Bulletin

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CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue:

1. Secretary, New South Wales Department of Education v Johnson [2019] NSWCA 321
2. State of NSW (HealthShare NSW) v Morrison [2020] NSWWCCPD 1
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Court of Appeal Decisions

Causal relationship between injury and incapacity – the extent to which the permanent impairment is the result of the first injury as distinct from the second injury

Secretary, New South Wales Department of Education v Johnson [2019] NSWCA 321 – Macfarlan JA, Emmett AJA & Simpson AJA – 20 December 2019

On 30 April 2014 the worker suffered a psychological injury (the first injury) arising out of or in the course of her employment with the appellant. On 30 March 2017, she sustained suffered a further psychological injury (the second injury) arising out of or in the course of her employment with Aboriginal Hostels Limited. She claimed lump sum compensation from the appellant under s 66 *WCA* with respect to the first injury and the dispute was referred to an AMS.

On 11 April 2018, Associate-Professor Robertson issued a MAC that assessed 19% WPI with respect to the first injury, but he applied a deduction of 1/10 deduction under s 323 *WIMA* with respect to the effects of the second injury.

The appellant appealed against the MAC and alleged that it contained a demonstrable error because the AMS wrongly applied s 323 *WIMA* with respect to the second injury.

On 18 July 2018, the MAP revoked the MAC and issued a fresh MAC that assessed 6% WPI as a result of the first injury. However, the worker applied to the Supreme Court for juridical review of the MAP's decision on the grounds of jurisdictional error.

Garling J held that the MAP's task did not involve any process of apportionment between the first and second injuries. He stated that the MAP's MAC contained an error on its face and that the MAP ought to have determined that the worker suffered 19% WPI as a result of the firs injury. Accordingly, he quashed the MAP's MAC and ordered that the matter be remitted to the Registrar of the WCC.

The appellant then appealed to the Court of Appeal, which granted leave to appeal, but dismissed the appeal. The Court's reasons are summarised below.

> ***Whether, in the case of a subsequent injury, common law principles relating to causation apply to an assessment made under Pt 7 of Ch 7 WIMA in relation to the earlier injury.***
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> ***Simpson AJA (at [124]) (Macfarlan JA agreeing)*** held that the primary judge did not find that common law principles of causation are not applicable when assessing the degree of permanent impairment that results from an injury under s 293 *WIMA*. On the contrary, his Honour said it was significant that the MAP did not conclude that the second injury was a kind that severed the causal chain between the first injury and the permanent impairment, and that if it had come to such a conclusion it was obliged to find there was no impairment as a result of the first injury. This statement was consistent with the authorities that the appellant relied upon.
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> *Migge v Wormald Bros Industries Ltd* [1972] 2 NSWLR 29; *Migge v Wormald Bros Industries Ltd* (1973) 47 ALJR 236; *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; *Sutherland Shire Council v Baltica General Insurance Co Ltd* (1996) 39 NSWLR 87 considered.
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> ***Emmett AJA (at [53]) (Macfarlan agreeing)*** held that there is no difference between the legal view of causation in tort and causation in the field of workers compensation, subject to the qualification that, in a claim for workers compensation, it is unnecessary to prove that the incapacity was the natural and probable consequence of the injury. That is to say, the question of foreseeability does not arise. It is sufficient to say that the incapacity results from the injury by a chain of legal causation unbroken by a novus actus interveniens.
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> *Baker v Willoughby* [1970] AC 467 at 492; *Busby v Morris* [1980] 1 NSWLR 81 at [19] applied.
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> ***Emmett AJA (at [55]) (Macfarlan agreeing)*** also held that the phrase "*the degree of permanent impairment of the person as a result of an injury*" requires an enquiry as to the causal connection between the degree of assessed permanent impairment of a worker, on the one hand, and the compensable injury, on the other. It was necessary for the AMS and the MAP to assess the degree of WPI of the worker that was caused by or is attributable to the first injury. In doing so, common law principles of causation in tort are to be applied.

Whether in the circumstances of this case, the common law principles required the Appeal Panel to determine that the entirety of the whole person impairment assessed by it, in reliance on the assessment by the AMS, was the result of the first injury, without allowing for apportionment on account of impairment resulting from the second injury.

Simpson AJA (at [134]) and Emmett AJA (at [71]) (Macfarlan JA agreeing) held that the fact that the appellant's argument proceeded on the assumption that only the third category in *State Government Insurance Commission v Oakley* (1990) 10 MVR 570; [1990] Aust Torts Reports 81-003 (*Oakley*) was relevant was unwarranted and without adequate analysis. There is much in the evidence that would support the application of the second *Oakley* category. That is, there is medical evidence that the worker was, by reason of the first injury, in a vulnerable position, leaving her exposed to a greater level of damage resulting from subsequent events. That issue was not addressed by the MAP.

State Government Insurance Commission v Oakley (1990) 10 MVR 570; [1990] Aust Torts Reports 81-003 applied.

Emmett AJA (1t [73]-[74]) and Simpson AJA at [135]-[136]) (Macfarlan JA agreeing) also held that there was cause for some disquiet regarding the process undertaken by the MAP in making its assessment. The MAP relied on the AMS' examination of the worker and did not undertake a fresh examination of her and it was insufficient for it to merely record and summarise the various medical reports. The MAP did not undertake a detailed comparison of the respective seriousness of the two incidents.

Error of the MAP and conclusion

Emmett AJA (at [76]) and Simpson AJA (at [136]), (Macfarlan JA agreeing) held that the MAP failed to properly inquire as to whether, by reason of the first injury, the second injury was more serious than it would have been had the first injury not occurred. If that were the case, it would follow that there was a causal connection between the first injury and the degree of permanent impairment at the time of the examination.

Simpson AJA (at [137]-[139]) (Macfarlan JA agreeing) also held that the MAP erred by failing to make that enquiry and that the failure to address a case advanced on behalf of a party is constructive failure to exercise jurisdiction and constitutes jurisdictional error.

Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088 applied.

Emmett AJA (at [78]), Simpson AJA (at [139]) (Macfarlan JA agreeing) also held that although there was jurisdictional error on the part of the MAP, the primary judge erred in saying the decision that the MAP ought to have been reached was that the degree of impairment was 19%, as this is a matter for determination by a MAP. Therefore, the matter should be remitted for reconsideration by the MAP according to law.

Accordingly, the Court dismissed the appeal with costs.

WCC – Presidential Decisions

Arbitrator erred in fact finding – COD revoked and matter remitted for redetermination by a different Arbitrator

State of NSW (HealthShare NSW) v Morrison [2020] NSWWCCPD 1

The worker was employed as a kitchenhand and hospital assistant and developed symptoms involving her hands and wrists. On 25 August 2016, she underwent right carpal tunnel release and on 13 April 2018, she underwent left carpal tunnel release, left trigger thumb release and right middle finger release. The insurer paid some of the worker's medical expenses on a voluntary basis, but at an arbitration hearing on 16 May 2019, the parties agreed that the appellant disputed the bilateral carpal tunnel syndrome and left trigger thumb injuries.

On 29 May 2019, ***Arbitrator Batchelor*** delivered an oral decision. She held that the worker suffered injury to the left upper extremity (carpal tunnel syndrome and trigger thumb) and right upper extremity (trigger middle finger) on 2 November 2017 and that employment was a substantial contributing factor to those injuries. He awarded the worker weekly payments for a closed period and made a general order under s 60 *WCA.* He noted that PIAWE was agreed as $671.98 and that s 36 *WCA* applied to the weekly payments claim. The appellant conceded total incapacity for the period from 12 April 2018 to 27 May 2018 (when the respondent was off work because of surgery) and said the other odd dates were a matter for determination by the Commission.

The Arbitrator said that he found the views of Dr Lai more persuasive than those of Dr Masson and Dr Kumar on the issue of causation of the carpal tunnel syndrome. He referred to the decision of Burke J in *Perry*, and a later decision of Roche DP in *DP World Sydney Ltd v Kelly*, including other decisions referred to in *Kelly,* and found (based on the opinion of Dr Lai), that employment with the appellant was a substantial contributing factor to the injury. He said Dr Lai had stated unequivocally that the injury was not a disease, and that for him to make a finding of '*disease'* would be contrary to the medical evidence in the worker's case. However, he said that if he was wrong about whether it was a '*disease*' injury, then for the reasons given the worker's "*employment was the main contributing factor to her left carpal tunnel syndrome and her left trigger finger*". He noted injury to the right middle finger was not in issue. He also found the deemed date of injury as being 2 November 2017.

At the conclusion of these oral reasons the appellant's solicitor stated to the Arbitrator:

> Didn't the [respondent] plead nature and conditions or disease injury? Wasn't that the basis of their claim? You found a traumatic injury.

On 28 May 2019, the Arbitrator issued a further COD, which deleted paragraph 2 of the original COD and instead determined that the worker's employment with the appellant was the main contributing factor to the injuries. He also provided short reasons as follows:

> 1. At the conclusion of the oral reasons given on 27 May 2019, it was pointed out to me by the solicitor for the [appellant] that the [respondent] pleaded her case as a '*disease injury*', a matter that I overlooked in making the determination. I acknowledge this error which results in the finding 2 of the Certificate of Determination dated 27 May 2019 that the [respondent's] employment with the [appellant] being found to be a substantial contributing factor to injury was an error.
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> 2. Included in Findings and Reasons in my oral decision was a finding that that the [respondent] suffered injury on 2 November 2017 to which her employment with the [appellant] was a substantial contributing factor, rather than finding a disease injury to which the [respondent's] employment was the main contributing factor.

3. In my view, the [respondent's] employment with the [appellant] was the main contributing factor to injury, for the oral reasons given on 27 May 2019.

4. I therefore revoke the finding that the [respondent's] employment with the [appellant] was a substantial contributing factor to injury. I substitute a finding that the [respondent's] employment with the [appellant] was the main contributing factor to injury.

The appellant appealed and asserted that the Arbitrator erred as follows: (1) in finding that the worker suffered personal injury in the form of left carpal tunnel syndrome and left thumb trigger condition, and there should be a finding that this was not established on the probabilities; (2) in finding that employment with the appellant was the main contributing factor to the injury, and there should be a finding this was not established on the probabilities; and (3) in finding that the date of injury of the left carpal tunnel syndrome, left trigger thumb and right trigger middle finger was 2 November 2019 (sic, 2017). The deemed date of injury should be 7 August 2017 (left carpal tunnel and left thumb) and 2 November 2017 (left thumb [sic]).

Deputy President Snell cited s 352 (5) *WIMA* and he referred to the decision of Roche DP in *Raulston v Toll Pty Ltd* (which applied the decision in *Whiteley Muir & Zwanenberg Ltd v Kerr*, which was cited with approval by Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ in *Zuvela v Cosmaman Concrete Pty Ltd*) regarding the nature of the appeal process, as follows:

(a) An Arbitrator, though not basing his or her findings on credit, may have preferred one view of the primary facts to another as being more probable. Such a finding may only be disturbed by a Presidential member if '*other probabilities so outweigh that chosen by the [Arbitrator] that it can be said that his [or her] conclusion was wrong'*.

(b) Having found the primary facts, the Arbitrator may draw a particular inference from them. Even here the '*fact of the [Arbitrator's] decision must be displaced*'. It is not enough that the Presidential member would have drawn a different inference. It must be shown that the Arbitrator was wrong.

(c) It may be shown that an Arbitrator was wrong '*by showing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the [Arbitrator] is so preponderant in the opinion of the appellate court that the [Arbitrator's] decision is wrong'*.

Snell DP also noted that in *Davis v Ryco Hydraulics Pty Ltd* Keating P observed that these principles "*have been consistently applied in the Commission*". In *Raulston,* Roche DP also cited the following passage from *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*:

… in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.

Further, in *Northern NSW Local Health Network v Heggie*, Sackville AJA said:

A fortiori, if a statutory right of appeal requires a demonstration that the decision appealed against was affected by error, the appellate tribunal is not entitled to interfere with the decision on the ground that it thinks that a different outcome is preferable: see *Norbis v Norbis* [1986] HCA 17; 161 CLR 513, at 518-519.

