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CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions (links provided where available).

Decisions reported in this issue:

1. Workers Compensation Nominal Insurer v Hill [2020] NSWCA 54
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Court of Appeal Decisions

Death claim – deceased killed by her co-worker (her de facto husband) – attack inspired by his paranoid delusions related to work and personal relationship – causation & substantial contributing factor – Appeal dismissed

Workers Compensation Nominal Insurer v Hill [2020] NSWCA 54 – Basten JA, Payne JA & Simpson AJA – 31/03/ 2020

This matter has a lengthy history and was most-recently reported in Bulletin no. 55. At first instance, Arbitrator McDonald found for the employer, but President Keating overturned that decision and remitted the matter for re-determination by a different arbitrator. Upon remitter, Arbitrator Rimmer found that the injuries that caused the death arose out of and in the course of the deceased's employment with the appellant and her employment was a substantial contributing factor to the injuries and awarded lump sum benefits under s 25 (1) (a) *WCA,* which she apportioned between beneficiaries under s 29 *WCA,* and listed the matter for a further teleconference to consider claims for interest and periods in which weekly payments are payable to the dependants.

However, the appellant appealed and asserted that the Arbitrator erred: (1) in determining that she was satisfied on the balance of probabilities that the deceased's employment in the particular job caused or materially contributed to the injury resulting in her death and as a consequence of that finding, was in error by concluding that her death was an injury arising out of her employment; (2) in concluding that she was satisfied that the deceased

was either actually performing her employment related duties at the time of the injury, or else was on call, and consequently erred in finding that the injury arose in the course of her, and (3) in determining that the deceased's employment was a substantial contributing factor to her injury and death.

On 22/07/2019***, Deputy President Wood*** determined the appeal on the papers (*S L Hill and Associates Pty Ltd (de-registered) v Hill* [2019] NSWWCCPD 37). She amended the COD dated 19/12/2018, to indicate that the deceased's children were wholly dependent upon her for support at the date of death and that there were no other dependants, but otherwise confirmed the COD. She remitted the matter to the Arbitrator for determination of the remaining issues under s 352 (7) *WIMA* and held that the Arbitrator's decision was not interlocutory in nature as it defined the parties' rights to compensation under s 25 *WCA*.

Wood DP rejected ground (1). She stated that the Arbitrator approached her task by giving consideration to various relevant authorities and, relying on *Badawi, Nunan v Cockatoo Docks and Engineering Co Ltd* (1941) 41 SR (NSW) 119, and *Ryan v Regional Imaging Pty Ltd* and correctly observed that she was required to determine whether the fact of the deceased's employment in her particular job caused, or to some material degree, contributed to the injuries resulting in her death.. She considered the first respondent's motivation for the attack, based on the principles established in a long list of authorities that Neilson CCJ discussed in *Stojkovic v Telford Management Pty Ltd*, in which his Honour considered the distinction between an altercation arising from employment related matters and one that arose from personal issues.

Wood DP held that the Arbitrator referred to the first respondent's statement evidence, which was not challenged, which squarely put employment related matters as being the predominant basis of the first respondent's concerns about the way the deceased was conducting herself in that employment and his mistrust of her. She drew support from the medical evidence and concluded that work-related matters, including the downturn of the business, and the first respondent's distrust of the deceased in the performance of her role, were key factors influencing the first respondent's delusional beliefs. She gave clear and evidence based reasons for accepting the opinion provided by Dr Furst as to the motivation for the assault, and took into account Dr Roberts' view that "*the delusional belief system would inevitably incorporate the experience of the person in whom the delusional belief system is occurring*." That view imports into the first respondent's delusions an influence from circumstances in which the first respondent found himself, that is, the spiralling downturn in his business, in which, he believed, the deceased played a significant part.

Wood DP reviewed the "*assault*" cases, which show that the motivation for the assault is relevant in determining the causal connection in an altercation between co-workers. The Arbitrator recognised this. However, this was just one step in the Arbitrator's endeavour to determine the issue of causation. The fact that the assailant's beliefs were irrational, and the product of a disordered mind did not mean that the connection between the deceased's employment and the assault that was motivated by those beliefs was "*fanciful*" or even "*tenuous*", as considered by the Full Federal Court in *Law*.

Wood DP stated that questions of the acceptance of evidence and the weight it is given are peculiarly matters within the province of the trial judge, unless it can be said that a finding was so against the weight of the evidence that some error must have been involved. In this matter, the Arbitrator's determination was based on the evidence before her and while an appellate Court might form a different view, that is insufficient reason to disturb a factual finding.

Wood DP rejected ground (2). She stated that the Arbitrator considered the evidence that the deceased clearly made herself available to respond to telephone calls or discussions about work from as early as 7.30 am, and without any apparent exception, commenced her usual work duties at 9 am on any weekday. While the Arbitrator's references to

passages in *Hatzimanolis* and *PVYW* was misplaced, she did not apply those passages in her reasoning process and her reasoning process was not infected by legal error. The totality of the evidence in such a fluid working arrangement at least supported that at the time of the assault, the deceased was available to attend to calls or work matters arising, putting her "*on call*" and therefore in the course of her employment. This approach was consistent with the High Court's general observations of the principles in *Danvers* and *Hatzimanolis* (quoted at [277]–[278] above) that the course of employment covers not only the actual work which a person was employed to do, or the circumstances of the particular occasion out of which the injury arose, but the general nature and circumstances of the injured worker's employment.

Wood DP also rejected ground (3). She considered it very relevant that the relationship between the first respondent and the deceased was not simply a personal relationship, and that their employment relationship, which required the deceased to work with the first respondent and under his direction, was of significance in the context of their working week. The appellant's submission that the deceased's employment was of little significance in the chain of causation cannot be accepted. The Arbitrator based her conclusion that there was a "*slight*" probability that the assault would have occurred in any event on: (a) her finding that the delusions related to the deceased's work performance, and (b) Dr Furst's view that it was unlikely that those delusions would have existed without the first respondent and the deceased being in that employment and their mutual involvement with AMP. In view of Dr Furst's view that the delusions about the deceased's work performance were unlikely to have existed without the employment relationship, there was a proper basis for that conclusion.

Wood DP also held that the Arbitrator determined the question of whether the deceased's employment was a substantial contributing factor to the injuries resulting in death by considering the facts in this case, applying the principles set out in *Badawi*, and applying the terms of the legislation. The Arbitrator took into account other factors that played a part in the assault, and reading her reasons as a whole, appropriately accounted for those factors when ultimately deciding that the deceased's employment was a substantial contributing factor to her injuries and death.

