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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.

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1. Nader v A O Design Pty Ltd [2020] NSWWCCPD 19
2. Bosch v McCain Foods (Australia) Pty Ltd [2020] NSWWCCMA 64
3. Grace Worldwide (Australia) Pty Ltd t/as Grace Removals Group v Howarth [2020] NSWWCCMA 69
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WCC – Presidential Decisions

Alleged factual error: application of Raulston v Toll Pty Ltd - proof of injury simpliciter – s 289A WIMA

Nader v A O Design Pty Ltd [2020] NSWWCCPD 19 – Deputy President Snell – 1/04/2020

On 13/06/2012, the appellant suffered a lacerated left hand while lifting a cabinet at work. He has not worked since 26/04/2013. He suffered back symptoms prior to the frank incident and alleged that he injured his thoracic and lumbar spines. On 16/05/2017, he underwent decompression surgery at the L4/5 level. He claimed compensation under s 66 *WCA* for 24% WPI based upon assessments from Dr New (21% WPI for thoracic & lumbar spines & scarring) & Dr Lai (4% WPI for ulnar nerve compression in the left upper extremity & scarring). The respondent disputed the alleged back injury.

Arbitrator Homan conducted an arbitration hearing on 9/09/2019. The appellant sought leave to rely upon an alleged issue estoppel arising from Consent Orders dated 23/10/2018, by way of an application under s 289A (4) *WIMA*. The Arbitrator declined that application. On 14/10/2019, she issued a COD, which determined that the appellant had not discharged his onus of proving s 4 (a) injuries to his thoracic and lumbar spines as a result of the incident in 2012.

As the threshold under s 66 (1) *WCA* was not satisfied with respect to the left upper extremity alone, the Arbitrator entered an award for the respondent. She found that the first reference to back symptoms was in a Certificate of Capacity dated 31/01/2013 and stated:

> I have carefully considered the evidence as a whole but, the lack of contemporaneous medical evidence of back symptoms associated with the incident; the lack of credible explanation for the delay in reporting such symptoms; the inconsistency between the [appellant's] evidence and the contemporaneous medical evidence; the failure of Dr New to engage sufficiently with the contemporaneous medical evidence; and the identification in the materials of other possible causes for the [appellant's] condition; leave me unsatisfied that the [appellant] has discharged the onus of proving on the balance of probabilities that the incident on 13 June 2012 caused injury pursuant to s 4(a) of the 1987 Act to his lumbar spine or thoracic spine.

The Arbitrator held that her findings were not inconsistent with the 2018 Consent Orders because there was no evidence before her regarding the pleadings in respect of which the Consent Orders were made, the Commission did not determine liability in those proceedings and the award may only have related to the accepted left hand injury. Further, the respondent's later denials of liability were inconsistent with it having accepted liability for the now-disputed body parts.

Deputy President Snell determined the appeal on the papers. There being six grounds, the Deputy President relevantly noted that the appellant asserted that the Arbitrator erred: (5) in law, in requiring the appellant to demonstrate a '*dramatically different*' pathological change in the lumbar spine in order to demonstrate '*injury*' in circumstances where the '*injury*' was in the nature of an aggravation of a pre-existing condition and there was evidence that there had been a dramatic increase in symptoms such that the appellant was no longer able to work; and (6) in law, by failing to accord the appellant procedural fairness by refusing the appellant's application to make submissions and present argument in relation to the issue of estoppel.

Snell DP rejected grounds (1), (2), (3) and (4), but upheld grounds (5) and (6).

In relation to ground (5), Snell DP stated:

> 99. It is sufficient if the incident caused or materially contributed to the injury. This, of course, leaves issues of '*substantial contributing factor*' pursuant to s 9A of *the 1987 Act* (in a case involving injury pursuant to s 4 (a)), but that is a different issue. The appellant refers to the Arbitrator's observation that the thoracic injury issue "*is a matter for qualified medical opinion and there is no such medical opinion in the evidence*". The appellant submits there was the appellant's evidence and also the medical evidence of Dr Sanki. Dr Sanki expressed the view:
>
> > I also attribute the disc injury in his dorsal and lumbar spine to the type of work he is doing and to the above mentioned incident…
>
> 102. The Arbitrator's reference to there being no qualified medical opinion, on the issue of whether the thoracic pathology was caused by the incident, suggests that Dr Sanki's opinion was discarded out of hand. The Arbitrator did not say whether she accepted or rejected Dr Sanki's opinion relevant to '*injury*'. The appellant was entitled to an explanation for the Arbitrator's non-acceptance of his medical case in this regard. If Dr Sanki's opinion was to be rejected, this required coherent reasons.
>
> 103. The way in which the Arbitrator described the issue of injury to the thoracic spine, in the reasons at [130], was inconsistent with a recognition that the injury could be proved in the presence of other contributing causes. I accept that this involved a misdescription of the test. Additionally, it was necessary that the Arbitrator engage with the parties' respective medical cases and explain her preference for one over the other. This was not done in so far as Dr Sanki was concerned.