Snell DP rejected ground (1). He noted that the worker argued that the appellant did not raise an argument at first instance that Dr Lai's opinion should be deprived of weight because of an inconsistency between his history and the July 2014 nerve conduction studies. He held that the appellant should not be allowed to raise this on appeal, but said that if he is wrong on this issue, the argument involves a misreading of Dr Lai's opinion. He stated, relevantly:

> 41. …The appellant seeks to argue that the two "factors" relied on by the doctor were both, due to the July 2014 nerve conduction studies of which Dr Lai was unaware, "*completely absent*". Dr Lai's report should be read as a whole. The way in which Dr Lai's opinion was quoted by the appellant (see [32] above) involved ignoring the discussion about the respondent's duties, which was central to Dr Lai's opinion. The reference in the passage to the duties was omitted. The description in the passage, of duties that involved forceful gripping, repetitive movements and vibratory movements, was immediately followed by the doctor's opinion: "*Therefore, it is my opinion that her work was a substantial factor in the cause of her carpal tunnel syndrome*." The other two factors in the passage, to which the appellant's submissions refer, were also part of the doctor's reasoning. However, it is misleading to suggest those two factors to which the appellant referred were the only ones relied on by the doctor in concluding there was a causal relationship.
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> 42. Dr Lai's reliance on the nature of the respondent's duties, in reaching his conclusion about causation, is made clear from other passages in his report. In explaining his disagreement with Dr Masson's opinion, Dr Lai said:
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> > I disagree with this statement. Ms Faulkner never had these symptoms of left carpal tunnel syndrome before she started work as a kitchen hand. In fact when she was working in the school canteen where the work was less intense prior to starting working as a kitchen hand she never suffered such symptoms. I have already described Ms Faulkner's work duties in my report (History of Injury section) and highlighted the areas where both hands used forcible gripping on the repeated basis to carry out her work. I also highlighted that in the course of carrying out her work duties vibratory movements were also involved in both hands. It is therefore my opinion that the nature and conditions of her work was a substantial contributing factor to her development of left carpal tunnel syndrome, left trigger thumb and right trigger middle finger.
> >
> > And:
> >
> > I agree with this statement with the proviso that it is my opinion that the nature and conditions of Ms Faulkner's work was a substantial contributing factor to the development of her left carpal tunnel syndrome. Once this was established the extra activity using her hands would cause further injury as well as exacerbation or aggravation of the symptoms.
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> 43. The suggestion that the existence of the July 2014 nerve conduction studies removed the planks on which Dr Lai's opinion on causation rested is wrong. The appellant submits on appeal that the evidence of those studies was inconsistent with two factors in the history relied on by Dr Lai. This could be relevant to the weight to be given to Dr Lai's opinion. However, this argument was not raised at first instance and it is not error that the Arbitrator.

Snell DP held that the Arbitrator was clearly entitled to reject Dr Masson's attempted interpretation of Dr Yee's opinion, which was inconsistent with what Dr Yee actually said. His assessment of the medical evidence and his preference for Dr Lai's opinion regarding the work duties and their connection with the symptoms, was available on the evidence and did not involve error.

However, Snell DP upheld ground (2. He noted that the appellant asserted that the Arbitrator's original findings were inconsistent with the pleadings, but his ultimate findings were based on the pleadings. However, he noted that the question asked of Dr Lai and his response were consistent with Dr Lai being of the opinion that the worker's condition should not be characterised as a disease process. This is clearly how the Arbitrator understood that opinion and his formal findings in the COD dated 27 May 2019 were consistent with that analysis. In the COD dated 28 May 2019, the Arbitrator made a further finding that employment was a main contributing factor to the injury. He stated, relevantly:

> 66. The appellant submits that the Arbitrator did not, in the reasons and findings substituted on 28 May 2019, make any finding that the respondent's injury was a '*disease*' within the meaning of s 4. The appellant submits this was "*not surprising*" given the specific finding that, consistent with the opinion of Dr Lai, such a finding would be inconsistent with the respondent's medical case. The appellant submits such a finding would be irreconcilable with the Arbitrator's finding that the injury was not a disease. The appellant submits the Arbitrator gave no reasons to support a finding that the left carpal tunnel syndrome and trigger thumb constituted '*disease*' injuries. This submission is correct. The test of '*main contributing factor*' is in s 4 (b) of *the 1987 Act* and applies to findings of 'injury' based on the '*disease*' provisions. It is different to the finding originally made, that the injury was one pursuant to s 4 (a) of *the 1987 Act*. These difficulties are not solved by the finding, in the alternative, of '*main contributing factor*'. A finding remains in the original reasons, rejecting the proposition that the injury was appropriately characterised as one pursuant to the '*disease*' provisions. No specific finding of '*disease*' is made. No reasons are given to explain why the injury falls within s 4 (b) of the 1987 Act, contrary to the original finding.
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> 67. The making of conflicting factual findings is "*indicative of an erroneous reasoning process*": *Brown v Harding*. If it were accepted that a finding of a '*disease*' injury was made by implication, although not articulated, the failure to give reasons for that finding would constitute an error of law.

Snell DP rejected the appellant's argument that he should enter an award in its favour and held that it is inappropriate to deal with ground (3) in this appeal, as the need to fix a date of injury depends upon the worker succeeding and, if she does succeed, whether injury is found under ss 4 (a) or (b) *WCA.*

Accordingly, Snell DP revoked the COD and he remitted the matter for redetermination by a different Arbitrator.

The exercise of discretion to reconsider a COD – factors to consider – Samuel v Sebel Furniture Ltd applied - No error of discretion

Parsons v Dell Australia Pty Ltd [2020] NSWWCCPD 2 – Deputy President Wood – 15 January 2020

On 1 August 2013 (deemed), the appellant suffered a work-related psychological injury. In 2014, he commenced proceedings and claimed weekly payments, s 60 expenses and lump sum compensation under s 66 *WCA.*

The dispute under s 66 *WCA* was referred to Dr Glozier and he issued a MAC that assessed 15% WPI.

The respondent appealed against the MAC and the MAP revoked the MAC and issued a fresh MAC that certified 7% WPI as a result of the work injury. The appellant did not seek judicial review of the MAP's decision. On 3 August 2015, the Deputy Registrar issued a COD on 3 August 2013, based upon the MAP's MAC and determined that the appellant had not entitlement to lump sum compensation for permanent impairment as the threshold under s 65A (3) *WCA* was not satisfied.

The appellant filed a Miscellaneous Application seeking to have a COD dated 3 August 2015 set aside and reconsideration of the MAC issued by a MAP on 26 June 2015. He alleged that his condition had deteriorated and he sought to rely upon s 350 (3) *WIMA.*

The application for reconsideration was allocated to ***Senior Arbitrator Capel***, who directed the parties to file written submissions. He determined the matter on the papers and declined to reconsider the COD dated 3 August 2015. However, the appellant appealed against that decision.

Deputy President Wood noted that the appeal did not comply with Practice Direction No 6, it was apparent that the following grounds were raised: (1) Error of law in that the Senior Arbitrator declined to exercise his discretion because there had been unnecessary delay in bringing the current proceedings; and (2) Error of discretion in that the Senior Arbitrator failed to properly exercise his discretion in circumstances where a manifest injustice had occurred.

Wood DP noted the appellant's arguments, which I have summarised as follows:

- The COD dated 3 August 2015 should be set aside and he should be paid compensation in respect of 17% WPI, consistent with the assessment of 17% WPI by Dr Teoh (qualified by the respondent). Alternatively, he sought referral for re-assessment by the AMS;
- On 20 April 2018, the respondent issued a notice under s 39 *WCA* and advised him that his weekly payments would cease after 250 weeks because he was assessed as having 17% WPI;
- The assessment of 19% WPI by Dr Morris dated 21 November 2018, and the assessments of Dr Bertucen of 17% WPI and 22% WPI (on 26 February 2014 and 11 March 2016, respectively) support a deterioration his condition since Dr Glozier's assessment;
- Whether or not the Commission sets aside the COD dated 3 August 2015, which would enable him to revisit his entitlements under s 66 WCA, he is entitled to apply to the Commission for a further assessment by an AMS for the purposes of s 39 *WCA.* The decision in *Anderson v Secretary, Department of Education* as authority for the proposition that an assessment for the purpose of s 39 is not precluded by s 322A *WCA;*
- The claim under s 66 *WCA* was disputed and the various assessments of WPI would potentially entitle him to compensation exceeding $5,000. He also referred to the decision in *Abu-Ali v Martin Brower Australia Pty Ltd* and argued that in that matter, there was no compensation in issue because the notice related to a threshold issue and if the claim succeeded, it would not result in an order for payment. That was a dispute about whether a secondary psychological condition could be included in an assessment of WPI for an orthopaedic injury for the purposes of meeting the definition of "*high* needs" under s 32A *WCA.* However, his assessment is for the purpose of a claim under s 66 *WCA;*
- He sought to distinguish this matter from *Anderson* on the basis that *Anderson* involved a threshold dispute in relation to the issue of domestic assistance, where there was no monetary amount claimed, so that an appeal could not be brought. He also sought to distinguish *O'Callaghan v Energy World Corporation Ltd* in which the dispute related to a potential work injury damages claim, so that the monetary threshold was not met;

- Because the Senior Arbitrator's decision amounted to a complete dismissal of his claim, the amount in issue is at least 20% of the amount awarded and he cited the decisions in *Sheridan v Coles Supermarkets Pty Ltd* and *Howlader v FRF Holdings Pty Ltd* as authorities for that proposition.

Wood DP also noted the respondent's arguments, which I have summarised as follows:

- The threshold requirements under s 352 (3) *WIMA* are not satisfied and the appeal cannot proceed;
- In *Sheridan*, the amount in issue was less than $5,000 in weekly payments and s 60 expenses, and while an impairment assessment was obtained, there was no claim under s 66 *WCA* before the Arbitrator;
- In *O'Callaghan*, the Arbitrator refused to exercise the reconsideration power under s 350 (3) *WIMA* in respect of consent orders, which related to payment of compensation for 10% permanent impairment of the lumbar spine. The worker had obtained a higher assessment that included the cervical spine, which satisfied the relevant threshold for a work injury damages claim. The respondent argued that the claim before the Arbitrator sought an assessment for the purposes of a work injury damages claim. The initial application was withdrawn and an appeal against the original AMS' assessment was lodged, but it was dismissed because the consent orders were extant. The worker then lodged an application for reconsideration of the COD under s 350 (3) *WIMA* on the basis of a deterioration of the worker's condition. However, that application was dismissed because there was no evidence of the purported deterioration. The appellant appealed, but did not satisfy the monetary threshold because there was no amount of compensation in issue and the claim was not for work injury damages and not compensation;
- In *Abu-Ali*, the worker had previously agreed to an award for the employer in respect of an alleged psychological condition. He was later assessed as suffering 50% WPI with respect to his psychological condition and he claimed compensation under s 66 *WCA.* The Commission dismissed the claim. The worker the applied for a referral to an AMS for the purposes of ascertaining whether he had at lease 20% WPI (high needs) or 30% WPI (highest needs) in order to retain his entitlement to weekly benefits. The respondent asserted that because there was no compensation claimed, and the proposed referral to an AMS was for the purposes of a work injury damages threshold, it was determined that Mr Abu-Ali could not appeal because no amount of compensation was at issue in the proceedings;
- In *Anderson*, there was no amount of compensation in issue and no right to appeal.
- In this matter, the application for reconsideration does not claim an amount of compensation and the respondent disputed that the application claims compensation under s 66 *WCA.* This originally included a claim for weekly benefits and s 60 expenses, but those claims were discontinued at teleconference stage. In this matter, the only orders that the Senior Arbitrator had power to make were to set aside the COD and refer the matter to an AMS for assessment of the WPI due to the psychological injury. That referral would determine whether there was a further entitlement to compensation because the appellant's condition had deteriorated, and the matter is analogous to *Anderson.*

Wood DP held that it is necessary to review the steps taken after the MAC was issued on 26 June 2015, until the current proceedings were commenced and summarised the chronology of events in some detail (not repeated here).

Threshold issues

Wood DP noted that while the application does not refer to an amount of compensation, it can clearly be inferred from the circumstances surrounding the proceedings and the respondent's defence, that the appellant was attempting to pursue a claim under s 66 *WCA* "*despite the lackadaisical manner in which that claim was pursued*". She held that the cited authorities can be distinguished from this matter and she was satisfied that the appeal concerns a dispute in connection with a claim for compensation and meets the threshold under s 352 (3) (a) *WIMA.* Therefore, the appeal can proceed.

Application to adduce fresh evidence

The appellant sought to adduce further evidence in the appeal, which were aimed at showing that the Senior Arbitrator was wrong in respect to his conclusion that he ought not exercise his discretion to reconsider the COD because there had been an unexplained delay by the applicant in bringing the current application. The respondent objected to the tender of this evidence.

Wood DP declined to admit the fresh evidence and stated, relevantly:

> 60. As the respondent points out, the documents were clearly available to the appellant and could have been relied upon by him in the proceedings before the Senior Arbitrator. The first limb of s 352 (6) is therefore not satisfied. The Court of Appeal made it clear in Strickland that the evidence must be such that the admission of the evidence would be likely to show that the Senior Arbitrator's decision was wrong. The 2016 proceedings did not seek to have the COD set aside or the MAP decision reconsidered. The time line set out by the Senior Arbitrator was accurate and the pleadings in the 2016 proceedings, the report of Dr George and the Certificate of Determination issued in the 2016 proceedings bear no relevance to a consideration of steps taken in respect of bringing an application for reconsideration of a COD certifying the appellant's WPI to be 7%. In fact, the action taken by the appellant in bringing proceedings but not making such an application, and in discontinuing those proceedings without resolving any issue about the previous MAP decision, tends to add to the reasons for finding the appellant unnecessarily and without explanation delayed bringing these proceedings.
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> 61. I have below discussed the effect of the appellant appealing only the Senior Arbitrator's decision in respect of the delay in bringing the present proceedings. For those reasons and the reasons expressed above, I conclude that the evidence sought to be adduced would not materially affect the outcome of the proceedings at first instance and do not assist the appellant in this appeal.