The appellant appealed to the Court of Appeal and raised four (4) issues: (1) The scope of an appeal from a decision of a Deputy President; (2) The scope of an appeal from an Arbitrator to a Deputy President; (3) whether the Deputy President erred in holding that there was evidence to support the Arbitrator's findings as to the elements of the claim; and (4) whether the Deputy President failed to hold that the assault, being inspired by delusions, was causally connected to the deceased's employment.

The Court (Basten JA, Payne JA & Simpson AJA) dismissed the appeal. Their reasons are summarised below.

(1) The scope of an appeal from a decision of a Deputy President

1. The right of appeal to the Court extends to any decision in point of law, whether express or implicit, made in the course of the hearing before the Deputy President: [7], [61]. It can extend to a "*no evidence*" ground because any finding of fact necessarily depends upon first accepting that there was material capable of supporting the finding; what amounts to such material is a question of law: [9], [65]. *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390; [2010] HCA 32; *Kalokerinos v HIA Insurance Services Pty Ltd* [2004] NSWCA 312, applied

2. The Deputy President not being satisfied that there was error on the part of the Arbitrator, who was required to be affirmatively satisfied as to the elements of the claim, must have been satisfied that there was evidence capable of supporting each of the findings: [9], [61]. She did not err in point of law in so finding.

(2) The scope of an appeal from an Arbitrator to a Deputy President

3. The Deputy President was not entitled to uphold an appeal from an Arbitrator unless satisfied as to any error of fact, law or discretion: s 352 (5). Articulating that appellate function in language taken from *Whiteley Muir and Zwanenberg Ltd v Kerr* did not involve error: [17]; [61]; [91]. *Inghams Enterprises Pty Ltd v Sok* [2014] NSWCA 217 applied; *Whiteley Muir and Zwanenberg Ltd v Kerr* (1966) 39 ALJR 505; *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255; 12 DDCR 95, discussed.

(3) Whether the Deputy President erred in holding that there was evidence to support the Arbitrator's findings as to the elements of the claim

4. Ground one did not raise any point of law: [13]; [61]; [84]. There was evidence to support the Arbitrator's findings that the deceased's death (i) occurred in the course of her employment: [44]; [61]; [84]; (ii) arose out of her employment and (iii) was a substantial contributing factor to her death: [49]; [56]; [61], [84].

(4) Whether the Deputy President failed to hold that the assault, being inspired by delusions, was causally connected to the deceased's employment

5. The Deputy President considered in detail whether Mr Hill's assault was causally connected with the deceased's employment: [29]; [39]; [61]; [93]. The material before the arbitrator demonstrated a palpable and direct connection between Mr Hill's delusions, the deceased's employment and her death: [37], [61], [93]. The Deputy President did not err in concluding that there was material before the arbitrator rationally probative of that causal connection. The fact that the connection involved a delusion did not prevent it being a causal connection: [37]-[38], [61], [93]. *Kelly v Secretary, Department of Family and Community Services* [2014] NSWCA 102, discussed.

Statutory interpretation – a worker who is injured in Victoria, but is not entitled to compensation under the Victorian workers compensation scheme, is not required to pass through statutory gateways under the Victorian legislation when seeking common law damages

Australian Rail Track Corporation Limited v Dollisson [2020] NSWCA 58 Bell ACJ, McFarlan JA & Emmett AJA – 31/03/2020

The respondent lives in NSW and worked for Zero 05 Pty Limited t/as CR Rail, a company that carried on business in NSW. However, he was injured in Victoria while working on a rail line owned by the appellant. He was not entitled to compensation under the Victorian legislation because his employment was not connected with Victoria, but he was entitled to and received compensation under the NSW Scheme by operation of s 9AA *WCA.* He applied to the Supreme Court of NSW for damages against the appellant for its alleged failure to provide, install and maintain a safe operating system so as to ensure the safety of workers thereon.

However, as the respondent was injured in Victoria, his claim (including any question of limitations) fell to be determined by reference to the law of Victoria and he required an extension of time under s 27L of the *Limitations Act 1958 (*VIC). On 12/07/2019, Harrison ASJ granted an extension of time. The appellant sought leave to appeal to the Court of Appeal.

The Court observed that s 134AB (1) of the *Victorian Act* provides that damages for pecuniary or non-pecuniary loss can only be recovered in specific circumstances, which include passing through what have been described as "gateways" that involve a non-curial assessment of the seriousness of the injury in respect of which damages are sought. The appellant argued that Harrison AsJ should not have granted an extension of time to the respondent because it was futile to do so, as the respondent had not satisfied the steps required by Victorian law when a worker wishes to pursue a claim for damages against a

non-employer in respect of a work-related injury. He had not been certified by the Victorian WorkCover Authority or self-insurer has having a "*serious injury*" and he had not applied for such certification. However, the respondent argued that he did not need to take any of those steps as he was not entitled to compensation under the Victorian legislation.

The principal issue that the appellant raised on appeal was whether or not the limitations on, or pre-requisites for, the recovery of damages imposed by s 134AB of the Victorian legislation apply to a worker who has received or is entitled to compensation under any statutory scheme in respect of a work-related injury, or whether they only apply to a worker who has received or may be entitled to compensation under the Victorian legislation.

The majority of the Court (Bell ACJ, Macfarlan JA agreeing, Emmett AJA dissenting), granted leave to appeal but dismissed the appeal with costs, for reasons including:

1. After reviewing the provisions of the Victorian legislation, its legislative history and the policy considerations underpinning it, the majority of the Court held that the reference to "*compensation*" in s 134AB (1) was intended by the Victorian legislature to be a reference to compensation under the Victorian legislation. Therefore the majority of the Court held that the limitations imposed by s 134AB (1) only applied to an injured worker who has received or may be entitled to compensation under the Victorian legislation, which is not the case with the respondent: [13] (Bell ACJ); [62] (Macfarlan JA).

2. Accordingly, the respondent's failure to pass through the statutory gateways erected by the Victorian legislation did not stand in the way of his claim for damages. The Associate Justice's grant of an extension of time as sought by the respondent was not futile: [15] (Bell ACJ); [62] (Macfarlan JA).

3. In dissent, Emmett AJA granted leave to appeal and allowed the appeal. His Honour held that as the respondent was making a claim in a New South Wales Court against ARTC, which was not his employer, he should be required to satisfy the statutory gateways of ss 134AA or 134AB of the Victorian legislation. As s 134AB applied, because the respondent was " '*entitled to compensation' in respect of the injury that he suffered in the accident*", he would not be entitled to recover any pecuniary or non-pecuniary damages from ARTC. There would, therefore, be no utility in extending the time for commencement of the proceedings against ARTC: [134]-[137].