In relation to ground (6), Snell DP held that there was no evidence before him that the appellant consented to the procedural course that the Arbitrator adopted regarding the alleged estoppel. He held that s 289A *WIMA* is not relevant to the appellant's attempt to rely upon an estoppel argument and he stated:

> 127. The Arbitrator treated the question of whether the appellant could raise the issue of estoppel, on the basis of the earlier consent orders, as one involving the exercise of her discretion. In exercising her discretion on the basis of whether leave should be given pursuant to s 289A (4) she took account of irrelevant considerations. She failed to take account of relevant considerations. This involves error. Ground No. 6 characterises this as a failure to afford the appellant procedural fairness. That is appropriate where the nature of the error is that the appellant's entitlement to raise the estoppel argument and to make submissions in respect of it was dealt with on an erroneous basis.

Accordingly, DP Snell revoked the COD and remitted the matter to a different Arbitrator for re-determination.

WCC – Medical Appeal Decisions

Remitter after judicial review – injury to lumbar spine & vaginal prolapse – Held: treating surgeon's records do not support 'advice' that hysterectomy would give a better result or reduce the risk of recurrence of the prolapse and the loss of fertility is not rateable

Bosch v McCain Foods (Australia) Pty Ltd [2020] NSWWCCMA 64 – Arbitrator McDonald, Professor J Carter & Dr J Garvey – 30/03/2020

The judicial review decision of Simpson AJ was reported in Bulletin 46: *Bosch v McCain Foods (Australia) Pty Ltd* [2019] NSWSC 1390.

On 24/03/2015, the appellant suffered severe back pain and painful pelvic symptoms after lifting a box at work and a vaginal prolapse and bladder hypersensitivity was diagnosed. Surgery was proposed ("*anterior repair, posterior repair, vaginal hysterectomy, sacrospinous colpopexy and cystoscopy* …") and she claimed compensation including the costs of that surgery, but the insurer disputed liability for the prolapse. An Arbitrator determined that the proposed surgery was reasonably necessary as a result of the work injury and the insurer did not appeal against that determination.

On 3/11/2016, the appellant underwent surgery, including a vaginal hysterectomy, which resulted in a permanent loss of fertility, and she then claimed compensation under s 66 *WCA.* However, the insurer disputed the claim. She then sought WPI assessments (lumbar spine and urinary & reproductive system) for the purposes of ss 66 *WCA* and 151H *WCA*.Dr Rochford (AMS) assessed 1% WPI (urinary & reproductive systems) but stated that this did not result from the work injury because the hysterectomy was "*elective*". In his view, if preservation of fertility was a priority, the appellant could have undergone anterior and posterior repair of the prolapse without hysterectomy and prior symptoms of Menorrhagia and her age may have been factors in her decision to undergo the hysterectomy.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. She argued that the AMS misunderstood his task as the Arbitrator had determined liability and that he wrongly failed to assess infertility because he felt that the hysterectomy was "*elective*". However, the MAP confirmed the MAC.

The appellant applied for judicial review by the Supreme Court and Simpson AJ held that her case to the MAP assumed a chain of causation, namely that the infertility resulted from the hysterectomy, which resulted from the prolapse surgery, which resulted from the work injury (alternatively, that the work injury resulted in the need for the prolapse surgery, which

required the hysterectomy, which resulted in infertility). She noted that the Arbitrator held that both the prolapse surgery and the hysterectomy were "*reasonably necessary*" as a result of the work injury, but she rejected the appellant's argument that "causation" was closed because the *WIMA* assigns to the medical assessment system the determination of medical disputes including issues of causation.

Her Honour stated that in *Bindah,* Emmett JA (Ward JA agreeing) held that neither an AMS nor a MAP is bound by the Arbitrator's decision on causation and that decision is binding upon the Court. Therefore, she proceeded on the basis that causation was a live issue for the AMS and the MAP. She held that in order to establish the necessary causal link, it was not sufficient that the appellant would not have undergone a hysterectomy but for the work injury, or that she would not have had the hysterectomy if she had she not suffered the work injury and vaginal prolapse. It may well have been sufficient if the appellant established, to the satisfaction of the AMS or the MAP, that undergoing the hysterectomy was likely to have improved the outcome of the vaginal prolapse surgery and reduced the risk of recurrence.

However, neither the AMS nor the MAP directed any attention to these considerations and jurisdictional error was established because the MAP constructively failed to exercise jurisdiction. Also, the MAP's speculation about alternative possible reasons for the appellant's decision to undergo a hysterectomy constituted a denial of procedural fairness and its reasons were inadequate, which also constituted an error of law on the face of the record (Wingfoot). Accordingly, her Honour set aside the MACs (x 2) and remitted the appeal against the MAC to the Registrar for determination according to law.

