*. Therefore, the applicant was not performing rural work within the meaning of sch 1 cl 3 (1) *WIMA* and he entered an award for the respondent.

Worker did not establish an entitlement to weekly payments

Lions v Prysmian Australia Pty Ltd [2019] NSWWCC 213 – Arbitrator Paul Sweeney – 17 June 2019

Background

On 2 February 2016, the worker injured his low back at work. On 3 June 2019, ***Arbitrator Paul Sweeney*** identified the issues in dispute as being: (1) whether that injury caused an

incapacity for work after 31 October 2017; and (2) whether this gives rise to an entitlement to weekly compensation.

The respondent attacked the worker's evidence based upon inconsistencies between his signed statements and the absence of a complaint in his medical records between March 2016 and 12 July 2018. It also argued that the worker returned to work and performed pre-injury duties for approximately 6 months after the injury occurred, but it did not seek to cross-examine the worker.

The Arbitrator was reluctant to make an adverse credit finding against the worker on this basis, but said that there are other aspects of the case that go to the issue of his reliability, namely: (1) The *"strikingly different emphasis in the accounts of the applicant's back injury and consequent incapacity for work in the signed statements…"* He noted that there are 2 different accounts of his back condition after his return to full duties, which are difficult to reconcile; and (2) There are 2 conflicting accounts of hours of work and remuneration while employed by another employer: in one he said the worked 12 hours per week, while in the other stated that he worked from 18 to 30 hours per week. He therefore held that not all of the worker's evidence could be accepted at face value. He stated, relevantly:

> 51. On several occasions in recent years, the Court of Appeal has cautioned against the use of medical records and the histories contained in medical reports to undermine the credibility of a witness. See *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34 (26 February 2004), *Daniel Fitzgibbon v The Water Ways Authority & Ors* [2003] NSWCA 294 (3 December 2003) and *Mason v Demasi* [2009] NSWCA 227 (31 July 2009). These cases suggest that a tribunal would be wary of preferring entries in clinical records to the sworn evidence of witnesses. They also emphasise that the primary function of medical records is to facilitate treatment and not as an unerring record of the medical history.
>
> 52. Nonetheless, where clinical notes are legible they may provide an objective record of the complaints made by a worker from time to time. Certainly, they have been utilised for this purpose in workers compensation cases for a very long time: see *Azzopardi v Tasman UEB Industries Ltd* (1985-86) 4 NSWLR 139, where Kirby P discussed the use Burke J made of the medical record. It was accepted that it was open to the judge to take into account an absence of complaint by the appellant to his treating medical practitioners in finding that an injury had not occurred at work. While Burke J explicitly stated in his reasons for judgment that the absence of complaint did not go to the "general reliability" of the worker, it is difficult to accept that this approach is correct. However, it is unnecessary to consider this matter further in this case.
>
> 53. The facts in Azzopardi are by no means identical to the present case, as the judge found that the worker had not suffered an injury as alleged. The reasoning at first instance, and on appeal, suggests, however, that where the evidence of a worker is unsatisfactory it is legitimate and, probably, obligatory to consider the medical record, subject to the reservations flowing from the cases discussed above.

While the Arbitrator accepted that the worker probably has some low back pain, it is *"much more difficult"* to find that this gives rise to an entitlement to weekly payments. He held:

> 61. It seems likely on the evidence that, after he was certified as fit to return to work, the applicant was able to continue in his pre-injury employment with the respondent for more than six months without complaining to a medical practitioner of back pain. It also seems likely that he ceased that employment because of heel pain, possibly plantar fasciitis. That conclusion is entirely consistent with the medical record which I have set out above

62. The evidence does not permit a clear finding to be made about the nature of the applicant's work. I would infer from his description of the injury to medical practitioners, that some aspects of his work with the respondent were heavy. He told Dr Giblin that adjustments were made to his employment after he returned to work in February 2016. It is not entirely evident what these were. Clearly, the applicant performed full-time work throughout the period up until his redundancy and there is no indication that he lost income.