WCC – Presidential Decisions

Deemed worker – Cl 16 of Sch 1 WIMA – Voluntary Ambulance Officer – whether there is evidence of co-operation – weight to be given to oral evidence - Devries v Australian National Railways Commission [1993] HCA 78; 177 CLR 472; Shellharbour City Council v Rigby [2006] NSWCA 308 applied

Dawson v Secretary, Ministry of Health [2020] NSWWCCPD 16 – Deputy President Wood – 19 March 2020

A previous Presidential decision dated 2/07/2019 (*Secretary, Ministry of Health v Dawson* [2019] NSWWCCPD 30) was reported in Bulletin no. 36. At first instance, Arbitrator Young found for the applicant. However, Deputy President Snell overturned that decision upon appeal. He remitted the matter for re-determination by a different arbitrator and observed that s 67B of the *Health Services Act* may be relevant.

Upon remitter, on 13/09/2019, ***Arbitrator Douglas*** issued a COD, which determined that the appellant was not a deemed worker within the meaning of Cl 16 of Sch 1 *WIMA* and he entered an award for the respondent. However, the appellant appealed.

Deputy President Wood determined the appeal on the papers. She noted that the appellant sought to adduce fresh evidence in the appeal, namely: (1) the NSW Health Services Functional Area Supporting Plan (HEALTHPLAN); (2) the Model Litigant Policy; and (3) a file note dated 25/07/2019, written by the appellant's solicitor.

Wood DP declined to admit the fresh evidence. In doing so, she applied the principles set out in the decision of Basten JA in *Northern New South Wales Local Health District v Heggie* [2013] NSWCA 255 (*Heggie*), that "*the basic purpose of the power in s 352 (6) is to allow the Commission to admit further additional evidence which, if accepted, would be likely to demonstrate that the decision appealed against was erroneous.*" Further, in *Strickland*, Barrett JA observed:

> The part of s 352 (6) concerning 'substantial injustice' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence 'would cause' substantial injustice in the case. There must therefore be a decision as to the result that '*would*' emerge if the evidence were taken into account and the result that '*would*' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

Wood DP held that the appellant must establish that if the fresh evidence had been before the Arbitrator, it would have produced a different outcome. She did not accept that the HEALTHPLAN constitutes compelling evidence that would have resulted in a different outcome if it had been before the Arbitrator. She stated that the Model Litigant Policy is of no assistance, as the only legal remedy available to an aggrieved person is potentially a favourable costs order, which is not available in this matter. In any event, the role of the Presidential member in this jurisdiction is limited to correction of error in the Arbitrator's decision and the respondent's conduct of its defence does not constitute a breach of the Model Litigant Policy and it has not resulted in an error of fact, law or discretion in the Arbitrator's decision-making process.

In relation to the appellant's solicitor's file note, Wood DP noted that the appellant did not raise an issue of apprehended bias before the Arbitrator and he could not have erred by failing to determine an issue that was not before him. In any event, the appellant was complaining about what the Arbitrator said in a teleconference. She stated:

> 35. As I read the file note, the Arbitrator was not providing an advice on evidence to the respondent. On the contrary, the Arbitrator, in my view, was attempting to have before the Commission any evidence that existed that might shed light on the appellant's case. The Arbitrator's overall duty pursuant to s 355 of the 1998 Act includes the identification of issues and application of practical solutions to those issues. In the circumstances, the approach taken by the Arbitrator in the telephone conference was not inappropriate.

Wood DP stated that the grounds of appeal were "…*poorly drafted*", but she expressed them follows: (1) The Arbitrator erred in determining that in *Dawson*, Deputy President Snell made findings as to what was required to prove "*co-operation*;" (2) The Arbitrator erred in determining that it was necessary for the appellant to prove that at the time of the injury, she was co-operating with the HAC; (3) The Arbitrator erred in law by confusing the test for "*injury*" within the meaning of s 4 of *the 1987 Act* with the necessary element of "*co-operation*" in applying the standard of proof; (4) The Arbitrator erred in law by confusing the test for "*injury*" within the meaning of s 4 of *the 1987 Act* with the necessary element of "*co-operation*" in assessing whether the appellant was a deemed worker within cl 16 of Sch 1 of *the 1998 Act*; (5) The Arbitrator erred in fact and law by finding that the appellant's evidence, which was uncontested, did not prove that there was the necessary "*co-operation*" so that the deeming provision in cl 16 of Sch 1 applied; (6) The Arbitrator erred in law by concluding that the appellant had not discharged the onus of proof in

circumstances where the Arbitrator made specific findings in relation to s 67B of the *Health Services Act* and a factual finding in relation to the transfer of the patient's care; (7) The Arbitrator erred in fact, law and discretion by finding Ms Murphy's evidence persuasive, when Ms Murphy's role was that of Health Manager – Insurance and Risk, and (8) The Arbitrator erred in law by failing to take into account the appellant's submission that consent was evidence of co-operation.

Wood DP rejected ground (1). She agreed with DP Snell's construction of the third alternative provided for in cl 16 of Sch 1, and the statutory meaning of the word "*co-operation*": *Secretary, Ministry of Health v Dawson* [2019] NSWWCCPD 30

Wood DP rejected ground (2) and observed that the appellant had not explained why she considered the Arbitrator was wrong. She stated that the Arbitrator's approach was consistent with the explicit requirement to establish the element of co-operation in accordance with cl 16 of Sch 1 and the approach taken by Snell DP in the first appeal. What is required is that the ambulance services that the appellant provided through St John in conjunction with an event at Broadmeadow Racecourse were provided in co-operation with the HAC. She had not identified any error in that approach.

Wood DP rejected ground (3) and she stated that the appellant's submissions do not identify any error in the Arbitrator's careful consideration of the evidence. There is nothing in the Arbitrator's reasons that would indicate that he applied a greater burden of proof than that of the balance of probabilities. The acceptance of evidence and the weight that is given to it are peculiarly matters within the province of the decision maker, unless it can be said that a finding is so against the weight of the evidence that some error must have been involved. The appellant failed to identify any probative evidence that supports her case and any error by the Arbitrator in his consideration of the evidence before him.

Wood DP rejected ground (4) and stated that this is "*incomprehensible*" and that the absence of any cogent submission to explain or support it was fatal.

Wood DP rejected ground (5) as there was a clear conflict between the appellant's evidence and that of Ms Murphy.

Wood DP rejected ground (6). She stated:

> 147. This ground of appeal asserts that the Arbitrator made specific findings in relation to s 67B of the *Health Services Act*, and a factual finding in relation to the transfer of the patient care which weighed against the Arbitrator's determination that the appellant had not discharged the onus of proof…
>
> 152. The assertion that the Arbitrator merely read the provision onto the record is patently incorrect. The appellant identifies no part of the transcript or the Arbitrator's reasons where the Arbitrator "refused to properly consider" the effect of s 67B, and it is evident from the above passages that the Arbitrator gave due consideration to the effect of the section.

