Bulletin

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Independent Review Office

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.

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Court of Appeal Decisions

CONSTITUTIONAL LAW – federal jurisdiction – whether PIC exercised judicial power when determining claim brought by resident of Queensland against employer State of NSW – common ground that PIC exercised administrative power – appeal allowed by consent

Kanajenahalli v State of New South Wales (Western New South Wales Local Health District) [2023] NSWCA 202 - Leeming JA; Adamson JA; Basten AJA – 30/08/2023

The background to this matter was reported in Bulletin no 132, but a summary follows.

The worker was an unaccredited trainee in Paediatrics and Child Health employed under a 12-month contract arranged through the AHPRA. He ceased work on 11/06/2019 and resigned on 12/06/2019. He claimed compensation for a psychological injury ("*burnout*" and "*depression*"), but the employer disputed the claim.

The worker commenced PIC proceedings and claimed weekly payments, s 60 expenses and compensation under s 66 WCA for "*an aggravation, acceleration, exacerbation or deterioration of a psychological disease*" (deemed date: 11/06/2019).

Member Burge conducted an arbitration. Injury was not disputed and the only issue for determination was whether the s 11A defence (performance appraisal and/or discipline) was made out. Neither party raised any jurisdictional issue.

On 10/01/2022, the Member issued a COD, which found for the worker and dismissed the s 11A WCA defence.

The employer appealed.

Deputy President Wood identified a preliminary jurisdictional issue, as the worker resided in Queensland when the ARD was filed. She observed that for the PIC to have jurisdiction to determine the dispute it must be shown that it was a court of the State (and thus invested with the relevant federal jurisdiction) or that it was exercising administrative power and not judicial power in determining the dispute.

Both parties argued that the Member was exercising administrative power and not judicial power by determining the dispute under s 11A WCA and that a determination of the appeal would also involve the exercise of administrative power. Therefore, the PIC has jurisdiction.

The worker relied upon the decision of Snell DP in *Lee* as authority that the Member was exercising administrative power in the decision-making process. However, Wood DP rejected that submission.

The employer argued that because the PIC is not a court, the power exercised by the Member was administrative power.

However, Wood DP rejected that argument and she relied upon the decision in Orellana-Fuentes, in which Ipp JA (Spigelman CJ and Handley JA agreeing) said:

> Undoubtedly, the Commission does exercise judicial powers, but this does not necessarily make it a court. There are many institutions that exercise judicial powers but are well recognised not to be courts.

Wood DP held that the fact that the PIC is not a court does not necessarily lead to the conclusion that all its decisions are administrative in nature.

The worker relied upon the Court of Appeal's decision in *Searle,* which was an appeal in a matter that was determined by Motor Accidents Division of the PIC, in which Kirk JA (with Bell CJ and Ward P agreeing) observed:

> Mr McGregor also submitted that determination of claims for statutory benefits under the [*Motor Accident Injuries Act 2017 (NSW)*] would be subject to the *Burns v Corbett* limitation. That is a submission open to substantial doubt, for it is questionable whether the various determinations of such benefits involve the exercise of judicial power. In that regard it is notable that claims for statutory workers compensation benefits in the federal sphere have long been, in general, determined first by an administrative agency (Comcare), with review rights in the Administrative Appeals Tribunal ... However, it is not necessary to address the issue of the nature of claims for statutory benefits here.

Wood DP held that *Searle* did not assist the parties as the Court of Appeal did not consider the nature of the power exercised in the PIC's Workers Compensation Division, which resulted in enforceable orders awarding weekly compensation and treatment expenses under the workers compensation scheme, and it certainly did not consider the nature of the power exercised at the presidential level.

Wood DP found that the Member's decision involved a consideration of s 11A WCA and the applicable authorities, an assessment of the available evidence and an independent evaluation of each party's case. Section 56 of the PIC Act provides that the decision is final and binding, and an appeal under s 352 WIMA is limited to the question of whether the determination is or is not affected by error of fact, law or discretion. The decision operates to quell the controversy between the parties in respect of whether the employer's conduct was reasonable and if the worker was entitled to compensation.

Wood DP concluded that a determination of the appeal would also involve an impermissible exercise of judicial power and she stayed the appeal for 12 weeks to enable the parties to take necessary steps to progress the matter in a different forum. She granted the parties liberty to apply in the event that they were aggrieved by the stay order.