63. On his own evidence, the applicant ceased work as a traffic controller because of the condition of his feet. He was working up to 30 hours a week. There is no evidence of his earnings, but it is notorious that traffic controllers can earn $30 an hour in the Sydney area. Given his previous history, there is no obvious reason why he could not have worked in this employment on a full-time basis. In those circumstances, it seems likely that the applicant would have earned the equivalent of 95% of his pre-injury average weekly earnings.

Accordingly, he found that the worker is not entitled to weekly compensation, but awarded s 60 expenses with respect to the back injury.

Arbitrator refuses applications for reconsideration of a COD under s 350 WIMA; for referral to the AMS for further assessment under s 329 WIMA; and for referral to MAP for further assessment under s 378 WIMA

Dotlic v AKP Projects Pty Ltd & Ors [2019] NSWWCC 226 - Arbitrator John Harris – 25 June 2019

Background

On 21 June 2012, the worker injured his lumbar spine and he suffered consequential injuries to his digestive system as a result of taking medication for that injury.

On 2 September 2015, the worker filed an ARD against AKP Projects Pty Ltd (first respondent), Tomislav & Ranka Divljak (second respondents) and the Workers Compensation Nominal Insurer (third respondent) as the second respondents were uninsured. There was also an issue as to whether the first respondent was the principal of the second respondents under s 20 *WCA.*

On 2 November 2015, Dr Berry issued a MAC which assessed 7% WPI (cervical spine), 5% WPI (lumbar spine), 2% WPI (upper digestive tract) and 1% WPI (anus). It assessed 0% for the thoracic spine and 0% for the lower digestive tract.

The first and second respondents appealed against the MAC, but the worker did not appeal against any assessment. On 29 March 2016, the appeals were dismissed following a re-examination by a member of the MAP (Dr McGroder), who noted findings of Scheuermann's disease in the thoracic spine. On 31 May 2017, ***Arbitrator Brown*** determined that the second respondents were the employers at the time of the injury.

The second respondents applied for judicial review of the MAP's decision in the Supreme Court of NSW and in May 2018, the Supreme Court quashed that decision and remitted the matter to the WCC for re-determination. It held that the assessment for the anus was undertaken in circumstances where there was no claim for that body part.

On 12 November 2018, a second MAP upheld the appeal with respect to the assessment for the anus and it issued a MAC that assessed 14% WPI (including 0% for the thoracic spine). On 21 December 2018, Arbitrator Wright issued a COD, which ordered the first (sic) respondent to pay compensation under s 66 WCA for 14% WPI.

Application for reconsideration

On 16 May 2019, the worker applied to the WCC as follows: (1) for reconsideration of the assessment of the thoracic spine; and (2) rescission of the COD under s 250 *WIMA* and referral of the matter back to the MAP under s 329 (1A) *WIMA* and s 378 *WIMA.* He sought to rely upon further medical reports from Dr Mastroianni (dated 26 March 2019) and Dr Dixon (4 April 2019).

During a teleconference on 21 June 2019, ***Arbitrator John Harris*** ascertained that the application had not been served on the second respondents. He informed the parties that he would be dismissing the application and that he was of the view that the application was without merit. His written reasons are summarised below.

General Principles – s 350 WIMA

The Arbitrator noted that the reconsideration power exercised by the Compensation Court, which is almost identical to that set out in s 350 (3) *WIMA*, has been the subject of comment by the Court of Appeal in a number of decisions and that in *Atomic Steel Constructions Pty Ltd v Tedeschi* [2013] NSWWCCPD 33 Roche DP stated:

> The discretionary power conferred by the reconsideration power is in *'extremely wide terms'* (*Hardaker v Wright & Bruce Pty Ltd* [1962] SR (NSW) 244 at 248). It is important, however, to remember the distinction between the existence of the reconsideration power and the occasion of its exercise, and that courts should not lose sight of the general rule that the public interest requires that litigation should not proceed interminably (Street CJ in *Hilliger v Hilliger* (1952) 52 SR (NSW) 105 at 108). Nevertheless, as Street CJ further observed, it is clear that the legislature intended to leave with certain tribunals the power of reviewing the decision to see *"that justice is done between the parties".*

He held that the relevant legal principle is whether it is in the interests of justice that the application be granted.