Wood DP rejected ground (7) and held that the Arbitrator's grounds for accepting Ms Murphy's evidence considered the appellant's submissions regarding Ms Murphy's capacity to give that evidence, the plausibility of her evidence and her presentation. The Arbitrator's conclusions were open to him and, applying the principles enunciated in *Devries* and *Rigby*, there is no basis for disturbing his finding.

Wood DP also rejected ground (8). She noted that while the appellant also complained that the Arbitrator failed to consider her arguments regarding the relationship between the HAC, the employees of the local area health network and NSW Ambulance, that relationship was not in issue. This is apparent from the Arbitrator's reasons and there is no basis for the appellant's complaint.

Accordingly, Wood DP confirmed the COD.

WCC – Medical Appeal Decisions

MAC revoked because AMS failed to carry out usual provocative tests for carpal tunnel syndrome – worker re-examined by a member of the MAP – assessment made for right carpal tunnel syndrome, but no objectively verifiable diagnosis made with respect to the left wrist

Pritchard v Australian Personnel Global Pty Ltd [2020] NSWWCCMA 54 – Arbitrator McDonald, Dr M Burns & Dr B Noll – 16 March 2020

On 14/12/2016, the appellant commenced employment with the respondent. Her work was repetitive and fast-paced and she alleged that she developed pain in her hands and wrists soon after she began work. On 28/12/2016, her GP diagnosed carpal tunnel syndrome and referred her for treatment, but she could not afford it and she continued to work until October 2017.

On 20/11/2019, Dr Kuru issued a MAC that assessed 0% WPI. However, the appellant appealed under ss 327 (3) (c) and (d) *WIMA* and asserted that the AMS failed to make a diagnosis and that the MAC was incomplete because it did not disclose the path of reasoning that the AMS adopted. In particular, he failed to apply the Guidelines and particularly cl 1.23, which provides:

> AMA5 (P11) states: 'Given the range, evolution and discovery of new medical conditions, these guidelines cannot provide an impairment rating for all impairments... In situations where impairment ratings are not provided, these guidelines suggest that medical practitioners use clinical judgment, comparing measurable impairment resulting from the unlisted conditions and measurable impairment resulting in similar conditions with similar impairment of function performing activities of daily living.

However, the respondent argued that para 1.16 of *the Guidelines* does not require the AMS to make a diagnosis. The AMS found inconsistencies in the appellant's presentation and deficiencies in the clinical and radiological assessments and it was therefore open to him to not provide a diagnosis.

The MAP required the appellant should be re-examined by Dr Burns on 20/02/2020. It referred to the MAC and noted that the AMS reviewed the nerve conduction study undertaken on 23/02/2017, which he felt was "*consistent with severe median nerve entrapment of the carpal tunnel on both sides, more pronounced on the left than on the right.*" When summarising the injuries and diagnoses, the AMS said:

> Ms Pritchard has a standing diagnosis of bilateral carpal tunnel syndrome, although she presents with symptoms generally inconsistent with this. Her reported numbness is predominantly in the ulnar three digits of both hands, which is anatomically discordant with carpal tunnel syndrome. She reports pain in her wrists but does not appear to have had any other investigation of this.

The AMS explained his findings as follows:

> Ms Pritchard presents with a history of pain in her wrists and numbness in her hands. Following initial assessment, she was sent for a nerve conduction study which demonstrated an underlying carpal tunnel syndrome. The difficulty is that the symptoms she reports now and those repeatedly documented in her notes are not consistent with a diagnosis of carpal tunnel syndrome…

The AMS noted that on 28/12/2016, Dr Alexander noted altered sensation in the right middle and ring fingers and that a discharge summary from Maitland Hospital dated 18/08/2018 referred to decreased sensation on the fourth and fifth fingers. He stated:

According to AMA 5 page 481, 16-5(b) impairment evaluation methods, paragraph 1 in impairment determination method states '*If sensory deficit or pain is present, localise the distribution and relate to the nerve structure involved.*' The distribution of symptoms reported by Ms Pritchard is not consistent with compression of the median nerve in carpal tunnel, then hence according to the Guidelines, is not assessable for impairment due to sensory impairment.

This lady has not been properly assessed, clinically or radiologically. She has had a nerve conduction study which has returned a finding of compression of the median nerve in the carpal tunnel but is not presenting with symptoms characteristic of this.

The MAP held that the referral to the AMS required him to assess permanent impairment. It did not set out a diagnosis nor was that appropriate. It noted that the appellant relied on a diagnosis of carpal tunnel syndrome, which is the compression of the median nerve in the carpal tunnel of the wrist. The median nerve controls sensation and movement in the thumb and first three fingers. The error in the MAC was the AMS' failure to carry out – or to report that he carried out – the usual provocative tests for carpal tunnel syndrome. Dr Burns' findings are consistent with a diagnosis of carpal tunnel syndrome in the right arm only and his findings in the left arm are not consistent with any particular diagnosis. The clinical signs do not support a diagnosis of left carpal tunnel syndrome.

Accordingly, the MAP revoked the MAC and it assessed 6% WPI with respect to the right upper extremity and 0% WPI with respect to the left upper extremity. It did not apply a deductible under s 323 *WIMA.*

Injuries to neck, shoulders, wrists & hands in 1990 – matter referred to AMS for assessments under Table of Disabilities & AMA5 Guides – Appellant alleged AMS did not adequately explain how current losses result from 1990 injury, did not consider all of the evidence and did not apply correct criteria to determine deduction under s 323 WIMA – MAC confirmed

Esto Pty Ltd v Stanaway [2020] NSWWCCMA 55 – Arbitrator Douglas, Dr T Mastroianni & Dr J Ashwell – 17/03/2020

The worker was employed on an abattoir process line until 1990. Duck J (Compensation Court of NSW) awarded her weekly compensation from 10/08/1991 and compensation under s 66 for loss of use of both arms below the elbow equivalent to 1/6 of the total loss thereof. She claimed further compensation under s 66 *WCA,* based upon assessments made by Dr Patrick, but the appellant disputed that maximum medical improvement had been reached. On 13/11/2017, she filed an Application for Assessment by an AMS, to determine whether the degree of permanent impairment was fully ascertainable.

On 21/12/2017, the AMS certified that it was not possible for the degree of permanent impairment to be fully ascertained. At some stage in 2019, the same medical dispute was referred back to the AMS and the AMS issued a further MAC stating that maximum medical improvement had been reached. On 17/04/2019, the worker made a further claim upon the appellant based upon Dr Patrick's assessments and she asked it to concede that she was a worker with high needs.