Upon remitter, the MAP determined that a further medical examination of the appellant was not required, but it called for the production of all medical records and noted that there was a significant delay in the production of those documents. It noted that the evidence that Dr Manning said that hysterectomy would reduce the chance of recurrence of the prolapse and provide a better result was only contained in the MAC and that its review of Dr Manning's reports shows that her opinion was in fact the opposite – that the appellant sought advice about heavy periods and that "*the hysterectomy has no effect on bladder, bowel or sexual function. It does not make any difference to the success of the repair*". It held that the appellant's argument for a causal connection between the work injury and the hysterectomy is unsustainable and that surgery is not rateable other than in respect of the bladder, as assessed by the AMS.

Accordingly, the MAP confirmed the MAC dated 26/07/2018.

MAC set aside as the AMS exceeded the terms of the Referral

Grace Worldwide (Australia) Pty Ltd t/as Grace Removals Group v Howarth [2020] NSWWCCMA 69 – Arbitrator Perrignon, Dr M Burns & Dr D Crocker – 3/04/2020

On 31/05/2014, the appellant suffered a ruptured left ACL, which required reconstruction. He was prescribed medication that caused a nephrotic syndrome and on 24/12/2014, he was admitted to hospital suffering chest pains. A large pulmonary embolus was diagnosed and treated, but on 2/01/2015, he suffered a further pulmonary embolus, which required further hospitalisation. In 2019, he commenced WCC proceedings that claimed compensation under s 66 *WCA* for permanent impairment of the left knee and 2 consequential conditions, namely pulmonary embolism and nephrotic syndrome.

On 8/11/2019, the Registrar referred the disputes to the following AMSs to assess WPI of the left lower extremity (Dr Pillemer – lead assessor), Urinary & reproductive system (Dr Garvey) and cardiovascular system (Dr Ackroyd).

On 16/12/2019, Dr Pillemer issued a MAC that assessed combined 26% WPI (4% left lower extremity, 14% urinary & reproductive system and 11% cardiovascular system). The latter impairment was assessed by Dr Ackroyd as comprising 3% (cardiovascular swelling), 5% (cardiovascular hypertension) 3% (treatment effect).

The appellant appealed against Dr Ackroyd's MAC under s 327 (3) (d) *WIMA* and argued that that the pulmonary embolus had resolved by the time of the AMS' examination and he exceeded the terms of the Referral by assessing swelling and hypertension as a result of the embolus. It asserted that he should have assessed 0% WPI.

The MAP determined the appeal on the papers and a further medical examination was not required. It held that the existence of swelling was relevant to the assessment of impairment of the urinary and reproductive system and it was not a sign of damage to the cardiovascular system. Accordingly, as Dr Ackroyd assessed WPI by reference to swelling resulting from nephrotic syndrome, he had exceeded the terms of the Referral and his assessment of 3% WPI for '*swelling*' was set aside.

While the appellant also argued that the assessment for hypertension was beyond power because this was not the subject of any specific claim made in the ARD, the MAP held that it was on notice that the worker was claiming compensation in respect of the cardiovascular system due to hypertension because Professor Haber reported on this. There was no evidence that either party objected to the terms of the Referral to Dr Ackroyd and there was no error in his assessment for hypertension. It also held that the assessment of 3% WPI for treatment effect was sustainable.

Accordingly, the MAP revoked Dr Ackroyd's MAC and issued a fresh MAC that assessed 8% WPI with respect to the cardiovascular system.

WCC – Arbitrator Decisions

Claims under s 66 WCA – threshold under s 66 (1) WCA not satisfied with respect to the accepted injuries - dispute not referred to an AMS

Ali v Linksmart Pty Limited [2020] NSWWCC 100 – Senior Arbitrator Bamber – 31/03/2020

On 5/08/2018, the worker suffered a partial amputation of his left index finger while using a dicing machine at work. He claimed compensation under s 66 *WCA* for the left upper extremity and scarring and also alleged that he suffered consequential conditions in his cervical spine, upper gastrointestinal tract and CRPS. The respondent disputed the alleged consequential conditions.

Senior Arbitrator Bamber cited the decision of DP Roche in *Kumar v Royal Comfort Bedding Pty Ltd* [2012] NSWWCCPD 8 as authority that the legal test of causation for a consequential condition is that set out by Kirby P (as his Honour then was) in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR:

> 462E. Since that time, it has been well recognised in this jurisdiction that an injury can set in train a series of events. If the chain is unbroken and provides the relevant causative explanation of the incapacity or death from which the claim comes, it will be open to the Compensation Court to award compensation under the Act…

The Senior Arbitrator held that the disputes regarding CRPS and the upper digestive system should be referred to an AMS, but she was not satisfied that the worker had not discharged his onus of proving that he suffered a consequential condition in his cervical spine. However, as the threshold under s 66 (1) *WCA* was not satisfied by the assessments for the left upper extremity, scarring, CRPS and upper digestive system, those disputes could not be referred to an AMS and the worker was not entitled to compensation.