Substantive matters

Wood DP noted that the Senior Arbitrator summarised the parties' submissions, reproduced the relevant legislation and clarified the nature of the appellant's application. He noted that the appellant sought to have the COD set aside so that his claim for WPI could be referred to an AMS for assessment. He took the view that this application was misconceived, but that this was not fatal to the application. He noted that if he reconsidered the COD and revoked it, it was a matter for the Registrar to decide whether to refer the claim back to an AMS or a MAP. He also noted that any assessment of WPI would be a matter for the MAP, and not the AMS, because the previous AMS' MAC was revoked by the MAP. He observed that s 329 *WIMA* provides that the Registrar may refer a matter to an AMS for assessment as an alternative to an appeal, but only where the matter could otherwise have proceeded to an appeal under s 327 *WIMA*. He referred to s 378 *WIMA* and to the power of the Registrar and MAP to reconsider, rescind, alter or amend any matter that they had dealt with, which he considered included an assessment of a worker's WPI.

The Senior Arbitrator pointed out that the application sought relief under s 350 (3) *WIMA*, which gives the Commission power to reconsider, rescind, alter or amend any previous decision of the Commission, on the ground that there had been a deterioration of the appellant's condition. He pointed out that the application was on the background of the conclusive and unchallenged determination by the MAP dated 6 June 2015. He noted that there would have been no legislative barrier to such an application before the 2012 amendments to the legislation, in particular the introduction of s 66 (1A) *WCA* and s 322A *WIMA*, which created issues for the appellant.

The Senior Arbitrator referred to the decision of Arbitrator Harris in *Lizdenis v Centrel Pty Ltd* and considered that its facts were remarkably similar to this matter. The Arbitrator found that the worker's condition had deteriorated but noted the conflict between s 66 (1A) *WCA* and s 327 (3) (a) *WIMA*, which provided for an appeal from the MAC where there had been a deterioration in the worker's condition that resulted in a further impairment. The Arbitrator held that it would be inconsistent with s 66 (1A) *WCA* to allow an appeal based on a deterioration of the worker's condition after a MAC had been issued.

The Senior Arbitrator held, based upon the authorities cited in his reasons, that the appellant had made his one claim and that any further claims were precluded by s 66 (1A) *WCA*. Further, in the absence on an appeal under s 327 *WIMA,* s 322A *WIMA* restricted the appellant to only one assessment. He therefore declined to reconsider the COD. However, in the event that his conclusion was wrong, it was necessary to consider the merits of the application. His comments are summarised as follows:

- The relevant principles were summarised by Arbitrator Johnstone in *Howell v Stringvale Pty Ltd* and the decision of ADP Roche (as he then was) in *Samuel v Sebel Furniture Ltd*, in which Roche ADP cited with approval the Court of Appeal's decision in *Schipp v Herfords Pty Ltd* and extracted the following factors to consider in the exercise of the discretion to a reconsider a decision:

  (a) the delay in bringing the application;

  (b) whether there was a right of appeal from the decision which the party did not exercise;

  (c) any waiver or estoppel issues that arose, and

  (d) whether a rescinding of the earlier award would allow a party to bring fresh proceedings.

- However, the fact that these principles are applicable does not mean that they are determinative and the discretion to reconsider under s 350 (3) *WIMA* must be exercised fairly;

- The appellant bears the onus of proving deterioration and the decision in *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission* is authority regarding what must be considered in assessing whether there has been a deterioration. That is, s 327 (3) (a) does not authorise a challenge to the correctness of the MAC, and the focus should be entirely on what has occurred since the MAC was issued;

- He considered the evidence of deterioration as being "*far from satisfactory*" and there was no statement from the appellant in relation to the alleged deterioration in his condition since 2015. He discussed the available medical evidence and concluded that there was some doubt in his mind as to whether this was sufficient to establish a deterioration that would result in a different assessment to that of the previous MAP if there was to be a further referral;

- The matter had not proceeded with appropriate speed and diligence, in circumstances where the appellant had obtained fresh evidence from Dr Bertucen on 11 March 2016, made a claim under s 66 *WCA* on 25 March 2016, and did nothing further until 3 May 2018, when he sought the insurer's consent to set aide the MAP's MAC. The application for reconsideration was not made until 3 December 2018 and this was not lodged with the Commission until 2 April 2019, which is almost 4 years after the MAP's decision was issued. There was no explanation about why the application was not made in 2016 or 2017;
- The facts of this matter are analogous to those in *Maksoudian* and he concluded that because of the delay in bringing the application for reconsideration, he was not persuaded that he should exercise his discretion in favour of the appellant.

Wood DP held that the appellant cannot say that he acted with expedition to bring his application for reconsideration before the Commission. He has not pointed to any evidence that the Senior Arbitrator failed to consider or to which he failed to afford sufficient weight. Rather, the Senior Arbitrator considered each of the medical opinions and gave reasons as to why the evidence was not sufficiently probative. The appellant has failed to establish that the Senior Arbitrator erred in the application of a legal principle, made a material error of fact or took into account an irrelevant consideration. His conclusion that there was an unacceptable delay in bringing the application for reconsideration was based on an accurate review of the timeframe from the issue of the MAP's decision and COD in 2015 and the commencement of the current proceedings. That conclusion is not affected by any error of fact or law, and the appellant has failed to demonstrate any of the factors identified in *Raulston* have occurred, which would indicate an error in the exercise of the Senior Arbitrator's reasoning that led to an error of discretion. She also stated:

> 142. The appellant argues that the Senior Arbitrator's failure to exercise his discretion has resulted in a manifest injustice. The appellant relies upon the various assessments of WPI provided by the medical experts as evidence that the MAP assessment was incorrect. The Senior Arbitrator considered and gave appropriate weight to the various opinions of the medical experts. He provided reasons as to why he was not satisfied that the appellant had established a deterioration in his condition which could warrant a disturbance of the COD. The appellant's global submission that the Senior Arbitrator ought to have accepted that the MAP was wrong because all of the experts provided higher assessments does not identify how it is alleged the Senior Arbitrator erred in the task before him. It is not sufficient to submit that the Senior Arbitrator ought to have reached a different conclusion, and it is incumbent upon the appellant to establish that there was an error of either fact, law or discretion in the decision-making process. The appellant has failed to identify such an error.

Accordingly, Wood DP held that the grounds of appeal were not made out. He also noted that there was no appeal before her that challenged the Senior Arbitrator's primary decision not to exercise his discretion because there could be no further lump sum claim. Therefore, the Senior Arbitrator's decision must stand and his COD dated 14 June 2019 is confirmed.

WCC – Medical Appeal Decisions

Demonstrable errors regarding s 68A WCA & s 323 WIMA – Failure to properly apply s 323 WIMA regarding post-2002 injury – Deduction at odds with available evidence – MAC revoked

Lend Lease Project Management & Construction (Australia) Pty Limited v Usher [2020] NSWWCCMA 16 – Arbitrator Wynyard, Dr R Pillemer & Dr M Gibson – 19 December 2019

On 27 June 2019, a delegate of the Registrar issued a Referral to the AMS to assess permanent impairment as follows: (1) Under the Table of Disabilities with respect to injuries to the back and right leg at or above the knee that occurred on 29 March 2000; and (2) WPI with recept to an injury to the left lower extremity that occurred on 21 September 2005.

The Referral indicated previous awards under s 66 *WCA* as follows: (1) 15% WPI for injury to the right lower extremity on 17 August 2007; and (2) 11% WPI for injuries on 15 December 2009 (6% WPI for the lumbar spine and 5% WPI for the cervical spine).

The evidence indicated that following the injury in 2000, the worker underwent an arthroscopic meniscectomy and chondroplasty on his right knee. The treating surgeon noted "quite marked erosion" in the patellofemoral and medial compartments and multiple splits in the lateral tibial plateau. After the injury in 2005, he underwent an arthroscopic meniscectomy and chondroplasty of his left knee, which indicated medial compartment arthritis and a medial meniscus tear. He suffered several later incidents where he fell because his left knee gave way. He underwent left total knee replacement on 7 March 2012, and right total knee replacement on 14 November 2012.

On 19 August 2019, Dr Harvey-Sutton issued a MAC, which assessed permanent impairment as follows: (1) 2000 injuries - 20% permanent impairment of the back and 25% permanent loss of use of the right leg at or above the knee, but although she stated that there was a '*nil*' deduction, she reduced the latter assessment to 15%; and (2) 2006 injury – 15% WPI, with no deduction under s 323 *WIMA.*

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and requested that the worker be re-examined by an AMS-member of the MAP. However, following a preliminary review, the MAP determined that a re-examination was not necessary.

The appellant argued that the AMS erred as follows: (1) she failed to make any relevant diagnoses; (2) she failed to give proper consideration to the evidence regarding the referred back injury; (3) she failed to give proper consideration to the subsequent right knee injury on 17 August 2007; and (4) she failed to make any deduction under s 323 *WIMA* regarding both knee injuries.

The MAP rejected the appellant's argument that the AMS failed to make any relevant diagnoses. It noted that in *Johnson v Workers Compensation Commission* [2019] NSWSC 347, Garling J considered submissions made with respect to "*diagnosis*" and stated:

> 54. On the diagnosis issue, I accept the plaintiff's submission that a certificate, whether of an AMS or else of an appeal panel, which finds the existence of an identifiable percentage of whole person impairment of a claimant must set out the medical condition which has caused that impairment. This may well be a straightforward task and readily apparent where there is an identifiable physical injury with obvious sequelae…
>
> 56. Unless a Certificate shows the injury or diagnosed condition in the way described, then the basis of any conclusion as to whole person impairment will not be exposed. …… Neither the claimant nor the employer will be able to discern the rationale for the ultimate conclusion as to percentage impairment…..

75. His Honour however was satisfied that in the circumstances of the case it could be readily inferred that the diagnosis was apparent, being a chronic Post-Traumatic Stress Disorder, and that ground failed.

The MAP held that the AMS noted the reports that confirmed the degenerate osteoarthritic nature of the pathology, but failed to mention the back injury in that summary and she only referred to it when discussing the opinions of other medical practitioners. In the field of orthopaedics, the injuries to the knee and back fall into the category described by Garling J are straightforward and are readily identifiable physical injuries with obvious sequelae.

The MAP rejected the argument that the AMS failed to give proper consideration to the evidence regarding the back injury, which is based upon an assumption that the weight of contemporaneous evidence should have caused her to reject the history that obtained from the worker regarding his 2000 back injury. It stated, relevantly:

83. There is a presumption of regularity that the AMS would have read the material that had been referred to her. The assumption that underlined the appellant employer's submission was either that the apparent contradictions were not discussed with Mr Usher, or that the AMS ignored them. It is apparent that the AMS accepted the history given by Mr Usher during the assessment. An AMS is entitled to do so, particularly as she had the opportunity to elicit more precise facts than were apparent from the evidence relied upon by the appellant employer. The fact that Mr Usher told Dr O'Brien (whom he was consulting with regard to his right knee injury) that his back symptoms had settled does not mean that they had entirely settled. He could still have been experiencing the on-going stiffness he described to the AMS. This is particularly so where Mr Usher appeared to be a stoic character who preferred to work through a lot of his injuries.

84. We also reject the submission that the later back injury of 15 December 2009 was relevant to the task of the AMS. The back injury referred to the AMS was that of 29 March 2000 The submission that the AMS fell into error because she did not address whether any of the impairment found related to the 2009 back injury is misconceived.

85. When requested to assess an impairment caused by an injury at a certain date, an AMS is required to make an assessment pursuant to s 323 as at that date. In the present case, any impairment found as at 8 May 2000 that was due s 323, (or its then equivalent, s 68A of the 1987 Act), was to be deducted.

86. Accordingly, any subsequent injury to the back, such as that of 15 December 2009, could not affect the impairment assessed as a result of the injury referred to the AMS, that of 29 March 2000. The AMS was correct when she answered the templated question that there had been subsequent work accidents, but did not make any other comment. The subsequent accidents of course did cause additional impairment, as has been seen from the prior awards described on the face of the referral. They were not however relevant.

The appeal against the assessment of the right knee failed for the same reasons and the subsequent history of injury on 17 August 2007 was irrelevant. The MAP stated:

88. We note the reference to an "*original*" Medical Assessment Certificate, and our enquiries showed that the difference between the Amended MAC and the original MAC is that contained in the Certificate pursuant to the Table of Disabilities. A 25% loss was found for the injury to the right leg at or above the knee but, without explanation or any indication that there had been any deduction for previous injuries, a 15% assessment had been included in the total. We are satisfied that this inconsistency constitutes a demonstrable error. Indeed, Mr Usher argued but faintly that it was not…

91. Whilst we cannot speculate on the reasons why the AMS issued a second MAC showing a deduction of 10% from her original assessment of 25% loss of use, the deduction coincides with our view as to an appropriate fraction of 1/3rd, rounded up. The results of the arthroscopy militate against a finding of 1/10th, and the subsequent history demonstrates the accuracy of Dr O'Brien's opinion on 15 August 2000, when he said that Mr Usher's prognosis was poor. Dr O'Brien said that he would be advising Mr Usher how to treat his arthritis conservatively, but that the end stage management would be a total knee replacement.