On 17/07/2019, the insurer disputed injury to the cervical spine and shoulders. The worker then filed an ARD, which alleged injury and/or disease including the aggravation etc. "*of a disease to both upper extremities (including the hands, shoulders, wrists and arms including tendinosis) and cervical spine*", due to the nature and conditions of employment.

Arbitrator Burge determined that the worker injured her neck and both arms above the elbow by way of an acceleration etc. of a disease process as a result of the nature and conditions of her employment and that the deemed date of injury was 5/12/1990. He remitted the matter to the Registrar for referral to an AMS to determine impairment of the neck, both arms at or above the elbow and WPI.

On 3/12/2019, Dr Anderson issued a MAC, which assessed 22.5% permanent impairment of the neck and 22.5% permanent loss of each arm at or above the elbow and he assessed combined 45% WPI (6% WPI for the cervical spine and 23% WPI for each upper extremity). However, the appellant appealed against the MAC under s 327 (3) (c) *WIMA.*

The MAP held that the AMS provided a sufficient explanation for his conclusions regarding permanent impairment and the available evidence supports the assessments. While different assessors might have weighed specific items of evidence differently and attached different weight to items of evidence than the AMS did, this does not mean that the AMS did not adequately explain his assessment. The AMS was not required to discuss every piece of evidence, but rather only the evidence that he considered relevant. He stated that he studied all the evidence "*in detail*" and the inference is that he considered the reports of Dr Martin and Dr Ellis (about which the appellant complained) as being not particularly relevant to his assessment of permanent impairment.

The appellant also complained that the AMS did not provide adequate reason to support his conclusion that there is a causal relationship between the worker's employment and her aggravation of poly-arthritis of the small joints of her hands. However, the MAP noted that the AMS considered the worker's employment as a knife hand, that she experienced swelling in her hands before she ceased work with the respondent and that she then experienced swelling of her hands with anything that she did. It was not until many years after the worker ceased work that she was diagnosed with poly-articular osteoarthritis. The AMS opined that the worker's employment as a knife hand "*aggravated quite badly*" the poly-articular osteoarthritis in the small joints of her hands and that large components of the aggravation continue. For these reasons, the MAP held that the AMS' reasons sufficiently exposed his path of reasoning.

The appellant also complained that the AMS erred in his approach to a deductible under s 323 (1) *WIMA.* The MAP noted that s 68A *WCA* applies by force of ck 3 (1) of Pt 18C of Sch 6 *WCA* with respect to the assessments under the Table of Disabilities. The steps involved are similar to those under s 323 *WIMA.* It held that the AMS followed all steps correctly to determine the deduction to be made and he did not err in assuming that the deduction should be 10% as there was simply no evidence to reveal the extent to which the degenerative changes in the worker's neck and shoulders were present as at 4/12/1990 or to what extent the poly-articular osteoarthritis was present in her hands at that time. It held that it would be too difficult, if not impossible, to determine the extent to which those pre-existing conditions were then present and now contribute to the impairment.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Section 59A WCA - Commission prevented from making an order for reasonably necessary medical treatment

Johnstone v Schmetzer [2020] NSWWCC 78 – Arbitrator Scarcella – 16 March 2020

The worker was employed by the respondent as a track rider. On 15/02/2007, he was thrown from a horse, which ran over him and trod on his left ankle while he was riding track work. Injury was not in dispute. He underwent multiple surgeries, including left lateral hip repair.

On 10/04/2014, Racing NSW made a WCD and notified the worker that weekly payments would cease on 17/07/2014, based upon a Complying Agreement dated 23/05/2011 (17% WPI). The worker sought a procedural review of the WCD by WIRO after MRS determined that he did not meet the criteria for weekly payments after the end of the second entitlement period as he was able to work in suitable employment. On 25/07/2014, WIRO dismissed the application.

On 28/07/2017, Dr Bradshaw (treating orthopaedic surgeon) recommended a left triple fusion and calcaneal bone grafting on the left foot and sought approval from the insurer. However, on 8/09/2017, the insurer disputed liability for the proposed surgery, but it did not specifically rely upon s 59A *WCA.*

On 18/04/2019, Dr Bradshaw again sought approval for the proposed surgery and the insurer again disputed liability for the proposed surgery, but it did not rely on s 59A *WCA.*

On 20/09/2019, the worker sought a review of the insurer's decision, but the insurer maintained its decision. The worker then filed an ARD.

The insurer filed a Reply that also asserted that the compensation sought in the ARD was excluded by operation of s 59A *WCA.*

Arbitrator Scarcella identified 4 issues for determination: (1) Whether the worker was in breach of cl 44 of *the Regulation*; (1) whether the respondent could raise s 59A *WCA* as an issue; (3) whether the proposed surgery is reasonably necessary treatment as a result of the accepted injury; and (4) whether the worker was precluded from recovering compensation for the surgery by operation of s 59A *WCA.*

In relation to issue (1), the Arbitrator held that the worker had not breached cl 44 of *the Regulation,* as the relevant reports did not deal with the issues before him - they were obtained in relation to a different claim.

In relation to issue (2), the Arbitrator allowed the respondent to raise s 59A *WCA* as an issue. He noted that s 289A (4) *WIMA* provides that where a respondent has failed to meet the notice requirements, or has failed to put all relevant issues in dispute, the Arbitrator may exercise their discretion to allow issues to be raised where they are of the opinion that it is in the interests of justice to do so. In considering the exercise his discretion, the Arbitrator considered the principles set out in *Mateus v Zodune Pty Ltd t/as Tempo Cleaning Services* [2007] NSWWCCPD 227 (Mateus*)* and he held that allowing the issue to be raised would not prejudice the worker, as he had provided detailed and well considered written submissions in relation to the issue. The respondent clearly articulated its intention to rely on s 59A *WCA* in the Reply dated 31/10/2019 and its lawyers moved promptly to clearly articulate the issue after being served with the ARD. He had regard to the merit and substance of the issue that is sought to be raised. Section 59A *WCA* is a disentitling provision. It is an issue that ought to be ventilated if I am to act according to equity, good conscience and the substantial merits of the case.

In relation to issue (3), the Arbitrator held that the proposed surgery was reasonably necessary medical treatment within the meaning of s 60 *WCA,* but the Commission currently lacks power to make an order for payment due to s 59A *WCA.* He stated:

> 93. The relevant parts of Clause 27 (1) of Part 2 of Schedule 8 provide that an existing claim is exempt from the operation of section 59A of *the 1987 Act* until the injured worker reaches retiring age in respect of compensation payable to him/her under Division 3 of Part 3 of *the 1987 Act*, if the worker's injury has resulted in permanent impairment of greater than 20%. The relevant parts of Clause 27 (2) provide that a worker's injury is considered to have resulted in permanent impairment of greater than 20% only if the injury has resulted in permanent impairment and an assessment of the degree of permanent impairment is pending and has not been made because an AMS has declined to make the assessment on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. However, it no longer applies once the degree of permanent impairment has been assessed.