Accepted injury to right elbow in 2012 & incident at home in 2018 – whether further symptoms were causally related to the work injury – worker failed to discharge her onus of proof – Nguyen v Cosmopolitan Homes (NSW) Pty Limited & Kooragang Cement Pty Ltd v Bates applied

Seles v State Transit Authority [2020] NSWWCC 110 – Senior Arbitrator Bamber – 7/04/2020

On 22/05/2012, the worker suffered an accepted injury to her right elbow. However, she also alleged that on 1/03/2018, her condition deteriorated and she injured her right arm and elbow. The respondent disputed that the 2018 symptoms were causally related to the 2012 injury. The worker claimed continuing weekly payments from 1/03/2018 and a general order for s 60 expenses. The respondent placed work capacity in issue.

Senior Arbitrator Bamber conducted an arbitration on 6/03/2020. On 7/04/2020, she entered an award for the respondent. Her reasons are summarised below.

- The worker stated that on 1/03/2018, she was placing her 2-year old daughter into a low chair at home and her right elbow locked. She suffered instant pain in her elbow and thought that she had re-fractured it.
- On 17/05/2019, the respondent medically retired the worker.
- On 12/07/2018, Dr Presgrave (treating neurologist) stated that he suspected that the 2012 elbow fracture may have set off other musculoskeletal issues. However, he did not explain what these "issues" were or how this could have occurred and it is not clear whether he was aware that the 2012 fracture was un-displaced. Because of those factors, the Senior Arbitrator could not place weight upon that opinion regarding the issue of causation.
- The Senior Arbitrator preferred the opinion of Dr O'Sullivan to that of Dr Gronot regarding the causation issue, as he was the only doctor who actually considered that issue in detail. He stated that the fracture of the right radial head is on the opposite side of the elbow to where the ulnar nerve passes and that the 2012 injury would not have injured the ulnar nerve.
- In *Strinic v Singh* [2009] NSWCA 15, the Court of Appeal referred to the principles and practices of a specialist jurisdiction. The respondent argued that some of these matters in issue could be ascertained from medical resource books and the Court stated that recourse to medical dictionaries and anatomical tables may be appropriate to ascertain the meaning of terminology used in medical evidence. However, the Court was invited to confirm that the trial judge's medical diagnosis was correct and this was not permissible. The Court stated that even if recourse was had to medical dictionaries and anatomical tables, it could not be satisfied that its interpretation of such matters would be accurate, or whether there would be other matters that needed to be taken into account before drawing any conclusion. More importantly, the parties would not then be afforded the opportunity to make submissions in respect of any matter upon which the Court might reach a particular conclusion. The error in the Court taking such a course is obvious. It stated:

  > The appeal comes to this Court from a specialised Tribunal which is dealing with compensation cases and conflicting lay and medical evidence every day. The flavour of the expertise of the Compensation Court can be found in the judgment under appeal. Medical conditions, unfamiliar to a lay body are stated in the judgment without definition simply because those practising in the Compensation Court are, or are taken to be, familiar with the medical terms used and the ordinary and oft repeated conflicts of medical opinions expressed. It can be inferred from the establishment of a specialised Compensation Court (one might say especially given the abolition of such bodies elsewhere in

Australia) that the Parliament of this State has entrusted the decision making in (relevantly) questions of medical causation and the aetiology of incapacity to a specialist tribunal comprised of specialist members whose expertise is refined by the repeated performance of their tasks.

- However, being part of a specialised tribunal does not mean that a determination can be made in the absence of evidence and the worker had the opportunity to challenge Dr O'Sullivan's evidence by direct medical evidence.
- The legal test of causation of a consequential condition is that set out by the Court of Appeal in *Kooragang Cement Pty Ltd v Bates* (1994) NSWCCR 796. Further, in *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* [2008] NSWCA 246, McDougall J stated (at [44]):

> A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact. See Dixon J in Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336. His Honour's statement was approved by the majority (Dixon, Evatt and McTiernan JJ) in Helton v Allen [1940] HCA 20; (1940) 63 CLR 691 at 712.

- In applying the principles in *Kooragang* and the decision in *Nguyen* to this matter, the Senior Arbitrator was not satisfied that the worker had established on the balance of probabilities that there is a causal connection between the symptoms in March 2018 and the accepted injury in 2012.

Alleged disease injury and/or aggravation etc. of disease injury – gaps and inconsistencies in medical evidence & absence of a reasoned diagnosis of work-related injury in a fair climate – award for the respondent entered

Sullivan v Southern Meats Pty Ltd [2020] NSWWCC 111 – Arbitrator Scarcella – 7/04/2020

The worker alleged that she injured her left shoulder, thoracic spine and cervical spine as a result of the nature and conditions of her employment from 1/07/1992 to 2/09/1992. On 7/03/1997, she was awarded compensation under s 66 *WCA* for 17% permanent impairment of the back and for pain and suffering. On 3/12/2010, the parties entered into a complying agreement for 20% permanent loss of efficient use of the left arm at or above the elbow.

On 28/02/2017, the insurer issued a dispute notice, which denied liability for the neck injury and injections into the neck. On 14/03/2017, it issued a s 39 notice to the worker and advised her that weekly payments would cease in December 2017.