The MAP also held that there was a demonstrable error regarding the deduction under s 323 *WIMA* for the left knee injury in 2005, as an MRI scan performed three weeks after the work injury indicated grade IV osteoarthritis with bone on bone contact, which equates to 20% WPI under the Guides. As these degenerative changes were obviously longstanding, a deduction of 1/10 was not appropriate and it applied a deduction on 1/3.

The MAP revoked the MAC and corrected any other errors, including a discrepancy regarding the assessment of the left lower extremity, as follows:

99. Dr Breit assessed a "*good*" result from the total knee replacement in his report of 8 May 2018. We concur that such a result pursuant to AMA5 would yield a 15% entitlement. We note that the AMS found that the result from the total knee replacement was only "fair", which we agree would entitle Mr Usher to a 20% WPI finding. The AMS gave no reasons as to why she assessed 15% in the light of her earlier finding of 20%. However, her explanation for according 20% was clear. She had applied the relevant guide line and come to a figure of 80, which the Panel confirms is a finding of a "fair result." She said:

> Assessed under whole person permanent impairment, for a total left knee replacement under Table 17-35 rating knee replacement on page 549 of the AMA5 Guides:
>
> (a) Pain 30 points
>
> (b) Range of motion 25 points for 120° of flexion
>
> (c) Stability there was no anteroposterior or mediolateral instability and thus there is 25 points.
>
> In total there are 80 points.

100. Accordingly, the Panel is satisfied that the 15% assessed was inadvertent, and that the AMS intended to award an assessment in accord with her finding.

The MAP issued fresh MACs as follows: (1) Injury on 21 September 2015 – 13% WPI (left lower extremity); and (2) Injuries on 29 March 2000 – 20% permanent impairment of the back and 17% permanent loss of efficient use of the right leg at or above the knee.

Failure to consider relevant evidence is an error - AMS not provided with, or did not consider, a forensic medical report that the worker relied upon – Tattersall v Registrar of the Workers Compensation Commission of NSW & Anor and Wentworth Community Housing Ltd v Brennan considered

Galvin v Comtam Pty Ltd [2020] NSWWCCMA 3 – Arbitrator Douglas, Dr R Pillemer & Dr D Crocker – 6 January 2020

On 15 April 1994, the worker injured his back at work. He underwent surgery in 1995 and 1996. He claimed compensation under s 66 WCA for permanent disabilities of his back and both legs, but the respondent disputed the degree of permanent impairment.

On 3 September 2019, Dr English issued a MAC, which assessed 20% permanent impairment of the back, 10% permanent loss of efficient use of the right leg at or above the knee and 5% permanent loss of efficient use of the left leg at or above the knee.

The appellant appealed against the MAC under s 327 (3) (d) *WIMA* and he argued that the AMS was either not provided with, or did not consider, Dr Righalgh's report dated 17 August 2018 and that this is a demonstrable error.

However, the respondent argued that the appellant had not identified any error with the AMS' assessment, which was based upon his clinical examination. The fact that the AMS did not specifically refer to Dr Ridhalgh's report did not mean that he had not been provided with a copy of it. The AMS explained his path of reasoning for the assessment and considered all relevant facts.

The MAP noted that the AMS stated that he received medical reports from other doctors after he had examined the worker and that Dr Ivers and Dr Ridhalgh used later assessment systems that are not directly compatible with assessments under the table of disabilities. However, it noted that in a report that was filed with the ARD, Dr Ridhalgh provided assessments under the table of disabilities.

The MAP stated that an AMS does not have to refer to every item of evidence to explain their assessment, but they need to consider all the evidence. It is an error for an AMS not to consider all relevant and significant material. It stated, relevantly:

> 24. The Appeal Panel notes that the Commission initially provided the AMS with documents relating to another case. The documents relating to this matter were not sent to the AMS until after he had examined the appellant. The documents the AMS specifically listed in Part 2 of the MAC that had been provided to him, did not include Dr Ridhalgh's report of 17 August 2018. The AMS said in the MAC that Dr Ridhalgh had not provided an assessment under the Table of Disabilities. That is incorrect, because Dr Ridhalgh had and had detailed that assessment in his report of 17 August 2018. Based on those circumstances, the Appeal Panel considers that in all likelihood the report of Dr Ridhalgh of 17 August 2018 was not provided to the AMS.
>
> 25. If that not be the case, then the only alternative is that the AMS did not consider Dr Ridhalgh's report of 17 August 2018. This is necessarily the case because the AMS said that Dr Ridhalgh had not assessed the appellant's impairment under the Table of Disabilities whereas Dr Ridhalgh had done so and had set out his assessment in his report of 17 August 2018.
>
> 26. In the circumstance where either the AMS was not provided with Dr Ridhalgh's report of 17 August 2018 or did not consider Dr Ridhalgh's report of 17 August 2018, the AMS has failed to consider all the relevant evidence. It is not for the Appeal Panel to speculate as to what the AMS would have made of that evidence. The fact that the AMS did not consider it, amounts to an error in the AMS's assessment. Given that, the Appeal Panel finds that the MAC does contain a demonstrable error.

Accordingly, the MAP revoked the MAC and reassessed the impairment dispute based upon the findings on re-examination by Dr Pillemer. It held that there is objective evidence of radiculopathy involving the right S1 nerve root and referred pain on both legs. It therefore assessed 30% permanent impairment of the back, 20% permanent loss of efficient use of the right leg at or above the knee and 10% permanent loss of efficient use of the left leg at or above the knee. It issued a fresh MAC to that effect.

Hearing loss – jurisdiction to make a deduction for hearing loss resulting from post-injury employment outside NSW and non-work related conditions

Cuskelly v New England Milk Industries Pty Ltd [2020] NSWWCCMA 2 – Arbitrator Batchelor, Dr P Niall & Dr H Harrison – 6 January 2020

The appellant left school at the age of 15 years. He worked as a builder's labourer and was exposed to high levels of machinery noise. He then worked at a cordial factory and was exposed to noise of bottle washers and conveyor belts without any ear protection.

In about 1964, the appellant commenced similar work with the respondent. He then went to New Zealand and worked in a cannery, in meat works and as a shearing contractor, and returned to Australia in 1968 and worked for the Postmaster General's Department until 2008. He was exposed to nose both above and below ground in that work, although he wore ear muffs after 2002. Since 2008, he has been self-employed on his property, where he has been exposed to nose of a tractor, chainsaws, angle grinders and shearing machines, but wore hearing protection. He also occasionally fired .22 calibre rifles over the years.

On 23 July 2019, Dr Scoppa issued a MAC., which assessed 55.5% BHL with respect to a deemed injury on I January 1964, from which he deducted 32.1% BHL for pre-existing impairment and 6.6% BHL for Presbyacusis. He assessed 16.8% BHL for noise-induced hearing loss, but stated that only 2% of this was sustained in NSW.

The appellant appealed against the MAC under s 327 (3) (d) *WIMA.* He complained that the AMS made a deduction for employment outside NSW that post-dated his employment with the respondent and that he did not have power to make that deduction. Alternatively, he argued that if the AMS did have power to make such a deduction, he did not have the power to make the deduction based upon either a mathematical calculation or upon epidemiological data and such a deduction had to be made on a proper evidentiary basis. He argued that the decision in *Seltsam Pty Ltd v McGuinness; James Hardie & Coy Pty Ltd v McGuiness* (*Seltsam*) is authority for the proposition that the use of epidemiological data, which the AMS used to estimate hearing loss suffered in NSW, is "*impermissible*"

The respondent argued that there is no basis for a finding of demonstrable error. In determining the degree of permanent impairment as a result of industrial deafness and the nature and extent of the hearing loss suffered by the worker, the degree of hearing loss due to periods of subsequent noisy employment outside the jurisdiction of NSW constitutes a legitimate avenue of enquiry. It disputed that the AMS lacked power to apply a deduction for BHL due to post-injury employment outside NSW.

The respondent also disputed the argument that *Seltsam* is authority for the proposition that it is impermissible to use epidemiological data to estimate the hearing loss resulting from employment in NSW. Rather, it was held that epidemiological evidence that exposure to a substance is a possible cause of injury may be used to establish that the exposure is the legal cause of injury and the decision is not relevant to the issues raised in the appeal.

The MAP held that the AMS has power to make an appropriate deduction for injury due to employment outside NSW after 1 January 1964. It stated (citations excluded):

> 36. The appellant takes issue with the use of epidemiological data by the AMS to make a deduction for injury that was the result of employment outside New South Wales and submits that such a deduction, if it was to be made, needed to have a proper evidentiary basis.
>
> 37. In *Pascoe v Mechita Pty Ltd* the reliance upon ISO tables 1999 to 2013 (ISO 1999) by the medical appeal panel, whose decision was under challenge in the Supreme Court, was held not to have been permissible as the plaintiff (worker) in that case had been denied procedural fairness by not having been given the opportunity to make submissions on the use by the appeal panel of ISO 1999. In this case the appellant has made submissions in respect of the epidemiological data used by Dr Fernandes and adopted by the AMS.
>
> 38. In *Seltsum,* Spigelman CJ held at [49] that:
>
> > Epidemiology is the study of the distribution and determinants of disease in human populations. It is based on the assumption that a disease is not distributed randomly in a group of individuals. Accordingly, subgroups may be identified which are at increased risk of contracting particular diseases.

39. The Panel accepts the respondent's submission that *Seltsum* is not authority for the submission by the appellant that the use of epidemiological data, in this case the ISO 1999, is impermissible. In accordance with the finding in *Seltsum*, epidemiological data may be used to establish that the exposure to a substance as a possible cause of injury. That was a case involving exposure to carcinogenic substances. It is not relevant to the issue raised in the appeal in this matter.

40. The Panel notes that the AMS stated at [10.a.(vi)] of the MAC that there is no standard methodology of assessing such cases of industrial deafness as in the present matter. He does refer to the "*Epidemiological Data from ISO 1999: Australian Standards, as was applied by Dr Fernandes in his supplementary report dated 25 June 2018, where he assessed the maximal occupational BHL sustained in NSW at 2.0%.*"

41. The AMS then goes on to state in the next paragraph [10.a.(vii)] that he prefers calculation on the years (of exposure) in this case because Mr Cuskelly advised that the exposure to noise throughout his working life was relatively stable. Using the years of exposure method, the AMS then calculates the appellant's hearing loss at 1.41% that can be attributed to industrial deafness sustained as a result of noisy employment in NSW.

42. At [10.a.(ix)] of the MAC the AMS expresses his awareness that industrial deafness does not progress arithmetically with each year of exposure, and that relatively more industrial deafness occurs during the first five years than in later years. However, the Panel recognises that this is generally true only of loss expressed in dBHL terms. (Hearing level (HL) is the sound pressure level produced by an audiometer at a specific frequency. It is measured with reference to audiometric zero. In decibels (dBHL) it refers to the logarithmic ratio of a hearing level – here, the hearing threshold value - to audiometric zero.) When losses are converted, as required, to binaural hearing impairment percentages (BHI) these percentages increase generally linearly with equal hazardous exposures over time (see [44] hereunder). The AMS then however adopts the assessment of Dr Fernandes of probable BHL (binaural hearing loss) of 2%, arrived at by using the epidemiological data. He "*would accept this methodology as being a better estimate.*" However, the Panel does not agree with this.

43. The medical members of the Panel are of the view that, in a difficult case such as this, there are only two ways of assessing hearing loss. They are the years of exposure (or in the Panel's view, best described as the "*linear*" or "*temporal*") method, or by using the epidemiological data (ISO 1999) used by Dr Fernandes. The Panel notes that the BHL assessed by Dr Fernandes is similar to that assessed by the AMS using the linear or temporal method.

44. The Panel notes that both methods of assessment have limitations. However, in this regard it agrees with the initial preference expressed by the AMS, that in this case the linear method of assessment is appropriate. This is because although there is greater industrial deafness at the higher tones during the early years of exposure (in dBHL terms), but this tends to linearity (in BHI terms) as the lesion expands through time. This is because the cochlear noise lesion spreads temporally to progressively lower frequencies to which the NAL Table assigns higher values. The Panel also notes the history that Mr Cuskelly provided to the AMS that exposure to noise throughout his working life was relatively stable. This is supportive of the linear view. The epidemiological view (in ISO 1999) of this kind of apportionment is weakened by its never having been definitively canvassed in the published medical literature and because it is not an individual assessment being rather a central measure (an average) with limited account of actual real dispersion about a mean.

The MAP accepted the AMS' assessment (at [10.a.(viii)] of the MAC) that the appellant sustained a 1.41% BHL as a result of noisy employment in NSW and it held that the AMS erred in adopting the assessment of 2% BHL made by Dr Fernandes using the epidemiological method. It accepted the AMS' criticism (at [10.c.(iii)] of the MAC) of Dr MacArthur's assessment, as he does not appear to have made an adjustment for noisy employment outside the jurisdiction that post-dates the notional date of injury. The AMS acknowledged that s 323 *WIMA* does not apply in this matter because there is a history of long term occupational noise exposure after the appellant ceased employment in NSW and he included in the MAC a statement that 32.1% BHL is unrelated to industrial deafness.