Mistake or oversight

The Arbitrator rejected the third respondent's argument argued that a mistake or oversight by the worker's solicitors does not give rise to a ground for reconsideration, but stated that this is a matter that is relevant to the exercise of the discretion. He stated:

> 69. There does not appear to have been any proper appreciation by the applicant's solicitors in 2015 or at any time that an appeal should be lodged against the MAC in respect of the thoracic assessment. The concession by the applicant's solicitor that this was probably due to the 15% threshold being attained in the MAC shows a lack of awareness that any part of the respondents' appeal may be successful.
>
> 70. The first Appeal Panel decision indicates that the respondents disputed all MAC findings for the cervical spine, the lumbar spine, the upper digestive tract and the anus. It required only a minor reduction in any impairment of one of these assessments for the applicant to fall below the threshold to proceed with a claim for common law damages.
>
> 71. The decision of the Supreme Court on judicial review found that no claim had been made by the applicant for an assessment of the anus. Despite the clear warning by the Supreme Court, no steps were then taken by the applicant to rectify that obvious deficiency. The matter then proceeded to the second Appeal Panel, where it applied the observations of the Court in rejecting that part of the claim.

> 72. It is clear in these circumstances that the delay in disputing the 0% assessment of the thoracic spine is entirely due to the conduct of the applicant's solicitors. I accept that this is a relevant but not determinative factor adverse to the applicant's interests.

The right to appeal the assessment of the thoracic spine

The Arbitrator confirmed that the worker had a right to appeal against the MAC under s 327 *WIMA,* but subsection (5) imposed a time limit of 28 days where the ground was either demonstrable error or incorrect assessment criteria. However, his solicitor said that this right was not exercised because the worker had obtained an assessment of 15% and was then entitled to bring a claim for common law damages. He stated:

> 75. This is a particular unsatisfactory explanation for not pursuing an appeal right. The explanation is more unsatisfactory because the first and second respondents were pursuing appeals contesting the assessments provided by the AMS for the cervical spine, lumbar spine, the upper digestive tract and the anal tract. A successful appeal on any body part meant that that the applicant would fall below the 15% common law threshold…
>
> 77. The applicant does not explain why the question to appeal was not examined when the MAC was issued or when the initial appeals were filed against the MAC. It was clearly a possibility that the assessment of 15% could be overturned on appeal. The candid concession made by the applicant's solicitor in oral submissions is probably the true explanation, that is, the applicant had an assessment of 15% and took no steps, on legal advice, to contest the parts of the MAC where he had been unsuccessful.

He held that there was no reason why the worker's solicitors should not have examined this matter back in late 2015 and there is no logical reason why he could not have obtained the further medical opinions shortly after the MAC issued.

The delay

The Arbitrator noted that this application was made 3.5 years after the MAC issued and 5 months after the final determination of the proceedings and he held that there was no proper explanation for this delay. Delay is a relevant factor in the exercise of discretion and it was "all the worse" because the second defendants had not been properly served with the application before the teleconference. He held that the worker's delay, though his solicitors, in raising the issue of error in the MAC concerning the thoracic spine is "extraordinary".

Prejudice

While the worker argued that the only prejudice could be cured by the respondents replying to his further evidence, the Arbitrator stated that this ignores the prejudice arising because these issues could have and should have been litigated when the other appeals were determined. The current application involves further and unnecessary legal costs to the respondents and involves further delay.

Finality of litigation

There is a legitimate interest in the finality of litigation. The Arbitrator held, relevantly:

> 91. The manner in which the applicant is seeking to have the MAC and/or the second Appeal Panel reconsider its decision is inefficient and wastes further Commission resources because it requires a further determination. Had the applicant filed an appeal at the appropriate time pursuant to s 327 then the matter would have been disposed in a more timely and cost-effective fashion when the other appeals were determined.

92. The manner in which the applicant is seeking to have the matter reconsidered involves a waste of Commission resources. Rather than being consistent with the objectives of the Commission and the system, the applicant's conduct is inconsistent with those objectives.