On 1/06/2017, the worker underwent neck surgery. On 2/05/2018, she sought a review of the insurer's decision under s 287A *WIMA,* but the insurer maintained its decision to dispute liability for the neck injury under ss 4 & 9A *WCA* and it confirmed the s 39 notice.

On 6/11/2019, the worker filed an ARD, which claimed compensation under s 66 *WCA* for permanent impairment of the neck. The issue in dispute was whether the worker suffered a disease injury to her neck (s 4 (b) (i) *WCA)* or an aggravation etc. of a disease (s 4 (b) (ii) *WCA*).

Arbitrator Scarcella stated that the respondent conceded that s 9A *WCA* did not apply to this matter and he noted that the worker did not pursue a claim under s 67 *WCA.* He discussed the relevant case law and principles regarding the tests for causation of a disease injury and the aggravation etc. of a disease injury and set out the medical evidence in detail. He noted that none of the IME specialists qualified by the worker's solicitors in relation to the previous claims reported a history of neck injury and/or symptoms.

However, the Arbitrator noted that Dr Endrey-Walder opined that the worker developed symptoms in her neck, left shoulder/arm and thoracic spine as a result of the nature and conditions of her employment in 1992 and said that the worker "*acquiesced about her symptoms*" for a period of 10 to 15 years because nobody was able to assist her. He stated that he did not find Dr Endrey-Walder's opinion persuasive and he gave it no weight, as the doctor provided no diagnosis of an injury to the neck. Rather, he simply referred to her developing symptoms at the neck as a direct consequence of the nature and conditions of her work with the respondent during the relevant time. That conclusion was based on the worker's history that she developed gradually increasing neck pain at the time, which is inconsistent with the medical evidence. The doctor did not provide any reasoning to support the proposition that the worker suffered a disease process of gradual onset in her neck, which was contracted by her in the course of employment and to which the employment was a contributing factor; or any reasoning to support the proposition that she suffered an aggravation, acceleration, exacerbation or deterioration of a disease process to the neck.

The Arbitrator stated that Rule 15.2 (3) of the *Workers Compensation Commission Rules 2011* provides that "*evidence based on speculation or unsubstantiated assumptions is unacceptable*." Further, the authorities such as *Paric v John Holland (Constructions) Pty Ltd* (*Paric*); *Makita (Australia) Pty Ltd v Sprowles* (*Makita*); *South Western Sydney Area Health Service v Edmonds* (*Edmonds*); and *Hancock v East Coast Timbers Products Pty Ltd* (*Hancock*) establish that there must be a "*fair climate*" upon which a doctor can base an opinion. More than a mere "*ipse dixit*" (an assertion without proof) is required and Dr Endrey-Walder's opinion is an assertion without proof.

The Arbitrator stated that care should be taken not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment, as experience demonstrates that busy doctors sometimes misunderstand, omit or incorrectly record histories of accidents or complaints by a patient, particularly in circumstances where their concern is with the treatment or impact of an obvious frank injury: *Davis v Council of the City of Wagga Wagga*; and applied in *King v Collins* and *Mastronardi v State of New South Wales*. He therefore exercised caution in this regard. While he did not doubt the worker's credibility, he had significant concerns about the reliability of her evidence in relation to her neck symptoms after all these years and he noted that her statement was completed with the assistance of her solicitor some 27 years after the work-related incident occurred. He stated that the value of contemporaneous evidence has been repeatedly endorsed by the courts. However, the absence of contemporaneous evidence is not determinative on the issue of causation where there is other evidence: *Owen v Motor Accidents Authority of NSW* and *Bugat v Fox*. While independent corroboration of complaints of pain will often be helpful and relevant in assessing the probative value of the evidence overall, such evidence is not a "*requirement*" that must be satisfied before an arbitrator can feel actual persuasion about the existence of a fact in issue: *Department of Aging, Disability and Home Care v Findlay.*

The Arbitrator found that the worker first suffered stiffness and pain in her neck when she underwent a series of nerve block injections into her mid-to-lower thoracic spine in March/April 1995, some 2.5 years after the pleaded injury. He was not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that the worker suffered a disease of gradual onset in her neck (s 4 (b) (i) *WCA*) or an aggravation etc. of any disease process in her neck (s 4 (b) (ii) *WCA*) arising out of or in the course of her employment with the respondent between 1/07/1992 and 2/09/1992. Accordingly, he entered an award for the respondent.

Psychological injuries with consecutive employers - impairments can be aggregated - Department of Juvenile Justice v Edmed & Trustees of the Roman Catholic Church for the Diocese of Parramatta v Barnes considered – award for worker for 22% WPI

Elkhaligi v Lifestyle Solutions & Ors [2020] NSWWCC 109 – Arbitrator Sweeney – 7/04/2020

The worker suffered a psychological injury as a result of a series of incidents in the course of her employment with the respondents. The first incident occurred on 30/07/2012, while employed by the first respondent, and further incidents occurred in July 2014, on 5/08/2014 and in March/April 2015, while employed by the second respondent.