Accordingly, the MAP revoked the MAC and issued a fresh MAC that assessed 1.4% BHL due to the deemed injury on 1 January 1964.

AMS properly examined body systems and recorded his findings that resulted in correct assessments of 0% WPI – No demonstrable error despite AMS' failure to refer to the opinions of the qualified specialists – MAC confirmed

Nesci v Secretary, Department of Industry [2020] NSWWCCMA 6 – Arbitrator Batchelor, A-Prof M Fearnside & Dr B Noll – 8 January 2020

On 26 May 2016, the appellant fell down stairs at work and struck her lower back, neck and head. She subsequently developed vertigo and headaches. Because of persisting symptoms, she was demoted to a position of an assistant teacher, requiring supervision by another teacher until she ceased work at the end of 2018.

On 2 September 2019, Dr Mellick issued a MAC. However, the appealed against it under s 327 (3) (d) *WIMA.*

The appellant complained that the AMS should have conducted a physical examination regarding her lumbar, thoracic and cervical spines and left elbow as her qualified specialist, Dr Patrick, expressed clear findings that justify DRE II assessments. The AMS does not address in any clear way what examination he conducted of the spine and it is completely unclear from the MAC whether the AMS undertook any examination in order to identify any verifiable radicular signs etc.

The respondent cited the decision of Malpass AJ in *Mahenthirarasa v State Rail Authority of New South Wales & Ors (Mahenthirarasa)* (at [29]):

> A demonstrable error would essentially be an error for which there is no information or material to support the finding made - rather than a difference of opinion.

The respondent referred to the AMS' findings on physical examination and the details and dates of special investigations, the summary of injuries and investigations, and consistency of presentation set out in the MAC and argued that the AMS clearly took a comprehensive history and had the appellant undergo appropriate testing before arriving at his assessment, which included straight leg raising. The AMS' opinion regarding the cervical and thoracic spines and range of shoulder motion is consistent with that of Dr Smith. He relied upon his own assessment and arrived at a position that was open to him and he is not required to refer to every medical report before him when producing a MAC.

The MAP rejected the appellant's argument and held that it is apparent from the MAC that the AMS examined all spinal regions and that he was not able to identify any evidence of any soft tissue injury or bony abnormality, except for a developmental upper thoracic gibbus (which the MAP noted was a palpable bony mass at the top of the spine that was irrelevant to this claim). His clinical findings indicated that there are no neurological abnormalities in the upper or lower limbs and he considered his clinical findings in relation to the lumbar spine when assessing 0% WPI. It stated, relevantly:

34. The Panel has no hesitation in accepting that the AMS examined all three spinal regions. He found, in summary, that "*physical examination reveals no abnormalities*." On those findings there cannot be any other finding than 0% WPI for all three spinal regions…

42. As noted above at [28], the Court of Appeal in Vegan held that an Appeal Panel is obliged to give reasons. There are no disputes of fact in this matter requiring resolution by the Panel. There are differences in the findings on examination and assessment between the AMS, Dr Patrick and Dr Smith. Whilst it may have been desirable for Dr Mellick to refer to the findings and assessments of Dr Patrick and Dr Smith and their assessments, there is no obligation on him to refer to all the evidence before him. Having regard to the findings of Dr Mellick based on his examination of the appellant and the material he had before him, the Panel is firmly of the view that his assessment would not be different if reference had been made to Dr Patrick and Dr Smith. The Panel finds that Dr Mellick:

(a) took a proper history from the appellant;

(b) examined the appellant's cervical, thoracic and lumbar spine;

(c) recorded his findings;

(d) had regard to the material that was referred to him by the Registrar, and

(e) made his assessment of WPI in respect of the cervical, thoracic and lumbar spine in accordance with his findings on examination and the material referred to him.

43. The appellant's submissions highlight disagreement between the findings and assessments between the AMS and Dr Patrick. This does not constitute a demonstrable error as referred to by Malpass AJ in *Mahenthirarasa*.

44. The decision of Malpass AJ in *Mahenthirarasa*, which was in respect of the refusal of the delegate of the Registrar to allow an appeal from the finding of an AMS in a MAC (s 327 (4) of *the 1998 Act*), was the subject of an appeal to the Court of Appeal. Basten JA dealt with the concept of "*demonstrable error*" at [59] of the judgement. Whilst the decision of Malpass AJ was overturned, no issue was taken with his discussion of the concept of demonstrable error. Basten JA's comments are as follows:

> 59 The concept of '*demonstrable error'* is not defined, and may be open to various interpretations, ranging from the broad to the narrow. At the narrowest end of the spectrum, it may be thought that the error must be apparent from reading the certificate itself, thus equating the error with error '*on the face of the record*' for the unrelated purpose of relief in the nature of certiorari. There is no obvious reason why such a construction should be adopted when the purpose is review on the merits, rather than review for legal error. The word '*demonstrable*' does not in any event import such a constraint. As noted at [37] above, the example given in the second reading speech suggested that the error must be a manifest error. In *Plaintiff S157/2002 v The Commonwealth* [2003] HCA 2; 211 CLR 476 at [13], Gleeson CJ made comments relevant to such a concept, stating:
>
> > The concept of '*manifest*' defect in jurisdiction, or '*manifest*' fraud, has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a

primary judge's finding of fact, or exercise of discretion, are expressed in terms such as '*palpably misused [an] advantage*', '*glaringly improbable*', '*inconsistent with facts incontrovertibly established*', and '*plainly unjust'*. Unless adjectives such as '*palpable*', '*incontrovertible*', '*plain*', or '*manifest*' are used only for rhetorical effect, then in the context of review of decision making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected.

45. In *Merza v Registrar of the Workers Compensation Commission & Anor* Hoeben J thought that a "*demonstrable error*" is an error which is readily apparent from an examination of the MAC and the document referring the matter to the AMS for assessment. In that case there had been an agreed injury to the back but it was not a demonstrable error when the AMS had made his own determination of what the injury was.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Worker fell from a horse at work – award for the respondent entered regrading proposed total right hip replacement surgery as worker failed to discharge his onus of proof regarding that injury – Kooragang Cement Pty Ltd v Bates & Comcare v Martin discussed

Candy v MC Connor Racing Pty Ltd [2020] NSWWCC 2 – Senior Arbitrator Bamber – 6 January 2020

On 25 June 2018, the worker, who was employed by the respondent as a track rider, fell from a horse. She alleged that she injured her right hip and sought an order that the respondent pay the costs of and incidental to total hip replacement surgery.

Senior Arbitrator Bamber noted that in a statement dated 27 August 2019, the worker alleged that in a fall from a horse on 20 April 2013, she suffered injuries to her brain and left hip. She returned to work after 22 weeks, but suffered a number of further falls. On 25 June 2018, she fell from a horse and was trampled by it, causing injuries to her lower back and right hip. She denied any previous serious injury to her right hip.

The Senior Arbitrator discussed the medical evidence in detail and noted that the respondent argued that the worker's evidence should be treated with caution due to the consequences of her previous head injury. She accepted that argument and stated:

51. … I accept this submission. It seems clear from the medical history taken by Dr Powell that Ms Candy has some memory problems. Dr Bodel also refers to her having suffered from brain damage in 2013. I am concerned that Ms Candy makes no mention of the prior right hip problem, which is referred to in Dr Jordan's report. The fall described by Dr Jordan occurred in 2015 and the circumstances surrounding it are quite similar to that described by her in 2018. Dr Jordan describes the 2015 fall as involving "*a horse reared on its hind legs and threw her off the horse onto her back and the horse landed on top of her*".

52. Ms Candy in her statement says between the fall on 20 April 2013 and 25 June 2018 she had a number of falls, none of which were serious. She adds that "*this was the first time I have had a very serious injury to my right hip*." However, she does not refer to the fall in 2015 which caused her to be referred to a specialist, Dr Jordan, and have physiotherapy and receive a referral for a right hip MRI. Furthermore, Dr Nabavi obviously saw her before the fall on 25 June 2018 for her right hip because Dr Nabavi stated to Dr Li in his report dated 6 August 2018 that he saw her previously with right sided hip pain as a result of labral pathology and dysplasia.

53. Therefore, I accept I do have to treat Ms Candy's evidence cautiously. By making such a finding I am not suggesting she has been dishonest, but that relevant information about her medical history has not been covered in her statement.

54. Dr Bodel has a heading "past medical history" and says Ms Candy stated she has been previously quite well before these two horse-riding related injuries. The injuries he is referring to are those on 25 April 2013, involving an acute brain injury and fracture of the left hip, and the injury on 25 June 2018. Unfortunately, Dr Bodel does not appear to have known about the fall in 2015 and Dr Jordan's treatment of Ms Candy's right hip.

55. This was one reason why the respondent submitted that the report of Dr Bodel is seriously flawed. It was also argued that Dr Bodel has not seen any radiology and his opinion about causation is not reasoned. I accept these submissions and I find I can give no weight to Dr Bodel's opinion for these reasons.

56. The counsel for Ms Candy submitted that he agreed that Dr Bodel "*probably ought*" to have had access to the radiology, but he argued that it does not matter because the assumptions made by Dr Bodel turned out to be correct about what was in the radiology. However, I cannot accept this submission because Dr Nabavi in his report dated 6 August 2018 refers to an MRI scan, so this obviously is a scan that pre-dates the one which is in evidence from 8 February 2019. Dr Nabavi says of this scan that it confirmed the presence of labral cysts and hip dysplasia. It is not clear from the evidence if this was the MRI scan from the referral of Dr Jordan in 2015 or an earlier scan. In Dr Li's referral to Dr Nabavi there is reference to an MRI scan on 13 May 2014 showing a "*dysplastic hip, early OA, degen. Lobulated labral cyst (Right).*"

57. No doctor for either party has considered all of the radiology and treating medical evidence. Furthermore, it would seem that all of the treating medical material regarding Ms Candy's right hip is not in evidence before the Commission, for instance the scan of 13 May 2014 and Dr Nabavi's reports about his consultations before that of 6 August 2018. In the absence of considered opinions based on all the evidence, it is very difficult for the Commission to make sound findings about injury on 25 June 2018 and whether the right hip replacement surgery is needed as a result of such an alleged injury.

58. It was also submitted by the respondent that Dr Nabavi has given no opinion about causation. A report from him dealing with causation would have assisted both the Commission and the doctors that have been qualified by both parties.

59. Furthermore, the respondent submitted that the contemporaneous medical record for 26 June 2018 only refers to lower back pain and the reason for contact recorded by Dr Li was "*lower back injury*". It was submitted that this is consistent with Ms Candy's claim form that only refers to injury to the lower back and face. The respondent's counsel submitted that there is no reference to a right hip injury and the claim form was dated four days post the fall.

60. The respondent's counsel emphasised that the claim brought by Ms Candy in these proceedings relates only to injury on 25 June 2018, that she has not brought a nature and conditions of employment type claim.

61. The respondent submitted that Dr Powell also does not appear to have all of the material that is before the Commission. In particular, it was submitted that Dr Powell did not know that the entry of Dr Li on the day following the fall of 25 June 2018 made no reference to the right hip being injured, nor did the claim form signed by Ms Candy four days later.

62. Ms Candy's counsel submitted that the Commission needed to take a "*sensible approach*" to issues such as causation. It was argued if Ms Candy was having significant problems in her right hip before the fall on 25 June 2018 would she have been able to ride racehorses? However, because Ms Candy does not deal with her prior right hip problems in her statement, or in histories to the doctors, it is not possible to make the findings sought by her counsel. Even if Ms Candy has memory problems and was not in a position to make a comprehensive statement, evidence such as a report from Dr Li and/or Dr Nabavi who knew of her health pre and post 25 June 2018 would have assisted to determine, firstly, the question of injury and, secondly, the causation question about the need for the right hip replacement.

63. Not only does the contemporaneous note of Dr Li and the claim form not refer to the right hip being injured, Dr Li's referral to Dr Nabavi a month later on 20 July 2018 does not refer to Ms Candy suffering right hip pain after the fall. Dr Li's referral was for "*an opinion and management of L femoral acetabular impingement syndrome-Lisa is a horse rider and she has been reporting L hip pain, intermittently giving way*". Dr Nabavi in the report dated 6 August 2018 says, "*This time she is seeing me with left sided hip pain*." He noted that he had previously seen her for right sided hip pain. All of this evidence does not support a finding that there had been a right hip injury on 25 June 2018.

64. However, Dr Nabavi does state "*she has had a recent exacerbation and her pain has been related to a fall from a horse*". Unfortunately, I find this statement is not clear in its meaning as to whether the exacerbation refers to the right or left hip.

The Senior Arbitrator held that the worker bears the onus of proof and she cited the decision of McDougall J in *Nguyen v Cosmopolitan Homes (NSW) Pty Limited* ad [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.

The Senior Arbitrator held that the worker had not discharged her onus of proving injury to her right hip and she could not find that the proposed total hip replacement surgery is a result of the fall on 25 June 2018. She stated, relevantly (citations excluded):

68. Ms Candy's counsel submitted that one needs to be careful when considering the notes from a general practitioner because they do not always include the full picture. I agree that is often the case, which is why I have carefully scrutinised the clinical notes that have been put into evidence. However, where the claim form signed by Ms Candy does not refer to her right hip I cannot conclude that the several entries by Dr Li which do not refer to the right hip have omissions. It would have been helpful had the full clinical notes been placed into evidence so that it could have been ascertained when complaints about the right hip were recorded before and after 25 June 2018. It would have also been helpful to have the physiotherapy records to see if the right hip had been complained about.