The Arbitrator distinguished this matter from *Jovanovski* as cl 27 (2) (b) of Part 2 of Schedule 8 has not been satisfied - an assessment of the degree of permanent impairment is not pending and an AMS has not declined to make an assessment on the basis that

maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable. However, he noted that the worker also relied on s 59A (3) *WCA* and referred to Roche DP's decision in *Flying Solo Properties Pty Ltd t/as Artee Signs v Colette* (*Colette*). He argued that if he proceeded to have the proposed surgery at his own expense, he would be required to have time off work and, if medical certificates were submitted at that time in support of a claim for weekly compensation, then compensation would once again become payable to him and the insurer would be obliged to meet the cost of the treatment if it were found to be reasonably necessary. The Arbitrator stated:

> 97. In *Colette*, Roche DP explained the operation of section 59A of *the 1987 Act.* Relevant to Mr Johnstone's case, Roche DP held that workers will cease to be entitled to weekly compensation if having previously been entitled to such compensation, their right to receive actual weekly compensation comes to an end. That can occur because of the application of the legislation, as in Mr Johnstone's case, or because the worker has recovered from the effects of the injury. That is so, even though the right to receive actual weekly compensation may revive at a later time, as is dealt with in section 59A (3). In relation to section 59A (3), Roche DP explained that, if by operation of either section 59A (1) or (2), a worker has ceased to be entitled to compensation under Division 3 of Part 3, their rights to such compensation is revived during a period when weekly compensation is again payable, but only in respect of any treatment, service or assistance given or provided during the period when weekly compensation is payable to the worker.50 Section 59A (4) clarifies that weekly payments of compensation are payable to a worker for the purposes of the section only while the worker satisfies the requirement of incapacity for work and all other requirements of Division 2 that the worker must satisfy in order to be entitled to weekly payments of compensation.
>
> 98. Following the decision in *Colette*, section 59A underwent amendment, particularly in relation to the issue of the "*compensation period*."

Accordingly, while the Arbitrator held that the proposed surgery is reasonably necessary medical treatment, he did not order the respondent to pay for it.

Worker died as a result of a subarachnoid haemorrhage of the basilar artery – Held: Injury arose out of or in the course of employment and employment was a substantial contributing factor to it – Section 9B WCA - employment gave rise to a significantly greater risk of injury than if the deceased had not been employed in work of that nature

Grundy & Ors v Cogri Australia Pty Limited [2020] NSWWCC – Arbitrator Sweeney – 23 March 2020

From 28/07/2014 to 13/08/2014, the deceased was employed by the first respondent as a skilled labourer. On the latter date, he was required to carry out joint sealing of a concrete floor and, while performing his ordinary work, he collapsed and was found to be unconscious. He was taken to hospital, but on 14/08/2014, he died as a result of a subarachnoid haemorrhage. His death certificate also listed aneurysmal disease and hypertension as causes of his death.

At the date of his death, the deceased lived in a de factor relationship with the applicant. She claimed death benefits under s 25 (1) (a) *WCA,* plus interest. The Second Respondent (the child of the deceased and the applicant) and the Third and Fourth Respondents (the children of the applicant) also claimed as dependants and sought weekly payments under s 25 (1) (b) *WCA.* However, the first respondent disputed that the deceased died as a result of a work-related injury under ss 4 (a), 9A, 4 (b) (i), 4 (b) (ii) and 9B *WCA.* However, dependency was not disputed.

Arbitrator Sweeney conducted an arbitration and observed that the language of s 25 *WCA* negates the possibility of compromise. He noted that during conciliation, the first respondent conceded that the deceased was injured in the course of his employment and the issue for determination related to the application of ss 9A and 9B *WCA.*

After discussing the medical and lay evidence, the Arbitrator observed that the factual and legal consequences of death or incapacity resulting from the rupture of an aneurysm had occupied a good deal of judicial time in the former Compensation Court and on appeal before the High Court's decision in *Darren Zikar v MGH Plastic Industries Pty Ltd* (1966) 197 CLR 310 (*Zikar*).

In *Zikar,* the High Court held that while an aneurysm may be an autogenous disease, the rupture causing haemorrhage could be separately characterised as an injury. Toohey, McHugh & Gummow JJ stated:

> it may be accepted that the aneurism was an autogenous disease, but the appellants claim to personal injury within par (a) is based on the rupture which occurred. From Dr Stening's evidence, it is clear that the rupture of the aneurism was not inevitable and further that the rupture may have been minor, allowing the appellant, after treatment, to return to his previous occupation stop if there was no rupture there would be no event answering the description of personal injury and the appellant would be driven to rely upon par (B) of the definition. But there was such an event and the presence of the disease does not preclude reliance upon the event as a personal injury.

The judges approved the decision and reasoning of the Appeal Division of the Supreme Court of Victoria in *Accident Compensation Commission v McIntosh* [1991] VR 253 at 262, where Murphy J said:

> if the rupture is due to blood pressure, arteriosclerosis, arteriovenous malformation, or any other congenital or diagnostic aetiology, it is nonetheless a rupture, something quite distinct from the defect, disorder or morbid condition which enables it to occur.

In relation to s 9A *WCA,* the Arbitrator referred to the Court of Appeal's decisions in *Badawi v Nexon Asia Pacific Pty Limited t/as Commander Australia Pty Limited* (2009) NSWCA 324 (*Badawi*) and *Da Ros v Qantas Airways Limited* (2010) NSWCA 89 (*Da Ros*) (28 April 2010). He stated that in *Badawi*, the plurality endorsed the Court's reasoning in *Dayton v Coles Supermarkets P/L* [2001] NSWCA 153, in which Meagher JA stated:

> Many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word 'substantial'. But this word is a plain English word which is understood by anyone who is not a judge. Nor had the endless judicial lucubrations on the word contributed to anyone's understanding of it. And nobody in their senses would regard a cause which could be correctly categorised as very '*minor*' as '*substantial*'.

However, Davies AJA, stated:

> Likewise, in their context and particularly having regard to the list of factors specified in s 9A (2), the words '*substantial contributing factor*' require that compensation be paid only when the employment can be said to have contributed to the injury in a manner that is real and of substance. The section intends to exclude those many instances where, as a result of legal theory and extension of thought, liability has been found in cases where, as a matter of practical reality, the contribution which the employment has made to the injury has little substance.
>
> So interpreted, the section appears to me to have a clearer and more appropriate application than if the word '*substantial*' were use in a sense of words such as '*serious*', '*weighty*', '*important*', '*sizable*' or '*large*', terms to which the trial judge

> referred. The word '*substantial*' may be used appropriately in a range of circumstances. A matter which is large or weighty is also substantial. However, a matter maybe substantial without necessarily being large or weighty. In s 9A, it is sufficient that the contribution be substantial.