The worker claimed compensation under s 66 *WCA* for 23% WPI from both respondents. However, the respondents disputed the claim based upon an assessment of 17% WPI from Dr Jones. However, at the respondents' request, he conducted a separate PIRS assessment with respect to the 2012 injury and assessed 10% WPI, which left 5% WPI due to injuries suffered with the second respondent.

Arbitrator Sweeney conducted a teleconference, after which he referred the dispute to an AMS and stated that the issue of aggregation would be considered following receipt of the MAC.

On 31/01/2020, Dr Parmegiani diagnosed chronic PTSD and secondary Major Depressive Disorder and assessed 22% WPI. He stated that 3% WPI was due to the 2012 injury and 19% WPI was due to the later injuries.

During a further teleconference, the parties were unable to agree on the quantum of compensation. The worker argued that she should be compensated for 22% WPI, but the second respondent argued that she should only receive an award for 19% WPI. The Arbitrator ordered the parties to file and serve submissions.

Under the heading "*Section 323(2)*", the Arbitrator stated:

> 20. In *Department of Juvenile Justice v Edmed* [2008] NSWWCCPD 6 (*Edmed*) the following appears:
>
> > This situation is partly addressed in section 322(2), which provides that '*Impairments that result from the same injury are to be assessed together to assess the degree of permanent impairment of the injured worker*' (emphasis added). The reference to '*the same injury*' in section 322 (2) cannot be a reference to '*the same incident*' because that situation is dealt with in section 322 (3). The expression '*the same injury*' is not defined but it follows that if '*injury*' in section 322 (3) means '*pathology*' (as it must), then, for the section to be logically consistent, it must mean the same in section 322 (2). If '*injury*' in section 322 (2) means '*pathology*' then, for section 322 (2) to be consistent with section 322 (3), impairments resulting from the '*same injury*' (the same pathology) are to be '*assessed together*' regardless of whether they arise from the same '*incident*' or separate incidents.
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> 21. Deputy President Roche referred to the Macquarie Dictionary, second edition, and noted that "*same*" was defined as "*identical*" or "*corresponding*", although having a different name.
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> 22. While the reasoning in *Edmed* is not without difficulty, as far as I am aware it has not been contradicted by any other presidential decision or overruled by the Court of Appeal. Accordingly, I am bound by the decision.
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> 23. Certainly, the principle is confined by the amendments made to section 66 by the *Workers Compensation Legislation Amendment Act 2012*, which precludes the making of more than one claim for permanent impairment as a result of an injury.

> Obviously, *Edmed* will have less work to do following the amendment than it did under the previous dispensation. Once a claim has been made for permanent impairment the worker's entitlement to permanent impairment compensation is spent. Impairment flowing from the injury cannot be aggregated with any other injury.

The Arbitrator held that the evidence establishes that the worker suffered from the same pathology as a result of the incidents in the employment of both respondent and the AMS' findings do not preclude the aggregation under s 322 *WIMA.* The caselaw clearly indicates that aggregation is a matter for the Commission and he was satisfied that he has power to aggregate losses and impairments in respect of separate injuries if the pre-requisites of the section are met. He also held that in *Barnes,* DP Roche reasoned that a single incapacity, loss or impairment can result from multiple injuries.

The Arbitrator was satisfied that it was appropriate to order the second respondent to compensate the worker for 22% WPI and he so ordered. However, he gave the parties liberty to apply with respect to the calculation of compensation and in respect of the apportionment of compensation between the respondents.

Section 261 (4) WIMA - Delay in giving notice of claim was not a bar to the recovery of compensation – ignorance, serious and permanent disablement – Broken Hill Proprietary Company Ltd v Kuhna (1992) 8 NSWCCR 401, Gregson v L & M Demasi Pty Ltd [2000] NSWCC 47 & Griffin v Qantas Airways Ltd considered

Jiear v Parmenter Jiaer Builders Pty Ltd [2020] NSWWCC 113 – Arbitrator Peacock – 8/04/2020

The worker claimed compensation under ss 60 & 66 *WCA* with respect to injuries to his back and left leg (deemed date: 1/01/1993). The insurer did not dispute injury, but it asserted that the claim was made out of time: s 261 (1) *WIMA.* The worker applied for leave under s 261 (4) *WIMA* on the basis that he failed to make the claim in time due to ignorance. However, the respondent disputed that the injury resulted in serious and permanent disablement.

Arbitrator Peacock noted that the respondent conceded that if the worker succeeded under s 261 (4) (b) *WIMA*, a general order under s 60 *WCA* was appropriate and the s 66 dispute should then be referred to an AMS to assess permanent impairment of the back and permanent loss of efficient use of the left leg at or above the knee. The respondent did not challenge the worker's evidence regarding "*ignorance*" and the Arbitrator was satisfied that his failure to make a claim within time was occasioned by ignorance. The remaining issue was whether or not the injury resulted in serious and permanent disablement.