69. Ms Candy's counsel relies on parts of Dr Powell's opinion wherein he says that it is probable she had some local trauma to the region in the fall and she may have extended some of the labral deterioration. Such matters are possible, but I cannot make such findings on the balance of probabilities because Dr Powell's opinion has not been based on a consideration of all of the treating evidence about Ms Candy's right hip. He has not considered the scans that were taken pre-25 June 2018 with those after. He does not know about Dr Jordan's treatment.

70. Reference was made to the test of causation in *Kooragang Cement Pty Ltd v Bates*. In *Kooragang* Kirby P (as he then was) found "*what is required is a common-sense evaluation of the causal chain.*"

71. More recently, in *Comcare v Martin* the High Court stated at [42]:

> Causation in a legal context is always purposive. The application of a causal term in a statutory provision is always to be determined by reference to the statutory text construed and applied in its statutory context in a manner which best effects its statutory purpose. It has been said more than once in this Court that it is doubtful whether there is any '*common sense*' approach to causation which can provide a useful, still less universal, legal norm. (Footnotes omitted)

72. In *Martin* the High Court referenced its decision in *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* wherein it was stated:

> [96] Santow JA also emphasised that this question of causality was not at large or to be answered by 'common sense' alone; rather, the starting point is to identify the purpose to which the question is directed. Those propositions should be accepted. The following may be added.
>
> [97] First, in *March v Stramare (E & M H) Pty Ltd*, McHugh J doubted whether there is any consistent '*common-sense notion of what constitutes a cause'*, and added:
>
> > Indeed, I suspect that what common-sense would not see as a cause in a non-litigious context will frequently be seen as a cause, according to common-sense notions, in a litigious context. This is particularly so in many cases where expert evidence is called to explain a connexion between an act or omission and the occurrence of damage. In these cases, the educative effect of the expert evidence makes an appeal to common-sense notions of causation largely meaningless or produces findings concerning causation which would often not be made by an ordinary person uninstructed by the expert evidence.

73. In *Martin* and *GSF Australia* the High Court was dealing with different statutory provisions to that in the NSW workers compensation legislation, but the passage about doubts about a *"common sense*" approach providing "*a useful, still less universal, legal norm*" are relevant to the determinations undertaken in the Commission. However, as I understand it, Kirby P in *Kooragang* when referring to applying "*common-sense*" was not suggesting it be applied at large or issues were to be determined or answered by "*common-sense*" alone, but by a careful analysis of the evidence.

74. In *Kooragang* it was stated at [461G],

> [f]rom the earliest days of compensation legislation, it has been recognised that causation is not always direct and immediate.

75. After referring to earlier English authorities, his Honour added at [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.

76. His Honour said at [463–464]:

> The result of the cases is that each case where causation is in issue in a workers compensation claim, must be determined on its own facts. Whether death or incapacity results from a relevant work injury is a question of fact. The importation of notions of proximate cause by the use of the phrase '*results from'*, is not now accepted. By the same token, the mere proof that certain events occurred which predisposed a worker to subsequent injury or death, will not, of itself, be sufficient to establish that such incapacity or death 'results from' a work injury. What is required is a common-sense evaluation of the causal chain. As the early cases demonstrate, the mere passage of time between a work incident and subsequent incapacity or death, is not determinative of the entitlement to compensation. In each case, the question whether the incapacity or death 'results from' the impugned work injury (or in the event of a disease, the relevant aggravation of the disease), is a question of fact to be determined on the basis of the evidence, including, where applicable, expert opinions. Applying the second principle which Hart and Honoré identify, a point will sometimes be reached where the link in the chain of causation becomes so attenuated that, for legal purposes, it will be held that the causative connection has been snapped. This may be explained in terms of the happening of a novus actus. Or it may be explained in terms of want of sufficient connection. But in each case, the judge deciding the matter, will do well to return, as McHugh JA advised, to the statutory formula and to ask the question whether the disputed incapacity or death 'resulted from' the work injury which is impugned.

The Senior Arbitrator held that in this matter she could not apply a common-sense evaluation of the causal chain because key information about it was missing. The expert evidence could not be relied upon because the opinions have been given without the experts being appraised of all of the medical evidence regarding the right hip condition and the medical evidence available immediately after 25 June 2018 does not refer to the right hip. Accordingly, she entered an award for the respondent.

Arbitrator finds a real and substantial connection between a fatal MVA that was caused by fatigue and the deceased worker's employment

Eather v Skillset Limited et Al [2020] NSWWCC 11 – Senior Arbitrator Capel – 7 January 2020

On 10 November 2015, the worker died as a result of injuries suffered in a motor vehicle accident that occurred when he was driving home from work. The evidence, including evidence from NSW Police, indicated that he fell asleep at the wheel and drove into the path of an oncoming truck.

The insurer disputed the claim under s 10 (3A) *WCA* and asserted that there was no evidence that the deceased was fatigued as a result of his employment. However, there was no dispute that the accident was caused by fatigue.

Senior Arbitrator Capel conducted an arbitration hearing and identified the following issues for determination: (1) was there a real and substantial connection between the deceased's employment and the accident? – s 10 (3A) *WCA*; (2) whether there were any persons wholly or partially dependent on the deceased – s 25 *WCA;* (3) apportionment of the lump sum of $750,000 payable – s 29 *WCA*; (4) orders in relation to payment of the compensation – ss 85 and 85A (1) (a) WCA; and (5) whether the first respondent is liable for the payment of interest – s 109 *WCA.*

The applicant (the deceased worker's father, acting as his legal personal representative) stated that the deceased commenced work with the first respondent as a printer/graphic art apprentice in September 2015. He alleged that the deceased got up and left home early in the morning and drove to Orange, where he met a co-worker and they drove to work in Bathurst together. They drove back to Orange after work and the deceased was 'very tired' when he got home, but he also went to a local gym after work.

The deceased's mother stated that his alarm would sound at 4am and the deceased would get up, shower and eat breakfast. He usually left for work at 4:45am or 5 am and he would arrive at work at about 6:15 am. He returned to Orange in time to collect his sister from a bus stop at 4 pm and occasionally took her to a dance class and picked her up again at 7:30 pm. He also went to the gym every afternoon during the week. She noticed that he had bags under his eyes and that he was very tired after work each day and would often say that he was tired. He would yawn and rub his eyes at dinner and he was usually in bed by about 9 pm. He would usually sleep in on weekends and spend the day at home playing with his puppy. He turned 21 on 4 November 2015 and has a small celebration at a local bowling club and a friend's house in Orange.

The deceased's brother stated that the deceased generally looked tired and had bags under his eyes after he started work with the first respondent.

The deceased's sister stated that on the day before the accident occurred, the deceased picked her up from her dance class in Orange between 8 pm and 9 pm and drove her home. He was yawning when he arrived home and he went straight to bed.

The first respondent relied upon statements from numerous employees, to the effect that the deceased did not look tired or complain about fatigue on the day that the accident occurred. He was involved in hand-binding duties, which was not strenuous. He did not work excessive hours or overtime and took all breaks.

The deceased's co-worker told Police that he and the deceased left work at 3 pm and that the deceased started sneezing due to hay fever. He fell asleep and then recalled hearing a loud bang. He looked at the deceased and noted that he has suffered head injuries. He kicked the door open and escaped from the vehicle. However, in a later statement, he said that they finished work at 3:30pm and did not talk much on the drive home. He saw a large semi-trailer approaching from Orange and their vehicle slowly veered across the centre lane. He looked across at the deceased and noticed that his head was down on his chest and his eyes were closed. He braced himself for the collision and the vehicle spun violently. He looked at the deceased and could tell that he was dead. He was eventually able to free himself from the vehicle.

The applicant relied upon a report from Dr Desai, respiratory and sleep medicine physician, dated 26 September 2018. He was asked to assume that the deceased rose each morning at 5 am and set out from Orange to Bathurst at 5:30am, worked from 6 am to 3 pm and then returned home (a distance of 110 km in total). He noted that the nature of the deceased's duties could be physically tiring and was advised that the deceased also attended a gym and lifted weights for about 1 hour each day after work. He went to bed at around 10:30 pm to 11 pm and had recently left a wedding at 8:30 pm because he was tired.

Dr Desai confirmed that the deceased fell asleep at the wheel of his car and that this was the cause of the fatal accident, which was in the context of chronic partial sleep restriction (he generally had 6.5 hours of sleep each night before work), and according to medical literature, adults required 7 to 8 hours of sleep to avoid sleep restriction or deprivation. The other fatigue factor that contributed to the deceased falling asleep was circadian sleepiness and he stated that the deceased fell asleep at such a time. He stated that there is a peak in accidents in the early morning and mid-afternoon because at these times, the body experiences a natural tendency for sleepiness that is regulated by circadian or diurnal

rhythm, although the former are less prominent in younger individuals. The sleep restriction and fatigue would have been minimised if the deceased went to be at least an hour earlier. He concluded that there were work factors – starting early and finishing in the afternoon – that contributed to the deceased falling asleep, but these factors were not substantial contributing factors.

However, in a supplementary report dated 10 December 2018, Dr Desai – "*armed with an explanation of the meaning of "a real and substantial connection"*", advised that the deceased's work was a real and substantial contributing factor to him falling asleep immediately before the accident. He opined that the early starts and lack of fatigue management by the employer had likely led to chronic sleep restriction, causing him the fall asleep at the wheel of his car.

In a further report dated 26 April 2019, Dr Desai noted that the deceased's mother said that he would usually go to bed at 9 pm and wake up at 4 am. This meant that the deceased had about 7 hours of sleep each night, so the severity of sleep deprivation would be reduced. She also indicated that the deceased looked tired after work, which was consistent with sleep deprivation causing driver fatigue. He confirmed his previous opinion.

Professor Dawson, an expert in sleep and fatigue research, issued a report on 15 October 2019. He conceded that it is very difficult to determine definitively whether an accident was caused by fatigue or something else and this required a consideration of the evidence of fatigue and whether the circumstances were consistent with a fatigue-related accident. He opined that it was likely that the deceased's hours of work and the travel to and from work resulted in a significantly reduced sleep opportunity at times of the greatest likelihood of sleep and consequently a greater likelihood of fatigue.

Prof. Dawson said that the literature established that early start times were likely to lead to increased levels of fatigue, which is in part due to circadian factors that typically result in an increased urge for sleep overnight and lower sleepiness during the day. This meant that the deceased would have found it difficult to go to sleep early enough to get a full night of sleep before work days. He concluded that it was likely that the deceased would have had shortened sleep periods on the nights prior to work days and that the actual sleep obtained was usually significantly lower than the available sleep opportunity. It was likely that the deceased was routinely obtaining between 5.5 to 6.5 hours of sleep per night during the working week, instead of the recommended 7 to 9 hours of sleep each night, and the reduced amount of sleep was likely to be associated with increased levels of fatigue during the day.

Prof. Dawson also stated that the time of day when the accident occurred also may have been associated with an increased likelihood of fatigue, because circadian rhythms typically had a dip in alertness in the mid-afternoon when sleepiness and fatigue were heightened. Therefore, it was likely that the deceased was experiencing heightened sleepiness at the time of the accident, on a background of sleep deprivation. While he cautioned that there is no direct evidence about the amount of sleep the deceased had in the days before the accident or whether he was acting in manner directly attributable to fatigue, he noted that the statements of the deceased's family members and his co-worker suggested that he was tired after work and the wedding. This was consistent with the likelihood that the deceased was significantly fatigued due to his work situation and the time of the accident. He also noted that the failure to respond to changes in road direction was often a direct indicator of reduced situational awareness, or even falling asleep, associated with elevated fatigue levels. He concluded that there was a real and substantial connection between the deceased's employment and his fatigue, but while some of the fatigue may have resulted from an increase in physical exercise at the gym, that contribution would have been minimal.

The insurer relied upon an opinion of Mr Smith, ergonomist and occupational therapist, dated 30 December 2019. He noted that the deceased's commuting time of 8.3 hours per week was greater than the Australian average of 4.5 hours, but the level of commuting would be considered as "*low risk*". However, he agreed with Prof. Dawson that the effects of fatigue may have been heightened at the time of the accident due to circadian rhythms. He largely agreed with Prof. Dawson's views, but noted that some of the literature that he relied upon related to shift-workers, early starts and irregular work schedules, which did not apply to the deceased. He also noted that the employer could not control what the deceased did outside of work.

Mr Smith noted that the deceased had the weekend off work and that there was only one sleep opportunity before the day of the accident. He opined that if the deceased was fatigued, it seemed likely that a significant component of the fatigue had accumulated over the weekend and therefore, it was unlikely to be work-related fatigue. He also opined that Prof. Dawson's assumption that the deceased used his weekends to catch up on sleep was unsustainable, because the research that he cited suggested that young adults slept for 8.5 hours per night on weekends and 7.5 hours per night on weekdays and felt that 2 working days of 8 hours, with no excessive physical demands, would not result in work-related fatigue. He therefore disputed that there was a real and substantial connection between the accident and the deceased's employment.