The appellant appealed to the Court of Appeal.

The Court of Appeal noted that both parties argued that the PIC was not a court of a State and, because it was exercising administrative power, it had jurisdiction to hear and determine the claim and the appeal. However, Wood DP considered that the Member had exercised judicial power in issuing the COD, and the appeal likewise would amount to an exercise of judicial power, neither of which was permissible: *Burns v Corbett* (2018) 265 CLR 304; *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16. She noted the statements in *Searle v McGregor* [2022] NSWCA 213 that it was questionable whether the determination of statutory benefits for workers compensation involved the exercise of judicial power, and that statutory workers compensation benefits in the Federal sphere have long been determined by an administrative agency (Comcare) with review rights to the Administrative Appeals Tribunal.

In *Searle* particular, Kirk JA (with whom Bell CJ and Ward P agreed) stated:

> 19. It was suggested to this Court by senior counsel for Mr McGregor that PIC has taken the view that it is incapable of exercising any decision-making authority whatsoever in relation to claims which, if and when any aspect of the dispute was to be litigated, would fall within federal jurisdiction. If PIC has taken that view it is mistaken. What PIC is precluded from doing is taking steps which involve the exercise of judicial power in matters which would fall within federal jurisdiction. It is not precluded from exercising powers which are not judicial in relation to issues arising in the course of dealing with such disputes, even if any ultimate resolution of (say) a claim for damages would involve the exercise of judicial power needing to be determined by a court.

The Court shared the parties' view that the PIC was exercising administrative power. Although originally the State of NSW disputed that the worker had suffered any injury, the only contested issue before the Member when the matter was heard was whether his injury was caused by the reasonable conduct of the State with regard to performance appraisal and/or discipline. (There was also, potentially, an issue as to the whole person impairment, which would be determined by a medical assessor in the event that the State was liable.) Therefore, the only issue was whether a statutory prohibition, framed on whether reasonable action taken by the employer was the whole or predominant cause of the injury prevented the worker's entitlement to statutory benefits.

There is no close analogy to any issue arising at general law. The closest analogy would be a claim for negligence, but in order to obtain the statutory benefits he seeks, the worker does not have to prove duty, or breach, or causation, and not only does he not have to prove loss, but the statutory benefits he claims do not necessarily have a close relationship with any loss he has suffered. This is considerably removed from traditional aspects of judicial power; cf *Attorney General for New South Wales v Gatsby* (2018) 99 NSWLR 1; [2018] NSWCA 254 at [125]-[126].

In *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1; [1987] HCA 19, the High Court considered whether, on a question of statutory construction, a long-established decision of the Workers' Compensation Board of Victoria should not lightly be overruled by a superior court. Mason J stated (at 12) that *"[a]lthough the doctrine of stare decisis is often said to apply to curial decisions, this statement in reality reflects the broad proposition that the doctrine applies to decisions of tribunals which exercise judicial power*". He concluded that the Board did exercise judicial power because its "*decision is a final and binding determination of the rights and liabilities of the parties with respect to workers' compensation*".

Brennan and Deane JJ (at 32) adopted a more constrained holding that:

> When a tribunal which has exclusive jurisdiction to determine claims between parties for the enforcement of a statutory right construes the statute in order to determine a claim, the construction placed on the statute is not a mere administrative opinion; it is a judicial determination.

Wilson and Dawson JJ did not address the issue in those terms.

No question involving an invalid investment of Commonwealth judicial power arose in *Babaniaris*, the characterisation of the Board's functions being undertaken for the purpose of applying a general law principle in relation to statutory construction.

The Court stated, relevantly:

> 12. What is determinative of this appeal is the nature of the particular dispute between the parties. More general considerations do not all point in the same direction. Thus (and without being exhaustive), although its decisions are final and binding, the Commission is empowered to "*reconsider any matter that has been dealt with by the Commission in the Workers Compensation Division*" and "rescind, alter or amend any decision previously made or given by the Commission in that Division": *Personal Injury Commission Act 2020 (NSW)*, ss 56 and 57. It is also true that the certificate of the Commission may be filed in a court and will thereafter operate as a judgment: Personal Injury Commission Act, s 59.