93. In Milosavljevic Roche DP observed that the s 329 does not stand "outside the terms of the Workers Compensation Acts"50. It is inconsistent with an effective and efficient system that concluded matters can be enlivened through a process raising submissions that should have been known and previously raised by the parties.

The substantial merit of the claim

The Arbitrator accepted that the worker has an arguable case to contest the 0% assessment of the thoracic spine, but he did not accept that the purported error is clear and without doubt. He stated, relevantly:

97. As part of his reasons the AMS stated:

> I noted that there were small degenerative disc protrusions in the thoracic spine, however, clinically there were no significant clinical findings to justify a DRE II assessment.

98. The applicant did not expressly contest these factual findings made by the AMS. It is otherwise difficult to accept that this portion of the MAC shows demonstrable error or the application of incorrect criteria as the opinion expressed by the AMS probably arises from clinical judgment and was reasonably open to him.

The reconsideration power under s 329

The Arbitrator stated:

110. In *Milosavljevic* Roche DP made observations about the exercise of the power under s 329 following a delay and the conclusion of proceedings. The Deputy President stated:

> The fact that section 329 gives power to allow for a further referral does not mean that that power is without limit and can be used where the dispute in question has been the subject of a binding determination by the Commission, as it has in the present matter. The Appeal Panel reconsidered its decision on 8 August 2007 and that decision was forwarded to the parties by letter dated 16 August 2007. Ms Milosavljevic had every opportunity after receipt of this letter to seek such relief as she thought appropriate before the Commission issued a Certificate of Determination on 14 September 2007. In fact, her solicitors forwarded two further letters between 16 August and 14 September 2007 unsuccessfully seeking further relief under section 378. There was nothing to stop Ms Milosavljevic from seeking relief under section 329 before the Certificate of Determination of 14 September 2007, but she did not do so until the letter of 25 September 2007. Even if she had done so, I do not believe such relief would have 54 at [59] 17 been granted, as Ms Milosavljevic has established none of the procedural fairness grounds made out in Mansour and has not established any other valid basis that would justify the use of section 329 (1) (b).

111. In *Adriaansen* Snell AP observed that an application could be brought pursuant to s 329 despite the fact that there had been a MAP decision where there had been "no final determination of the dispute." The Acting President stated:

> I accept, consistent with Mansour, that an order can be made pursuant to s 329 (1) (b) of the 1998 Act, notwithstanding that there has been a MAP decision. There has been no final determination of the dispute, and I accept that the Commission has jurisdiction to make such an order, should it be appropriate. I also accept, as was stated in Mansour at [74], that a party, having failed in a Medical Appeal, is not restricted to taking Supreme Court proceedings as his or her only recourse.

He noted that the worker was relying on s 329 (1A) as the source of the power to refer the matter back to the AMS for reconsideration and held, based on the Presidential authorities, that this power appears to be available in the appropriate circumstances when there has been no final determination of the dispute.

The right of an appeal panel to consider a portion of the MAC not raised as an appeal

The Arbitrator stated that in *Amone v Bluescope Steel Pty Ltd* [2019] NSWWCCMA 39¸a MAP rejected a respondent's submission to remit a matter back to the AMS to either reduce an assessment or otherwise hold that there was no loss and it stated, relevantly:

> As other Panels have stated58 submissions contained in an Opposition to an Appeal are not a legitimate way to ventilate an Appeal against a MAC. Similar principles apply to a respondent seeking to agitate a substantive attack on a MAC through its Reply by asserting that there should be a reconsideration with a more favourable result.