The Arbitrator referred to the decision of DP Roche in *Griffin v Qantas Airways Ltd* [2010] NSWCCPD 22 (*Griffin*), in which DP Roche provided a summary of the authorities, as follows:

> 228. The leading authorities on this issue are *Broken Hill Proprietary Company Ltd v Kuhna* (1992) 8 NSWCCR 401 ('*Kuhna*') and Gregson *v L & M Dimasi Pty Ltd* [2000] NSWCC 47; (2000) 20 NSWCCR 520 ('*Gregson'*).
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> 229. In *Kuhna* the Court of Appeal considered the meaning of the phrase in the context of section 14(2) of the 1987 Act which deals with situations where a worker has sustained an injury as a result of his '*serious and wilful misconduct*'. In that situation compensation is not payable in respect of such an injury unless the injury has resulted in death or '*serious and permanent disablement*'.
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> 230. Mr Kuhna suffered multiple abrasions to both elbows, a fractured nose, a fracture of two ribs on the right side, a comminuted fracture of the os calcis and an undisplaced fracture of the left lateral malleolus. As a result of his injuries he was unfit for any work from 4 June 1988 until 14 August 1988. He was permanently unfit

for his pre-injury work as a miner. The employer argued on appeal that the proper question was: was the worker seriously and permanently disabled for work generally, not just for his pre-injury job? Cripps JA agreed with the employer's submission that '*disablement*' in section 14 (2) '*is to be understood in an employment context*' (at 405E). His Honour added, *'that is to say, it is not sufficient merely to conclude that a worker suffers an impairment*'. On this issue his Honour referred to *Peters Ice Cream Pty Ltd v Feeney* [1970] 3 NSWR 125 at 127 where Jacobs JA, in dealing with the same phrase in *the 1926 Act*, said:

> The condition required under the section now being considered will be satisfied provided there is evidence that the disability was both serious and permanent. In the context it is correct, I think, to apply those words to employment situations, and it seems to me that that is what the medical evidence did in this case.

231. Cripps JA then continued at 406B:

> In the present case, there was evidence that the worker not only suffered an impairment but that that impairment affected his physical capacity to undertake work. The argument, as I understand it, on behalf of the employer is that the disablement cannot be said to be serious because, before such a finding could be made, it was necessary for the learned trial Judge to consider the whole range of the worker's activity and, it is submitted, that was not done.

232. The Court rejected that submission. Cripps JA added that the fact that the worker may have been earning as much as he would have been earning had he remained an underground miner '*did not mandate a conclusion that he had not been seriously and permanently disabled*' (at 406G).

233. Mahoney JA agreed with Cripps JA and added at 402B:

> No doubt the word 'disablement' primarily refers to disablement in respect of capacity to perform work. But provided the disablement or interference with capacity is '*serious'*, the provision may be satisfied notwithstanding that other work may be undertaken and even undertaken more remuneratively.

234. *Gregson* concerned the meaning of '*serious and permanent disablement*' in section 65 (13) of *the 1998 Act*, though the consideration of the phrase by Burke CCJ was strictly obiter. Nevertheless, the facts and his Honour's comments are instructive. At [78] his Honour said:

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

235. In that case, the worker suffered a back injury with consequential back and leg pain. In cross-examination, the worker conceded that he could do some suitable light work but could not do his pre-injury duties. There were conflicting diagnoses in the case: Dr Stephenson diagnosing a lumbar strain and Dr Combe diagnosing a 'disc derangement'. The CT scan disclosed '*discal anomalies*' (at [83]). On the question of impairment, Dr Stephenson assessed a 10 per cent impairment of the back and Dr Combe a 30 per cent impairment. In respect of the legs, Dr Stephenson assessed there to be no loss of use of the legs and Dr Combe assessed a 10 per cent loss of use of each leg. His Honour preferred the evidence of Dr Combe. Having regard to the findings made, his Honour added (at [105]) that the worker '*certainly falls within*' the description of '*serious and permanent disablement*' in section 65 (13).

32. Deputy President Roche in *Griffin* went on to find serious and permanent disablement as follows:

> 236. I considered the medical evidence earlier in this decision and will not repeat that analysis. I have found that Mr Griffin suffered an injury in the nature of a permanent aggravation, acceleration and exacerbation of the disease of obsessive compulsive disorder and the anxiety spectrum symptoms that go with that disorder. The question is whether that injury is an injury that has resulted in serious and permanent disablement of Mr Griffin. His injury has increased the severity of his condition and made it chronic. The worsening of his condition, caused by the fact that he continued to fly until November 1981, caused his symptoms to become increasingly entrenched and pervasive and generally worsened his obsessive compulsive disorder (Dr Phillips report 21 August 2009).