13. There is no occasion in determining the present appeal (which lacks any contradictor) to resolve any more general question as to the nature of the powers exercised by the Commission, or to seek to reconcile the statements in *Orellana-Fuentes* and *Searle* mentioned above (although it may be noted that the statement in *Orellana-Fuentes* was expressed in general terms, without regard to the particular powers being exercised in any particular case). It is sufficient to observe that in the case of the particular dispute involving these parties, where the only issue was that arising under s 11A, the Commission was exercising administrative power. The limitation in *Burns v Corbett* was not infringed.

The Court granted the worker leave to appeal (to the extent that it was necessary), allowed the appeal, set aside the decision of Wood DP and declared that the Member's decision did not involve the exercise of judicial power within Ch III of *the Constitution (Cth)*. The matter was then remitted to the President of the PIC for determination according to law.

Supreme Court of NSW Decisions

JUDICIAL REVIEW of a decision of a delegate – MAC – Adequate reasons – Grounds of assessment – Motor Injury – Minor injury – Threshold injury – Radiculopathy – Decision set aside and the matter remitted to the PIC

Momand v Allianz Australia Insurance Limited [2023] NSWSC 1014 – Harrison AsJ – 24/04/2023

On 19/01/2018, the plaintiff was injured in a MVA. An issue arose as to whether the plaintiff's injuries were "*minor*".

An MRI scan of the cervical spine dated 3/02/2018, indicated "*C5/6 broad-based disc protrusion associated with mild to moderate foraminal stenosis bilaterally abutting the exiting C6 nerve roots*." A CT scan of the lumbar spine also revealed a broad-based disc bulge at the L4/5 level without neural compression.

The dispute was referred to Dr Cameron, who assessed the plaintiff and determined that the injury was minor as there was no evidence of radiculopathy.

The plaintiff applied for a review of Dr Cameron's decision, but a delegate of the President refused to accept the application.

The plaintiff applied to the Supreme Court for judicial review of both Dr Cameron's decision and the delegate's decision.

The plaintiff alleged that Dr Cameron erred as follows: (1) he failed to give reasons or adequate for determining that the injury to the neck and low back were minor injuries; (2) he failed to have regard to the definition of minor injury in the MAIA as it relates to spinal discs; and (3) he applied cl 5.9 of the Medical Assessment Guidelines which is ultra vires.

The plaintiff alleged that the delegate erred: (1) in failing to find exceptional circumstances in the filling out of time of an application to review the MAC; and (2) in applying an incorrect test in relation to the correctness of the assessor's MAC.

Harrison AsJ set aside the delegate's decision and remitted the matter to the President of the PIC for determination according to law. She reserved the question of costs. Her reasons are summarised below.

Her Honour noted that the delegate stated that the MAC was issued on the PIC's portal on 26/07/2022 and that the 28-day review period expired on 23/08/2022. Therefore, the application for review was lodged out of time.

The delegate set out the 2 limbs to consider when determining an application to extend time, namely: (1) whether there are exceptional circumstances; and (2) whether losing the right to make the relevant application would work demonstrable and substantial injustice.

The plaintiff's explanation for delay was that on 23/08/2022, his solicitor made contact with the PIC to try to upload the application for review, but they were unable to upload it until 26/08/2022. Had the online filing system been operating as it should, the application would have been lodged on the last day, that is day 28, which is in a stipulated time period.

While the delegate acknowledged the plaintiff's submissions regarding the technical issues encountered on 23/08/ 2022, they did not make a decision about whether the application was lodged in time or whether in these circumstances, an extension of time to lodge the application should have been granted. Rather, they formed the view, after considering the grounds for the application for review, that it did not have reasonable prospects of success. The delegate considered that this mitigates any prejudice arising from the loss of opportunity to lodge the application.

The plaintiff put in issue before the delegate, the Assessor's determination of "*soft tissue injury*" to the lumbar spine and cervical spine and argued that considering the pathology and evidence of disc injury post-dating the accident, some explanation was required as to why the injuries were determined to be soft tissue injuries. As previously set out "*soft tissue injuries are considered to be minor injuries*".

The delegate stated that while the Assessor noted the pathology indicating disc injury at the cervical and lumbar spine, he did not consider the Assessor was required to provide any further reasoning as to why he determined these injuries to be soft tissue injuries and, for the purposes of the assessment he was conducting, these were "*minor*" injuries. They considered the Assessor had provided sufficient reasons.