(1) Was there a real and substantial connection between the deceased's employment and the accident? – s 10 (3A) WCA?

The Senior Arbitrator noted that in *Mitchell*, O'Grady DP opined that "*substantial contributing factor*" in s 9A *WCA* and "*real and substantial connection*" in s 10 (3A) *WCA* require a causal element, as follows:

> Whilst there is a clear distinction between the statutory terms '*substantial contributing factor to injury'* (s 9A) and 'real and substantial connection between employment and the incident etc' (s 10 (3A)), both involve, as was accepted by the parties and as found by the Arbitrator, a causal element. In the case of s 10(3A) the causal nexus is the connection between the employment and the incident. The term "*connection*" as appears in s 10 (3A) may also encompass some other association with the employment. That issue has not been argued and, given the parties' approach to the particular facts, it is unnecessary to determine that question. Whilst the requirement is that the connection must be '*real and substantial*' that concept may imply a lesser threshold than '*substantial contributing factor*' as appears in s 9A. That question has not been fully agitated on this appeal, and I make no finding regarding that question. However, it is clear that, as with s 9A, the requirement of there being a '*real and substantial connection*' involves a test that goes to causation at least as stringent as that found in s 4(a) (arising out of employment).

The Senior Arbitrator noted that authorities since *Mitchell* have watered down that analysis and established that the real and substantial connection referred to in s 10 (3A) *WCA* does not necessarily require a causal connection between the employment and the injury:

> 127. In *Bina*, Keating P stated:
>
> > The Arbitrator's essential conclusions, with which I agree, may be summarised as follows:
> >
> > > (a) that a substantial connection is one "*of substance*" (*Badawi* at [82]-[83], [107]);
> > >
> > > (b) that "*employment*" in s 10(3A) is the same as in s 9A, that is, it is the activities of, or incidental to the employment, as opposed to the (mere) fact of being employed (*Federal Broom Co Pty Ltd v Semlitch* [1964] HCA 34; (1964) 110 CLR 626 at [11]);

(c) the mere fact that a worker must travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident - there must be some real relationship (connection) between the activities of the employment and the accident out of which the personal injury arose, and

(d) if merely travelling to and from work was sufficient to establish the relevant connection, s 10 (3A) would be otiose.

128. In Wickenden, Deputy President Roche stated:

> There is no doubt that the actions of Ms Thomas played an important role in the accident. However, the submission that the accident was caused by the action of Ms Thomas, and that, therefore, Ms Wickenden cannot succeed, attributes to s 10 (3A) a causative element that is not present. As noted above, the word '*connection*' in s 10 (3A) may, but does not necessarily, convey the notion of a causal connection (*Bina v ISS Property Services Pty Ltd* [2013] NSWWCCPD 72 at [102] and [114] (*Bina*)).
>
> As the authorities discussed in *Bina* confirm, the expression '*real and substantial connection*' does not require any causal relationship between the two circumstances or situations concerned (*Phillips v Commissioner for Superannuation* [2005] FCAFC 2 at [44]; *Commissioner of Superannuation v Benham* [1989] FCA 93; 22 FCR 413 at [421]). It requires an association or relationship. This approach to the meaning of '*connection*' is consistent with the observations of the majority in *Comcare v PVYW* [2013] HCA 41; 88 ALJR 1 (PVYW), though those observations were made in a different context.

129. Further, the Deputy President stated:

> In s 10 (3A), which talks about a real and substantial connection between the employment and the accident or incident, the connection may be provided by establishing that the employment caused the accident, but that is not a necessary requirement. Even if, contrary to my view, s 10 (3A) requires a causal connection between the employment and the accident, the employment does not have to be the only, or even the main, cause. It is trite law that an accident can have many causes (*ACQ Pty Ltd v Cook* [2009] HCA 28 at [25] and [27]).
>
> The use of the indefinite article '*a*', in s 10 (3A), makes it clear that employment does not have to be '*the*" connection between the accident or incident. It only has to be '*a*' connection, albeit one that is real and of substance (*Bina* at [112], citing *Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324; 75 NSWLR 503 (*Badawi*) at [82]–[83] and [107]). That requirement is satisfied on the facts of the present case because Ms Wickenden's employment required her to work later than normal. That meant she finished work in darkness and had to journey home on a narrow country road in darkness.

130. This was also confirmed by the Deputy President in *Field v Department of Education and Communities* as follows:

> The Arbitrator based his decision on the premise that Mr Field had to prove that his employment caused the accident or incident (the trip and fall). That follows from his reference to, and reliance on, *Mitchell* and *Kooragang*. That was an error. For the reasons explained in *Bina v ISS Property Services Pty Ltd* [2013] NSWWCCPD 72 (*Bina*) at [102] and [114] and *Wickenden* at [37], s 10 (3A) may, but does not necessarily, require a causal connection between the employment and the accident. It follows that I accept Mr Hickey's

submission that the word '*connection*' in s 10 (3A) involves a wider concept than causation.

131. Finally, in *McCoy*, President Keating stated:

> The test to be applied under s 10 (3A) is a different and less demanding test to that applied to establish that an injury arose out of or in the course of employment pursuant to s 4 of *the 1987 Act*. The test under s 4 requires a causative element which is to be inferred from the facts as a matter of common sense. The test under s 10 (3A) of a '*real and substantial connection*' may, but does not necessarily, convey the notion of a causal connection. It requires an association or relationship between the employment and the accident or incident, which may be provided by establishing that the employment caused the accident or incident. However, employment does not have to be the only, or even the main cause. (citations omitted)

The Senior Arbitrator commented that whether the deceased looked tired or made no complaints does not mean that he was not tired or fatigued. This is was confirmed in *Namoi Cotton Co-Operative Ltd v Stephen Easterman (as administrator of the estate of Zara Lee Easterman)*, where Keating P indicated that objective assessments of the deceased's physical state based on her appearance at work were not determinative of whether she was in fact fatigued. He noted that the deceased's co-worker's evidence contained a number of inconsistencies.

The Senior Arbitrator also noted that Dr Desai's first report was based on an incorrect history, but this was corrected upon receipt of the second respondent's statement and he was then aware that the deceased had 7 hours of sleep per night on weeknights. He was satisfied that the deceased had chronic partial sleep restriction and that circadian influences contributed to him falling asleep and that there was a real and substantial connection between the deceased's employment and his fatigue. He also opined that Prof. Dawson's opinion carries significant weight and he concluded that there was a real and substantial connection between the deceased' employment and his fatigue.

However, the Senior Arbitrator stated that Mr Smith did not really explain why he disputed that there was a real and substantial connection between the deceased's employment and his fatigue and he therefore failed to address the relevant question. He stated:

> 159. The authorities referred to above confirm that all the applicant needs to show is that there was "*a*" real and substantial connection between the deceased's employment, not that it was "the" only connection. There only needs to be an "association or relationship"13. The deceased did not work long hours, but he was only young and was in his first full time position. His employment required him to start early and finish early, and this contributed to his fatigue. This was something that he was not accustomed to.
>
> 160. The evidence establishes that some of the deceased duties were physically demanding, but he was not doing strenuous work in the days leading up to his accident. Significantly, Professor Dawson did not consider the nature of the work to be material. Professor Dawson's focus was on the early starts and lack of sleep. Dr Desai agreed that lack of sleep was a relevant cause of fatigue.
>
> 161. There seems little doubt that the deceased's family obligations, social activities on weekends and the gym exercises would have contributed to his fatigue. However, the evidence of Professor Dawson and Dr Desai supports the contention that early starts, travelling to work, early finishes and lack of sleep would have made a contribution. Of course, according to Bina, merely having to travel to and from work is insufficient to establish a real and substantial connection between the employment and the accident, but clearly there are other factors in play.

Accordingly, the Senior Arbitrator held that there was a real and substantial connection between the deceased's employment and the fatal accident on 10 November 2015.

The Senior Arbitrator deferred the determination of issues of dependency and the claim for interest pending the lodgement of further evidence and written submissions by the parties.

Lack of contemporaneous evidence regarding disputed injuries – Arbitrator not actually persuaded that the worker suffered disputed injuries under s 4 (a) WCA or that there was a sufficient causal chain between the accepted injury and the disputed injuries

Briggs v Leslie T & Michelle M Hanlon [2020] NSWWCC 9 – Arbitrator Scarcella – 7 January 2020

On/about 5 April 2006, the tripped over a sheep and fell onto his right shoulder while working for another employer. He underwent right rotator cuff repair in/about July 2008 and he underwent a right MRI Arthrogram on 22 June 2009 due to ongoing pain. He claimed compensation under s 66 *WCA* and on 30 July 2009, he received compensation for 8% WPI (right upper extremity).

In/about October 2009, the worker commenced employment with the respondents as a sheep shearer. In/about February 2010, he injured his lower back while employed by the respondents and claimed compensation.

On 16 August 2012, the worker alleged injuries to his left shoulder, neck and right shoulder when he grabbed a sheep from a pen. On 28 May 2013, he underwent arthroscopic debridement, biceps tenotomy and supraspinatus-infraspinatus medialised repair on his left shoulder.

On 8 June 2018, the respondents disputed the alleged injuries to the neck and right shoulder and these injuries were further disputed on 3 July 2019.

Arbitrator Scarcella noted the following issues for determination: (1) Did the worker suffer an injury to his cervical spine and right shoulder on 16 August 2012 within the meaning of section 4 (a) *WCA*?; and (2) In the alternative, did the worker suffer a consequential injury to his cervical spine and right shoulder as a result of the accepted left shoulder injury on 16 August 2012?

In relation to issue (1), the Arbitrator held that the worker bears the onus of proof and that the issue of causation must be based and determined on the facts of each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*. He also held that *Castro v State transit Authority* provides a useful review of the authorities and makes it clear that what is required to constitute "*injury*" is a "*sudden or identifiable pathological change*". In *Castro*, a temporary physiological change in the body's functioning (atrial fibrillation), without pathological change, did not constitute injury.

The Arbitrator noted that Dr Rowe (the worker's IME) attributed the disputed injuries to the frank incident and the nature and conditions of his employment as a shearer and said that it is not possible to apportion liability between those causes and that any attempt to do so would be a guess and not reliable. He found these opinions difficult to follow because they did not support the worker's case. Dr Rowe did not provide any reasoning behind his conclusions and he did not identify any frank injuries to the cervical spine or right shoulder.

The Arbitrator held that rule 15.2 (3) of the WCC Rules 2011 provides that "*evidence based on speculation or unsubstantiated assumptions is unacceptable*" and 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.

While the Arbitrator accepted that a doctor does not need to provide elaborate or detailed explanations for his conclusion, he stated that more than a mere "*ipse dixit*" (an assertion without proof) is required and the latter seems to be precisely what Dr Rowe has done in this matter in relation to both the cervical spine and the right shoulder. He preferred the opinions expressed by Dr Doig to those of Dr Rowe. He stated, relevantly:

> 77. Histories in medical records are often used to attack the credit of a worker. Reference is made either to a failure to mention relevant matters, or a description in a medical record which is different to what the worker now says in evidence. Care should be taken when considering such evidence, not to place too much weight on the clinical notes of treating doctors, given their primary concern with treatment. 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.*
>
> 78. The caution referred to above was confirmed by Roche DP in *Winter v NSW Police Force* as follows:
>
> > It is important to remember that clinical notes are rarely (if ever) a complete record of the exchange between a patient and a busy general practitioner. For this reason, they must be treated with some care (*Nominal Defendant v Clancy* [2007] NSWCA 349; *Davis v Council of the City of Wagga Wagga* [2004] NSWCA 34; *King v Collins* [2007] NSWCA 122 at [34-36]).
>
> 79. 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.*
>
> 80. I acknowledge that caution must be taken when relying upon clinical records. I have exercised caution in this regard and considered all the evidence, including the evidence in Mr Briggs' two evidentiary statements…
>
> 82. In *Onassis and Calogeropoulos v Vergottis*, Lord Pearce said of documentary evidence:
>
> > It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason, a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance.
>
> 83. More recently, in *Watson v Foxman*, McLelland CJ in Equity said:
>
> > … Human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which the plausible details are then, again often subconsciously, constructed. All of this is a matter of human experience.

> 84. I have formed the view that the observations of McLelland CJ referred to above can be applied to Mr Briggs' primary evidentiary statement that, through the passage of time, became an impression from which the plausible details were then, more probably than not, subconsciously reconstructed.

Accordingly, the Arbitrator was not satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that the worker established a definite or distinct physiological change or disturbance in his cervical spine and right shoulder arising out of or in the course of his employment with the respondent on 16 August 2012.

In relation to issue (2), the Arbitrator stated that the worker's statements do not provide the evidence to assist him in conducting a common sense evaluation of the causal chain that would lead to a determination that the cervical spine and right shoulder symptoms resulted from the accepted injury to the left shoulder on 16 August 2012. He determined that the worker had not discharged his onus of proving the alleged consequential injuries.