While the worker argued that the MAP's power to reconsider its decision is wider than its powers on appeal, he cited no authority in support of this argument. The Arbitrator held that the worker's purported construction of s 378 *"is inconsistent with the plain language of the section and would produce an absurd textual construction"* and he stated, relevantly:

> 117. In *Uelese v Minister for Immigration and Border Protection* the plurality (French CJ, Kiefel, Bell and Keane JJ) cited *Legal Services Board v Gillespie-Jones* and stated that *"a construction that 'appears irrational and unjust' is to be avoided where the statutory text does not require that construction".* These observations are equally apposite to the construction proposed by the applicant in this case.
>
> 118. The words of s 378 (1) allow an Appeal Panel *"to reconsider any matter that has been deal with".* That wording clearly suggests that the power is limited to what an Appeal Panel has dealt with as opposed to what it has not *"dealt with".* I do not accept that the second Appeal Panel dealt with the thoracic spine as that assessment was not contested before it.
>
> 119. Subsection (3), whilst not limiting subsection (1), concerns correction of an obvious error. It was not an error of the second Appeal Panel to deal with a matter not argued before it…
>
> 121. The applicant's construction of the reconsideration power raises no logical basis why an Appeal Panel should have wider powers on reconsideration then it had on an appeal. That submission, without reference to the text of the provision, simply suited the applicant's purpose where he seeks the second Appeal Panel to determine a matter that was never argued before it.
>
> 122. The applicant did not file an appeal against the MAC in respect of the assessment of the thoracic spine. The second Appeal Panel properly did not assess that body part and applied the assessment made by the AMS. It would have been a complete denial of procedural fairness to the parties to reassess that body part when there were no submissions before it that this assessment should be changed.

123. The applicant now seeks, in the alternative, that the second Appeal Panel consider what is in effect an appeal from the AMS by a party who never filed an appeal.

124. Whilst it is unnecessary to my final decision, I otherwise do not accept that it would be appropriate to refer the matter back to the second Appeal Panel pursuant to s 78.

Accordingly, the Arbitrator: (1) refused the application for rescission of the COD under s 350 *WIMA;* (2) refused the applications to refer the matter back to the AMS and/or the second MAP.

Section 39 WCA, s 319 (g) WIMA & cl 28C of Pt 2A of Sch 8 of the Regulation –worker not entitled to weekly payments after 260 weeks and before maximum medical improvement was found to be not fully ascertainable – Hochbaum, Whitton & Strooisma applied

King v Metalcorp Steel Pty Ltd [2019] NSWWCC 229 – Senior Arbitrator Glenn Capel – 1 July 2019

Background

On 21 October 2005 and 24 February 2006, the worker injured his lumbar spine at work. The insurer accepted liability and paid weekly compensation and s 60 expenses until 25 December 2017. On 7 June 2007, Dr Meachin issued a MAC that assessed 4% WPI for the 2005 injury and 8% WPI for the 2006 injury.

However, on 14 February 2017, Dr Bosanquet assessed the worker on behalf of the insurer. He stated that maximum medical improvement had been reached and assessed 4% WPI. On 6 March 2017, the insurer issued a s 39 Notice to the worker based upon that assessment.

Following a request for internal review of this decision, the insurer qualified Dr Bentivoglio, who certified that maximum medical improvement had been reached and assessed 7% WPI for the 2006 injury. However, he did not address the 2005 injury.

On 10 October 2018, Dr Mobbs (treating neurosurgeon) submitted a request for approval of surgery (L5/S1 anterior lumbar internal fusion) to the insurer. He stated that maximum medical improvement had not been reached and that the worker needed to lose 10 to 15 kilos before having the surgery.

On 25 October 2018, Dr Anderson (AMS) noted that the surgery recommended by Dr Mobbs would be undertaken within 8 weeks and he issued a MAC that certified that the degree of permanent impairment was not fully ascertainable under s 319 (g) *WIMA.*

On 29 October 2018, the worker's solicitors served the MAC on the insurer and requested weekly payments from 26 December 2017 to 24 October 2018, but the insurer resumed payments from the date of the MAC. The worker then filed an ARD seeking weekly payments from 26 December 2017 to 24 October 2018 under s 38 *WCA.*

On 1 July 2019, ***Senior Arbitrator Glenn Capel*** determined that the worker is not entitled to weekly payments during the period claimed. He cited the decisions of President Judge Phillips in *Hochbaum* and *Whitton* and that of Arbitrator Sweeney in *Strooisma* and adopted their reasoning. He therefore entered an award for the respondent.