Her Honour stated, relevantly:

> 69. It is my view that the Assessor misdirected himself when he omitted to consider the entirety of the findings of the MRI scan to the plaintiff's cervical spine, namely, an assessment of the individual disc levels throughout the cervical spine is notable for broad-based disc protrusion at C5/C6. This indents the ventral thecal sac and is not associated with central canal compromise. Had he fully appreciated the report of the MRI scan to the plaintiff's cervical spine, he would have appreciated that there was a disc protrusion at C5/C6 and this indents the ventral sac. The ventral sac is a membranous sheath or tube of dura mater surrounding the spinal cord. A disc is comprised of cartilaginous material. This injury is not one that falls within the definition of a minor injury. In any event, the assessor did explain the relationship between a disc protrusion, the protrusion of disc material by reason of the partial or complete rupture of the cartilaginous tissue comprising it, indentation of the thecal sac and the definition of minor injury, where injury to cartilage, which is what a disc is, is not a minor injury by reason of the statutory definition. This ground of review was raised before the delegate.
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> 70. As set out earlier, the Delegate's response is that while the Assessor notes the pathology indicating disc injury at the cervical and lumbar spine, I do not consider the Assessor was required to provide any further reasoning as to why he determined these injuries to be soft tissue injuries, for the purposes of the assessment he was conducting which related to minor injury only. I consider the Assessor has provided sufficient reasons as to why the injuries met the definition of minor injury for the purpose of the medical assessment that was before him.
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> 71. Further, I agree with the applicant that if there is an approach which yields a different conclusion it should have been explained in the reasons given by the assessor. The assessor does not specify the process of reasoning or the actual path by which he arrived at a conclusion in direct conflict with the statutory definition.
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> 72. Additionally, the Guidelines cannot override the specific statutory provision which defined a rupture or partial rupture of cartilage to be a non-minor injury. To the extent it seeks to do so it is ultra vires.
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> 73. However, before dealing with whether there was reasonable cause to suspect that the medical assessment was incorrect in a material respect, it was enough to find that the application was actually lodged in time. It is my view that the Delegate has erred in law on the face of the record. The certificate of the Delegate dated 13 October 2022, should be set aside…

Her Honour concluded that if the delegate had properly addressed this issue, they would have concluded that there were grounds that the assessment was incorrect in a material respect.

Judicial review – decision of medical assessor referred to review panel –plaintiff underwent surgery for reported radicular symptoms – whether surgery rendered plaintiff's injury non-minor – where no evidence about what the surgery involved was put before the medical assessor – no error established.

Mandoukos v Allianz Australia Insurance Limited [2023] NSWSC 1023 – Chen J – 28/08/2023

The plaintiff was involved in a MVA that occurred on 8/01/2019 and he alleged that he suffered injuries to his right knee and cervical spine as a result of it. However, his claims for compensation for those injuries were largely rejected.

On 25/11/2019, the MA issued a MAC. His key findings were: (a) that the plaintiff suffered a musculoligamentous strain of his cervical spine, as well as aggravation of pre-existing multilevel degenerative spondylosis caused by the motor accident, but that that injury was "*a minor injury*" within the terms of the MAIA; and (b) that there was "*no objective medical evidence that he suffered any injury*" to his right knee in the motor vehicle accident, and any "*right knee symptoms [were] due to age related tricompartmental osteoarthritis … which is constitutional in origin*" and unrelated to the motor vehicle accident.

The plaintiff applied for a review of the MAC and on 14/04/2020, the MRP upheld the MAC.

On 14/04/2020 (sic), the plaintiff applied for a Merit Review, after which the insurer decided to revisit the claim on the basis that the plaintiff had undergone surgery (C5/6 foraminotomy) on 1/07/2020. July 2020. It considered further medical evidence, including a report from the treating specialist dated 19/08/2020.

On 8/09/2020, the insurer advised the plaintiff that based upon the NTS' report dated 19/08/2020, which referred to an earlier MVA on 1/12/2010 that caused him significant personal injury (including right C5/6 foraminal stenosis and a small bulge at the C5/6 level), it did not consider that the "*surgery undertaken was as a result of the injuries sustained in the motor vehicle accident … but rather an aggravation of a pre-existing injury*". It also stated that the radicular symptoms did "*not meet the criteria as set out in the Motor Accident Guidelines as previously confirmed*" and that it considered the injuries to the "*cervical spine sustained in the accident to be soft tissue and therefore you have sustained a minor injury in line with*" s 1.6 of the MAIA.