The Arbitrator held that the relationship between employment and an aneurysm is peculiarly a matter for specialist opinion and in this matter, there was a vast chasm between the doctors' opinions. He found that moderate physical activity can raise blood pressure sufficient to cause a rupture of an aneurysm and he stated:

> 66. The proposition that the postures adopted by the deceased in removing sealant was capable of significantly increasing blood pressure is not self-evident. But it was not directly challenged by Ms Hogan at the arbitration hearing. More importantly, it is not directly contradicted by Dr Walker in his report. This is yet another case in which an independent medical expert (IME) for one party offers a specific hypothesis for the cause of an injury, which the other party's IME, either deliberately or by oversight fails to address. The competing medical theories pass like ships in the night…
>
> 69. It not being inherently implausible or contradicted by medical evidence, I conclude that I should accept Dr Raftos' opinion that the deceased's posture in removing sealant from the concrete joins caused an increase in his blood pressure and triggered a rupture of a basilar artery. While it is not decisive, I note there have been many cases before the Commission, over many years, where the evidence asserted that increased blood pressure has contributed to a cardiovascular or cerebrovascular incident, particularly in the presence of hypertension. It would follow that the deceased's death arose out of his employment, although it is not strictly necessary to make such a finding. It also follows that Dr Walker's opinion that the deceased's death was random must be rejected.

The Arbitrator held that the deceased's employment was a real and substantial cause of the rupture of the aneurysm. While there were many pre-existing and pre-disposing factors at play, it is speculative to conclude that the injury would have occurred at or about the same time if not for the work performed by the deceased on the day of his collapse. Therefore, s 9A *WCA* was satisfied. He also held that s 9B *WCA* applied and that the decisions of Senior Arbitrator Snell (as he then was) in *Da Silva v Secretary, Department of Finance, Services and Innovation* [2015] NSWWCC 279 (*Da Silva*) and the Presidential decision of *Renew God's Program Pty Ltd v Kim* [2019] NSWWCCPD 45, are authority that the test requires that the relevant risk in the employment concerned be "*significantly greater*" than the risk had the deceased not been employed un employment of that nature. In *Da Silva*, Senior Arbitrator Snell held that the risk had to be greater, in a way that was "*important; of consequence*". The Arbitrator stated:

> 80. Accepting the opinion of Dr Raftos, the applicant (sic) performed work in the hours leading up to his stroke which repeatedly caused elevation of his blood pressure. This was not an isolated instance, as is the case with many of the activities referred to in the studies that occur occasionally throughout the course of the day or less regularly. It is logical to infer in those circumstances that the performance of the work gave rise to a significantly increased risk of rupture of the aneurysm.
>
> 81. I accept that the applicant (sic) had an underlying disease process which may ultimately have led to a haemorrhage of the aneurysm. The injury in this case, however, is the haemorrhage. It occurred at work, in circumstances where the applicant was performing activity that substantially contributed to its occurrence. The nature of the work significantly increased the risk of the worker suffering the injury than had the worker not been employed in employment of that nature. To use the language of the section, the nature of the employment gave rise to a significantly greater risk of the worker suffering the injury.

Accordingly, the Arbitrator found for the applicant with respect to the disputed liability issues. He awarded lump sum benefits under s 25 (1) (a) *WCA,* which he apportioned between the dependants, and weekly payments to the second, third and fourth respondents under s 25 (1) (b) *WCA)* and interest under s 109 *WIMA.*

Local Court of NSW Decisions

Local Court refuses to permanently stay the worker's private prosecution of the insurer for breach if s 283 (1) WIMA

Heise v Employers Mutual Limited 2018/00330932 – Magistrate R Maiden – 25 March 2020

The background to this matter was reported in Bulletin no. 26, but is summarised below.

- On 11/04/2017, the worker claimed compensation under s 66 WCA. However, EML failed to determine it. On 25/07/2018, she filed an ARD with the WCC and EML filed a Reply. The worker requested the Registrar of the Local Court of New South Wales to issue a CAN alleging that EML breached s 283 (1) *WIMA*. The Registrar issued the CAN (the date of issue is not clear) and it was served on EML on 30/10/2018.
- EML applied to the Supreme Court of NSW for judicial review of the Local Court Registrar's decision to issue the CAN. In effect, it argued that the Local Court had no power to deal with a breach of s 283 *WIMA* laid at the request of a person other than SIRA.
- EML acknowledged that s 245 (5) *WIMA* expressly provides that proceedings for an offence against the *WIMA* can be instituted by a person other than SIRA. However, it argued that because s 283 *WIMA* is a "*penalty notice offence*" and ss 246 (1) and (6) *WIMA* together with cl 71 of the *Workers Compensation Regulation 2016* (*the Regulation*) provide that only an "*authorised officer*" can issue a penalty notice, the worker is prohibited from instituting the Local Court proceedings.
- The worker argued that:
    - A prosecution for an offence can be commenced by way of a CAN under s 172 of the *CPA* and s 174 of the *CPA* expressly provides for the commencement of private prosecutions;
    - There is nothing in either the *WIMA* or the *Regulation* that expressly prohibits the issuing of a CAN and s 245 (1) *WIMA* expressly retains the power for the issuing of CANs and matters being dealt with by a Court;
    - Read plainly, s 246 (5) *WIMA* provides that the penalty notice procedure may be employed, but that the provision of penalty notice offences does not prohibit the ability to proceed by way of a charge in the Local Court or the District Court as provided by the "*other provision[s]*" contained at ss 283 and 245 *WIMA*; and
    - The use of the word "*may*" in s 246 (1) *WIMA* confers a discretion to an authorised officer to issue a penalty notice, but it does not impose a statutory obligation on that officer to issue a penalty notice for an alleged contravention of s 283 *WIMA*. It would require express words to oust the entitlement of a private citizen to bring a prosecution and there is no such prohibition.
- However, the worker did not dispute that: s 283 *WIMA* is a "*penalty notice offence*"; only an "*authorised officer*" may issue a "*penalty notice*" and that she is not an "*authorised officer*"; s 246 *WIMA* provides the power to issue a penalty notice; and she has no capacity under the *WIMA* to issue a penalty notice.

McCallum J noted the worker's concessions, but stated that it does not follow that the alternative method of prosecuting, by commencing criminal proceedings in a court by a CAN, is foreclosed. She held that the right to commence a prosecution as a common informer is an important common law right and its exclusion would have to be expressed in clear terms. It is not. On the contrary, s 245 (5) of the *WIMA* provides,

> Proceedings for an offence against this Act, the *1987 Act* or the regulations under those Acts may be instituted by (but not only by) the Authority.