Employment was not a substantial contributing factor to a ruptured aneurism and subarachnoid haemorrhage

Hoysted v Asbestos Removal & Demolition Contractors Pty Limited [2019] NSWWCC 231 – Arbitrator Anthony Scarcella – 2 July 2019

Background

The worker was the sole director and an employee of the Respondent. On 12 February 2010, he allegedly suffered a ruptured cerebral aneurism with a resultant subarachnoid haemorrhage while working for the respondent. He claimed weekly payments and s 60 expenses. The insurer did not commence payments under provisional liability and on 22 August 2017, it disputed the claim.

Arbitrator Anthony Scarcella identified the following issues: (1) whether the worker suffered a ruptured cerebral aneurism and a subarachnoid haemorrhage on 12 February 2010, within the meaning of ss 4 (a) and 9A *WCA;* (2) whether he is entitled to weekly payments for total or partial incapacity; and (3) whether his medical and related treatment expenses were reasonably necessary as a result of that injury.

The Arbitrator held that the worker suffered a personal injury in the course of his employment, but his employment was not a substantial contributing factor to it. He described the strength of the causal link between the employment and the injury as "extremely weak" and held that there was no connection with employment that was "real and of substance". Accordingly, he entered an award for the respondent.

Registrar's Delegate Decisions

Calculation of PIAWE – vehicle provided for performance of work only is not a "non-pecuniary benefit" for the purposes of s 44F WCA

Plachozki v Coreserve Australia Pty Ltd WCC 2482/19 – Arbitrator Gerard Egan – 26 June 2019

Background

The worker sought an Interim Payment Direction for weekly payments under s 297 *WIMA* in respect of an injury at work on 26 November 2018. On 13 February 2019, the insurer decided that PIAWE was $1,690.29 per week and determined the worker's entitlement to weekly payments on that basis. On 24 April 2019, it calculated PIAWE as $1,720.65 and made voluntary weekly payments on that basis. These decisions are deemed to be work capacity decisions under s 43 (1) (d) *WCA.*

The worker alleged that his PIAWE should include an amount for non-pecuniary benefits (NPB), being the monetary value of the provision of a motor vehicle (for use within 50 km of his home). However, while the respondent conceded that it provided the worker with a vehicle, it asserted that this was for only to be used to carry out his employment duties and as it was not available for his personal use, it did not satisfy the definition of an NPB.

The issues for determination were:

> (a) Whether the provision of a motor vehicle to the worker constituted NPB pursuant to s 44E and s44F *WCA* for the calculation of "average weekly earnings".
>
> (b) If so, what is the monetary value of the NPB calculated as per s 44F(4) and (5).
>
> (c) Assuming the vehicle is a NPB, what is the value of any deductible amount ("D") during any entitlement period in the calculation of weekly entitlements to the worker (bearing in mind s 35, s 36 and s 37).

The dispute was determined by ***Arbitrator Gerard Egan, as Delegate of the Registrar.*** He stated that the words, *"for the performance of work by the worker"* in the definition of NPB admits of two interpretations and to become a benefit to the worker, it must be provided for more than the mere practical carrying out of the work required of him in the respondent's enterprise. In other words, the mere fact that the thing is used by the worker for the performance of his work would not mean it was an NPB. He held, relevantly:

> 40. While there is a presumption that an interim direction is to be made, I do not consider that extends to a presumption that any such direction includes the benefit claimed by the applicant. The applicant, I find, retains the onus to establish that an NPB was provided.41. I accept the criticism by the respondent that the applicant's evidence falls short of details sufficient to establish that the vehicle was, in fact, available for the applicant's use. I note the respondent's evidence has been consistent in that the vehicle was for work purposes only. This is consistent with the early re-claiming of the vehicle for use by other employees.
>
> 42. The fact that the applicant may have thought, or understood, that he could use the vehicle for his own use is not the issue. I must look at the evidence to discern whether the provision of the vehicle by the respondent was, in part, for his benefit.
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> 43. On the evidence I am not persuaded that it was…

Accordingly, he declined to make an Interim Payment Direction.

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