On 9/09/2020, the plaintiff's solicitors requested a review of that decision, but the insurer declined to undertake an internal review.

On 28/10/2020, the plaintiff filed an application for a further medical assessment with the PIC.

On 8/02/2021, a delegate refused this application as they were not "*satisfied that there was additional relevant information or deterioration of the injury such as to be capable of having a material effect on the outcome of the previous assessment*".

On or about 30/07/2021, the plaintiff lodged a second application for further medical assessment in the PIC, relying upon a report from his NTS dated 8/06/2021 as "*additional relevant information*" (so as to engage s 7.24(2) of the MAIA and cll 13(1) and (2) of the *Motor Accident Injuries Regulation 2017 (NSW)*. The plaintiff essentially argued that this report demonstrated that he had radicular pathology leading to right arm radicular pain resulting in surgical treatment.

On 22/11/2021, a delegate decided to refer the matter for further medical assessment, on the basis that there was additional relevant information that was capable of having a material effect on the outcome.. The delegate noted that the further assessment would involve consideration of "*all aspects of the previous assessment afresh and may include all injuries assessed by the original Assessor and any additional injuries listed on the application or reply*" (reasons at [7]). The issues referred to the MA were: (a) Whether the cervical spine injury – radiculopathy caused by the motor accident is a minor injury for the purposes of the Act; and (b) Whether the right knee injury – chondral damage and bone oedema caused by the motor accident is a minor injury for the purposes of the Act.

On 6/06/2022, the plaintiff was assessed by Dr Assem and on 14/06/2022, he issued a MAC that assessed him as suffering a soft tissue injury to the cervical spine as a result of the MVA. He diagnosed "*Cervical spine/soft tissue injury, aggravation of pre-existing degenerative pathology causing non-verifiable radicular symptoms in his right arm*". He decided that the cervical spine injury was "*a minor injury*" because there was no objective evidence of neurological deficits that would satisfy the definition of radiculopathy. He also diagnosed a soft tissue injury to the right knee that was not caused by the MVA.

On 12/07/2022, the plaintiff filed an Application for Review of Dr Assem's decision.

On 9/09/2022, a delegate declined the application for review on the basis that they were "*not satisfied that there is reasonable cause to suspect that the medical assessment was incorrect in a material respect*" and issued a certificate and reasons to that effect pursuant to s 7.26 of the Act.

The plaintiff applied to the Supreme Court of NSW seeking judicial review of the decisions of Dr Assem and the delegate.

The plaintiff argued that the MA erred as follows: (1) he failed to consider whether the consequential injury – being the foraminotomy – was "*minor*" or not, and in omitting to do so constructively failed to exercise jurisdiction; (2) he failed to consider whether the surgery was a minor injury or not and he "*failed to apply the lawful test of causation regarding consequential injuries*"; (3) he failed to exercise his jurisdiction and did not afford him procedural fairness in failing to "*respond to*" his submission that the MVA created a need for the surgery and that the surgery rendered his injuries non-minor; and (4) he failed to provide legally sufficient reasoning for why the surgery did not cause his injuries to be non-minor.

Chen J determined the summons and dismissed it. His reasons are summarised below.

His Honour noted that in essence, the plaintiff's complaint was that his "*claim*" in respect of his cervical spine injury had not been dealt with at all, as both the MA and the delegate upon review, failed to consider whether the cervical spine surgery for which he underwent in July 2020 constituted a "*consequential injury*". As a result, the cervical spine injury was found to be a "*minor injury*" within the meaning of the *MAIA*.

His Honour rejected the plaintiff's argument that Dr Assem failed to apply the lawful test of causation regarding consequential injuries as this was based on a case that was not actually made to the MA. He rejected the plaintiff's argument that Dr Assem failed to deal with his case that the "*foraminotomy resulted in the plaintiff's injuries being non-minor*".