Accordingly, the Arbitrator remitted the matter to the Registrar for referral to an AMS to determined the degree of permanent impairment with respect to the left shoulder injury only.

Worker failed to establish injury to cervical spine – no supporting evidence from the treating doctor and the history recorded by the IME is inconsistent with the worker's evidence – Claim dismissed

Anslow v Pool Werx Operations Pty Ltd [2020] NSWWCC 8 – Arbitrator Sweeney - 7 January 2020

On 9 May 2017, the worker slipped and fell at work and injured his left shoulder. He claimed compensation and the insurer accepted liability. However, on 27 March 2019, the worker was examined by Dr Guirgis (his qualified IME) and he opined that the worker also suffered a traumatic injury to his cervical spine as a result of that incident. The respondent disputed that claim. The worker claimed compensation under s 66 *WCA,* but the parties agreed that the claim could only proceed if the worker established the alleged cervical spine injury, as the threshold under s 66 (1) *WCA* was not satisfied with respect to the left shoulder injury.

Arbitrator Sweeney discussed the available evidence and noted that the only reference to the cervical spine in the worker's statements is found in his description of Dr Guirgis' examination, as follows:

> During the course of the examination, flexed and twisted my neck and noted that my capacity to turn my neck to the right was greatly reduced. He advised that it is not unusual when a significant injury is sustained to or other [sic] of the shoulders that this affect the cervical spine as well as the degree of rotation of the cervical spine. I also noted that I suffer significant pain upon movement when I turn my head to the right at the extent of my rotation capacity.
>
> Accordingly, I have been advised, and I accept, that in addition to sustaining an injury to my left shoulder I also sustained an injury to my cervical spine which adversely affects me today.

The Arbitrator stated, relevantly:

> 32. I accept that the opinion of Dr Guirgis on the relationship between the injury and the applicant's neck condition was open to the doctor on the history that he recorded. However, there are considerable doubts about the accuracy of the history. As I have recorded above, there is nothing in the material from the applicant's general practitioner, from Dr Petchell or from the rehabilitation provider which could suggest that the applicant suffered a neck injury in May 2017. On the contrary, the material from Dr Cao, particularly his certificates, is inconsistent with the applicant's symptoms being explained, in part, on the basis of a neck/cervical problem.

33. The absence of a reference to neck/cervical symptoms in the clinical record requires that Dr Guigis' opinion on a causal nexus should be carefully scrutinised. There are several reasons why I do not accept it. In neither of his statements does the applicant assert that he suffered neck pain at the time of the incident in May 2017. By his statement of 21 October 2019, the applicant says that following the incident he felt "*immediate pain*" in his left shoulder. Subsequently, on his return to work, he continued to suffer increasing "*discomfort and restriction of movement*" in his left shoulder. This is consistent with the handwritten account the applicant gave of the incident, and his symptoms following it, in the handwritten passage attached to Dr Cao's first medical certificate.

34. As far as I can ascertain, there is nothing in the applicant's written evidence which is confirmatory of the history obtained by Dr Guigis of neck symptoms at the time of the incident of May 2017. On the contrary, the applicant's written evidence appears to studiously avoid an assertion that he felt neck pain at the time of the incident.

35. It is, of course, the applicant's evidence that he only became aware of sustaining a separate injury to his cervical spine at the time of his consultation with Dr Guigis, almost two years after the incident. He recounts that he was advised by Dr Guigis that a shoulder injury may "*affect the cervical spine*" and the degree of rotation of the cervical spine. That suggests that the applicant may have been told that a shoulder injury can cause a secondary or consequential medical condition of the neck. That argument, however, is not one which the Commission has to address in the circumstances of this case.

36. The second concern I have with Dr Guigis' opinion is that his assertion of neck injury is completely unsupported by radiological or other medical investigation. That is because, at least, at the time that Dr Guigis' provided his report, there were no such investigations. Neck symptoms can, of course, have many causes apart from the traumatic injury asserted by Dr Guigis. In the absence of radiological or other investigation, both diagnosis and attribution of these symptoms must involve an element of speculation.

37. Thirdly, there is no medical opinion evidence from a treating doctor in support of Dr Guigis' opinion. The evidence of treating doctors has traditionally been given considerable weight in issues of history and causal nexus in the Commission. Patently, a treating general practitioner who has seen the applicant on many occasions over the course of treatment for an injury, is often in the best position to offer an opinion. Of course, in this case the material from Dr Cao suggests that he may not be supportive of Dr Guigis' proposition that the applicant injured his neck at the time of the incident.

The Arbitrator held that the worker had not established an injury to his cervical spine on the balance of probabilities. He therefore declined to refer the s 66 dispute to an AMS and he dismissed the application.

Intramedullary lengthening nail is an artificial aid within the meaning of s 59A (6) WCA – Pacific National Pty Limited v Baldacchino applied

O'Brien v L & M Pittari Transport Pty Limited [2020] NSWWCC 16 – Arbitrator Scarcella – 9 January 2020

On 12 July 2012, the worker suffered a twisted left ankle and a fractured left fibula as a result of a fall at work. On 5 February 2013, he underwent a left ankle arthroscopy, debridement and spur excision. On 1 October 2015, while he working as a contractor, his left ankle and foot gave way and he fell a distance of about 1 metre onto the floor and suffered an intertrochanteric fracture of his right hip and a fracture of the right distal radius with displacement and required surgery for each injury.

On 4 December 2015, the worker claimed compensation from the respondent and alleged that the injuries on 1 October 2015 were consequential to the work injuries on 12 July 2012. The respondent disputed liability, but on 1 July 2016, the Commission issued a COD – Consent Orders with respect to that dispute.

On 20 March 2018, the worker sought approval from the insurer for right leg lengthening surgery that was proposed by Dr O'Carrigan. However, on 17 May 2018, the insurer declined liability for injuries to the right leg on 1 October 2015.

Arbitrator Scarcella noted that the issue for determination was whether the intramedullary lengthening nail to be used in the proposed surgery was an artificial aid within the meaning of s 59A (6) (a) *WCA.* He noted that if this is found to be an artificial aid, the worker is not subject to the time limits imposed by ss 59A (1) and (2) *WCA.*

Both parties referred to the Court of Appeal's decision in *Pacific National Pty Limited v Baldacchino*, in which Macfarlan JA (with whom Simpson AJA and Payne JA agreed) held that a total knee replacement was an artificial aid within the meaning of s 59A (6) (a) *WCA.* His Honour quoted the following passage from the judgment of Hutley JA (with whom Hope JA agreed) in *Thomas v Ferguson Transformers Pty Limited* [1979] 1 NSWLR 216:

> An artificial aid, in my opinion, is anything which has been specially constructed to enable the effects of the disability (the result of injury) to be overcome. The other articles in the subclause, crutches, artificial members, eyes or teeth, are illustrations of this. Because of [the applicant's] injury, she has lost all capacity for natural progression. The modifications to the car have given her some capacity to transport herself. It was suggested that, on this basis, the car was an artificial aid, and every person whose capacity to walk was diminished could have a car supplied at the expense of the insurer. It is not necessary to decide whether this conclusion follows. The essential quality of an artificial aid is that it is an aid specially tailored to the needs of a person, which flowed from the injury. The artificial aid is specific to an injured person. These modifications have this quality. As an artificial aid is useless unless the person for whom it is provided can use it, the provision of an artificial aid includes the provision of instruction in its use (emphasis added).

As to whether *Thomas* is a relevant authority, Macfarlan JA said:

> … in my view, Thomas remains a relevant authority, containing a useful explanation of what constitutes an 'artificial aid', notwithstanding that the present legislation is, to some extent, in a different form to that considered in that case. The only arguably material change in the form of the legislation has been the insertion in it of express reference to 'the modification of a worker's home or vehicle' as constituting medical treatment (s 59A(6)(b)). By this change, the legislature confirmed that the finding in Thomas reflected its intent that the injured worker's right to compensation in respect of the cost of such modification should not be subject to a time limit.

His Honour agreed with a submission of the appellant that the expression "*artificial aids*" must work to ameliorate the effect of the person's disability, and that it may comprise a single object or a composite of objects operating together.10 His Honour described the nature of a total knee replacement operation, including that the procedure involved the insertion of plastic materials and said:

> Plainly these materials are designed to facilitate the movement and use of the knee after the operation, therefore easing the patient's disability. Their '*provision*' (see s 59A (6) (a)) cannot occur without a surgical operation. The cost of the operation therefore falls within the statutory provision.

In referring to submissions by the appellant relating to a total knee replacement, Macfarlan JA said:

> Whilst it is a different means of alleviating a disability, there is no feature of the knee replacement which distinguishes it in principle, or character, from the other aids referred to.

As to whether section 59A (6) (a) *WCA* is beneficial in its operation, Macfarlan JA said:

> As stated in *ADCO Constructions Pty Ltd v Goudappel* (2014) 254 CLR 1; [2014] HCA 18 at [29], to determine whether a statutory provision is beneficial, a court should not construe the legislation under consideration as a whole but instead direct attention to the particular provision in question. On this basis, s 59A (6) (a) is clearly beneficial because it restricts the operation of a limitation on compensation that is payable. As s 59 (6) (a) in my view has a clear meaning (at least so far as is presently relevant), itis unnecessary to rely upon that conclusion but, if account is taken of it, it assists the respondent, not the appellant.

The Arbitrator noted the worker's evidence that his right leg had become progressively shorter than his left leg since 2016, and as a result, he walks lop-sided, which causes symptoms in his ankles, knees and lower backs. He trialled heel implants, but these did not assist and Dr O'Carrigan advised him that once his leg lengths are evened out, the level of pain should reduce. He therefore wished to undergo the proposed surgery. He also noted that Dr O'Carrigan opined that the proposed surgery was reasonable and necessary and that it was timely and had every chance of being successful.

The Arbitrator rejected the respondent's arguments that: the intramedullary lengthening nail is a surgical tool used to facilitate leg strengthening and not an artificial aid; that the nail would not actually assist in achieving its goal of leg lengthening; and that it is not something that is to be constructed specifically for the worker. He held that the nail will be, through its telescopic mechanism, an aid specially tailored to the worker's needs through the lengthening process. He also rejected the argument that the nail is distinguishable from a prosthesis or a hearing aid and that it does not have the characteristic of facilitating movement as in *Baldacchino*. He held that the nail will facilitate improvement in the worker's gait pattern and alleviate and prevent deterioration of his low back pain and collateral leg joint pain.

The Arbitrator also stated:

> 55. I reject the respondent's submission that if there is a finding that the Stryde nail is an "*artificial aid*", then it would open the possibilities of other types of procedures that included any metalware in order to overcome the restrictions imposed by section 59A of *the 1987 Act* contrary to the intention of the legislation. As Macfarlan JA said in *Baldacchino*:
>
> > I should not be taken to be adopting a general rule that the cost of surgery is always a cost of '*[t]he provision of … artificial aids*', as there may be cases where the insertion of material into a person's body is only an incidental part of major surgery. Each case must be decided on its own facts.
>
> In his case, the Stryde intramedullary lengthening nail is certainly not incidental to the proposed major surgery and I am satisfied on the facts for the reasons stated below that it is an "*artificial aid*" within the meaning of section 59A (6) (a) of *the 1987 Act*.
>
> 56. "*Artificial aids*" must work to ameliorate the effect of a person's disability. In this case, the expert evidence is that the stainless steel Stryde intramedullary lengthening nail to be used in the proposed surgery will alleviate and prevent the deterioration of Mr O'Brien's gait problems, back pain and collateral leg joint pain.

57. An "*artificial aid*" may comprise a single object or a composite of objects operating together. In this case, the unchallenged expert evidence of Dr O'Carrigan was that the Stryde intramedullary lengthening nail is telescopic with an internal magnet that drives a lengthening mechanism. The internal magnet is controlled by an ERC which is applied to the leg. A 1.5 Tesla magnetic field rotates the magnet within the nail, precisely controlling the rate and level of lengthening. It creates a stable environment and allows new bone formation within that space over time.

58. The unchallenged expert evidence is that the proposed right leg lengthening surgical procedure will involve the removal of the DHS and an osteotomy of the femur, that is, a surgical fracture to enable the Stryde intramedullary lengthening nail to be internally imbedded between the surgically fractured bones in the femur. The Stryde nail is then fixed proximally and distally to the femur with locking screws. Right leg lengthening would commence five days after the insertion and fixation of the Stryde nail using the ERC applied to the leg to precisely control the rate and level of lengthening at 1 mm per day and would be out to full length four weeks post-operatively. In this sense, the essential quality of an artificial aid is satisfied, in that, it is an aid specially tailored to the needs of a person, which flowed from the injury.

59. Clearly, the Stryde nail and its telescopic component are specifically designed to facilitate and maintain the required leg length and following surgery, ease Mr O'Brien's disabilities as described above. The "*provision*" of the Stryde nail (see section 59A (6) (a) of *the 1987 Act*) cannot occur without a surgical operation. Therefore, the cost of the operation falls within the statutory provision.

Accordingly, the Arbitrator ordered the respondent to pay the costs of and ancillary to the proposed surgery.

FROM THE ACTING WIRO

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

Phil Jedlin