237. Until his injury, Mr Griffin had been a successful pilot with other business and recreational interests. Since ceasing work with Qantas, he has been unable to work as a pilot and his business wound down and ceased. Every attempt to engage in alternative pursuits has failed and his life never returned to normal. Mr Griffin's evidence of his subsequent attempts to continue flying comfortably satisfy me that he was unfit to work as a pilot from 29 August 1979 or, in the alternative, from November 1981. This evidence is consistent with Dr Phillips' conclusion, which I accept, that Mr Griffin was not suitable to continue his career as a pilot and was '*substantially incapacitated for employment following the time of his resignation from Qantas and he remains incapacitated to undertake employment in the competitive open workforce at the present time*' (Dr Phillips report 21 August 2009). In these circumstances, I have no hesitation in finding that Mr Griffin's injury was serious and that it resulted in permanent disablement that prevented him from continuing in his usual occupation as a pilot and from engaging in higher-level technical work.

The Arbitrator was satisfied that the injury had resulted in serious and permanent disablement, based upon the evidence of Dr Isaacs that the permanent impairment had affected the worker's activities of daily living. She noted that after 1993, the worker continued to work in the building industry in a managerial capacity only until 2012, when he underwent spinal surgery.

Accordingly, the Arbitrator held that the worker is not barred from recovering compensation. She made a general order for payment of s 60 expenses and she remitted the s 66 dispute to the Registrar for referral to an AMS.

WCC – Registrar Decisions

Work Capacity Decision – whether the worker was fit for the suitable employment options identified by the insurer – Held: the worker's accepted physical limitations mean that the identified options are not suitable employment – Broadspectrum Pty Ltd v Skiadis applied – Orders made based on no current work capacity

Hoque v State of New South Wales [2020] NSWWCCR 1 – Arbitrator Harris (as delegate of the Registrar) – 6/04/2020

The worker was employed as a cook/chef. On 26/06/2018, he injured his cervical and lumbar spines at work. The insurer accepted liability and approved weekly payments, but on 17/12/2019, it issued a dispute notice, which indicated that PIAWE is $1,040 and that the worker was capable of earning $961.50 per week in suitable employment. It advised the worker that his weekly payments would be reduced from 26/03/2020.

The worker lodged an application for expedited assessment and claimed continuing weekly payments s 37 *WCA.*

Arbitrator Harris (as Delegate of the Registrar) conducted a teleconference on 27/03/2020. He identified the issues for determination as: (1) whether the worker had current work capacity; and (2) the quantification of his ability to earn in suitable employment.

The Delegate noted that the most-recent Certificate of Capacity indicated that the worker has current capacity for some employment for 30 hours per week with physical restrictions. The evidence indicated that the worker had no other work experience and had unsuccessfully applied for a number of jobs, including customer service and pathology courier work. Also, a rehabilitation consultant reported that he did not have the English literacy skills to adequately complete application letters and while he has basic computer skills and could use the internet, he has never used a computer in a work environment. The consultant concluded that the worker did not have skills that are readily transferrable to a new and unrelated industry/vocation.

The Delegate referred to the decision of DP Roche in *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWWCCPD 55:

> However, while the new definition of suitable employment has eliminated the geographical labour market from consideration, it has not eliminated the fact that '*suitable employment*' must be determined by reference to what the worker is physically (and psychologically) capable of doing, having regard to the worker's '*inability arising from an injury*'. Suitable employment means '*employment in work for which the worker is currently suited*' (emphasis added).

The Delegate accepted that there was merit in the respondent's argument that the deterioration in the worker's capacity, as indicated in the recent medical certificates, were inconsistent with Associate-Professor Sheridan's opinion that his condition would improve. It was also suspicious that the GP's certification regarding the decrease in physical capacity coincided with the WCD and he noted that the deterioration was "*otherwise unexplained*". He stated:

> 35. I accept that the respondent's submission was logical and one that I would have accepted except that the respondent otherwise conceded that the applicant's current physical restrictions were as recorded in the most recent certificate of capacity. This is particularly in circumstances where there is no direct evidence from the applicant stating that there had been a deterioration in his physical condition. But for that concession, I believe that the applicant was capable of undertaking courier work. I also agree with the respondent's submission that this was the appropriate finding even though there were no opportunities presently available.
>
> 36. Given the respondent's concession, the extent of the applicant's ability to engage in suitable employment must be examined in the context of the accepted restrictions.

The Delegate found that the respondent had provided the worker with "*assistance*", rather than "*re-training*". He noted that in *Broadspectrum Pty Ltd v Skiadis* [2016] NSWWCCPD 34 at [61]-[63], Keating P accepted that it was relevant that occupational rehabilitation services had not been provided by the respondent in the assessment of the worker's ability to undertake suitable employment. While he expressed "*some reservations*", he was satisfied that the worker had established – on the basis of how the case was argued - that he presently has no current work capacity and he observed that the respondent limited itself to the 2 jobs identified in the rehabilitation report and did not suggest that there was other suitable employment, or that the worker was suitable for these jobs for lesser hours.

The Delegate directed the respondent to make continuing payments from 26/03/2020 at the rate of $832 per week under s 37 *WCA*, with credit to the respondent for payments made.