Her Honour held that there is a bifurcation in the ways in which criminal proceedings can be commenced (between, on the one hand, the issue of a penalty notice and, on the other, the issue of a CAN, each being a path to the same end), as s 283 *WIMA* has a maximum penalty of 50 penalty units, which calculates to an amount of $5,500. The penalty notice provisions permit an authorised officer only to issue a penalty notice for $500. The section contemplates that offences under the *WIMA* will be dealt with by a court. Further, subsection (2) limits the penalty that can be imposed by the Local Court to 200 penalty units, whereas the maximum penalty that may be imposed in proceedings in the District Court is the maximum penalty provided in respect of the offence. The section therefore contemplates a hierarchy of prosecutions even within the Court system.

Her Honour held that there is no mandatory expression in the statute itself to the effect that the offence must be dealt with by way of penalty notice and that there is nothing in the legislation that expressly prohibits the issue of a CAN. As EML's submissions focussed on SIRA's role and concerned its functions, her honour afforded it an opportunity to be heard and a representative of the Crown Solicitor appeared for it on short notice, as amicus curiae. She dismissed the summons and concluded:

> 40. As already indicated, however, the right of a common informer to commence a private prosecution is an important common law right. And even having regard to those matters, I do not think there is anything in the language of the relevant statutes to suggest any intention to exclude that right. The circumstances recited at the outset of this judgment provide some illustration as to the importance of having an entitlement to bring a private prosecution alongside the prosecuting authority of a statutory body such as SIRA.

EML lodged an Appeal with the Court of Appeal, but discontinued this on 22/02/2019.

The worker's private prosecution then proceeded in the Local Court of NSW and on 25/03/2020, ***Magistrate R Maiden*** dismissed EML's Notice of Motion, which sought a permanent stay of the proceedings.

The Magistrate set out an agreed Chronology and an Agreed Statement of Facts, which relevantly include that on 19/12/2018, the Commission issued a COD that ordered the respondent to pay the worker compensation under ss 66 *WCA* for 19% WPI based upon a MAC from Dr Beer dated 14/11/2018, $15,000 for pain and suffering under s 67 *WCA* and costs. He noted that while McCallum J's decision did not specifically address the issue of a permanent stay, the reasons that she provided in refusing EML's application to quash the Registrar's decision to issue the CAN, are "*very instructive*".

The Magistrate concluded that the Registrar was simply required to determine whether or not jurisdiction exited to accept the request to issue a private prosecution. He accepted the respondent's submission that there is a clear inference from the decision of McCallum J that this involves an exercise of discretion by the Registrar.

Is an Application for the issue of a CAN is an inter-parties matter?

The Magistrate was not satisfied that this argument was made out and stated:

> The issue as to whether or not the proceedings then should be dismissed for reasons such as those advanced now are not a matter for the Registrar to determine. The Registrar is simply required to consider whether, on the face of it, taking the information at its highest, there is a basis for jurisdiction. I am of the view that if the Registrar attempted to go any further than that, he or she would exceed his or her powers.

Loss of a right to silence/Unfairness

EML argued that the worker was under some obligation to notify it of her intention to seek the issue of the CAN. The thrust of its argument was that it had lost the ability to consider whether or not information and/or documents would have been disclosed to the worker's legal representatives. In the event that it had known of the intention to issue the CAN, it would have been able to consider whether a right to silence needed to be exercised.

The Magistrate rejected this argument, because the offence is based upon a failure to determine a claim within a certain timeframe and there is a provision for a statutory defence (a reasonable excuse for the failure). He accepted the worker's argument that if EML was unable to determine the claim within the statutory period, it was required to give her notice as to why it was unable to do so. He also accepted that EML engaged the Commission by disputing the claim in the jurisdiction and that it clearly must have been aware, or ought to have been aware of the existence of the provision whereby a criminal prosecution could be launched. He stated:

> In the event that the criminal proceedings continue and there is a finding in the course of those proceedings that there have been circumstances where it is appropriate for one reason or another to exclude evidence or provide directions or warnings appropriate pursuant to various provisions of the *Evidence Act*, that would be a matter for the tribunal hearing the criminal proceeding.
>
> …In my view, it's not appropriate to grant a permanent stay where a perceived injustice or unfairness or prejudice is said to have occurred as a result of the way in which the matter has developed. In this regard I rely upon what was said in *R v RD* [2016] NSWCCA 84 as referred to above.

Determining the same issue twice

EML argued that a permanent stay is required to prevent the criminal proceedings simply re-determining the issue that the Commission has already determined and that it is an abuse of process for the worker to be able to proceed with the private prosecution. However, the Magistrate rejected this argument and stated:

> It goes without saying that the proceedings in the Commission were generated as a result of an application by the respondent for her claim to be determined on the basis that the applicant had not determined the claim within the timeframe allowed. The applicant then, as I understand it, exercised its right to seek to raise issues not previously relied on. That issue was determined in favour of the respondent in this matter and as a result her claim was finalised.
>
> Parliament created a separate provision as detailed in these reasons, creating a criminal offence if a claim was not determined within the statutory period and the relevant entity could not establish a reasonable excuse for the failure. I'm not persuaded that any failure by the legislation to provide a reasonable excuse in the Workers Compensation Guidelines thereby potentially removing the possibility for a defence to be raised alters the fact that Parliament has created the offence.
>
> I am not of the view that the fact that there is no available defence should prevent the respondent to be able to proceed to prosecute the case…

> I am of the view that the decision of the Commission did not try the same issues as would be tried in the event of the Court Attendance Notice proceeding in this Court. I am of the view that the issues are completely different setting aside the fact that one only addresses a civil action for compensation and the other addresses a criminal prosecution in accordance with the Act.
>
> In any event, I would think this situation is not unlike a private citizen seeking to issue a private prosecution of another for assault where there have been proceedings between them involving the same private citizen having successfully sued the other for damages arising from the same facts and circumstances.

The Magistrate held that there is no abuse of process: (1) where the legislation specifically provides for it; and; (2) where the legislator was aware that the legislation created the ability for a person to seek the assistance of the Commission to determine a claim when delay had occurred; and; (3) for the potential to exist that there could be a prosecution of the applicant for a criminal offence arising from delay by the applicant in resolving the claim. He stated that to grant such a stay prevents Parliament's intention in creating s 283 of the *WIMA* from being given effect. As both Parliament and the applicant in this matter were aware of the separate provision creating the offence, or the applicant ought to have been aware of it, it would be entirely wrong to grant a permanent stay.