His Honour stated, relevantly:

> 127. A constructive failure to exercise jurisdiction arises "where the decision-maker purports to have exercised the jurisdiction but in substance has not undertaken or completed the task of doing so because of failure to address some essential matter": *Ming v Director of Public Prosecutions (NSW)* (2022) 109 NSWLR 604; [2022] NSWCA 209 at [12] (Kirk JA). An 'essential matter' can be a critical argument raised, as was explained in *Dranichnikov* at [24] and [25]: "To fail to respond to a substantial, clearly articulated argument relying upon established facts" was not only a denial of procedural fairness, but a constructive failure to exercise jurisdiction or it can arise where there is "a failure to understand or determine a case or claim": *Day v SAS Trustee Corporation* [2021] NSWCA 71 at [37]; *Dranichnikov* at [24].
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> 128. It is important to restate the proper boundaries of this ground of review. In that respect, the following matters should be noted. First, the ground of review is concerned with a substantial and clearly articulated argument relying upon established facts: see also *Rahman v Insurance Australia Ltd t/as NRMA Insurance* (2022) 101 MVR 149; [2022] NSWSC 1079 at [17]. In Ming it was explained relevantly in these terms (at [15] – citations omitted):

> A risk with this type of argument is that claims about failure to address matters can shade into claims about arguments having been resolved incorrectly because misunderstood, or not really grappled with, which tends towards merits or appellate review. Further, as discussed below, it is not necessary for judicial decision-makers to address every argument or every piece of evidence in delivering reasons. Hence the need to show that there has been a failure to grapple with *a substantial, clearly articulated argument* … The failure to address an issue must be of such significance as to warrant a conclusion that the decision-maker has failed to complete the exercise of its power by reason of having failed to engage with an issue of importance to the matter being resolved. (Emphasis in original)

> 129. Secondly, and as a corollary of the first matter, the ground of review is not concerned with "any failure to refer to any argument put" (*Wang v State of New South Wales* [2019] NSWCA 263 at [63]), less still one where no argument is put – which is a situation here.

> 130. Here, no "*consequential injury*" or "*surgery was relevant*" (in the way earlier outlined) argument was advanced, nor anything remotely approaching it. Rather, the plaintiff put a very specific case that his cervical spine injury was not a minor injury because of the presence of radiculopathy: a finding that radiculopathy was present of course would fall within the exception to the statutory definition as contained in cl 4(1) of the Regulation. It is, with respect, a little difficult to accept the proposition that there could possibly be a failure of any kind to deal with such an argument when the argument was simply not put. Nor, given my finding that there was no other case that clearly arose from the material for the medical assessor to appreciate its existence, is there any other basis upon which to uphold this ground. Nor, further, was there any "established fact" in connection with what the surgery involved: as I have earlier noted, there was no finding and, no less importantly, as the plaintiff accepted, no evidence about what the surgery in fact involved (see [111], above).

His Honour rejected the plaintiff's complaint about reasons and he stated, relevantly:

> 134. The "*circumstances*" of this case include the following. The plaintiff's specific case, advanced before the medical assessor, was that he had radiculopathy which had the consequence that his cervical spine injury was excluded from being minor injury. The medical assessor dealt with that case, and made a finding that the plaintiff did not have radiculopathy – only non-verifiable radicular complaints – with the result that the plaintiff's injury was held to be a minor injury. The medical assessor's reasons identify (a) the case the plaintiff made in that respect; (b) the finding that he made; and (c) his conclusion on that issue. The reasons of the medical assessor – and the path of reasoning – was clear. They were legally sufficient, in my view. Indeed, the plaintiff does not make any case about radiculopathy in this Court.

> 135. The "*circumstances*" of this case also include the fact that this complaint is, in truth, about an absence of reasons in dealing with the case that was never run by the plaintiff below. In my view, it is inapt, in those circumstances, to attempt to assail the reasons of the medical assessor based upon an argument that no legally sufficient reasons were provided: in the circumstances of this case, none were required to deal with the case that was never made, nor one that arose on the material…

His Honour held that as all grounds of review were rejected, there is no basis upon which the matter could be the subject of a different outcome by a delegate, as the Court has determined that the decision of the MA was in accordance with law. In those circumstances, it is simply not open for any delegate, to arrive at a decision that would be inconsistent with that conclusion; it would thus not be open for any delegate to conclude that the assessment by the medical assessor "*was incorrect in a material respect*": s 7.26(2) of the Act.

Accordingly, his Honour ordered the plaintiff to pay the first defendant's costs.

PIC - Presidential Decisions

Referral to a MA for an assessment of permanent impairment – s 293 WIMA – Jaffarie v Quality Castings Pty Ltd [2018] NSWCA 88 considered.

The Star Entertainment Group Ltd v Samaan [2023] NSWPICPD 50 – President Judge Phillips – 18/08/2023

The worker was employed by appellant as a cleaner. On 9/07/2014, he injured his back at work.

The appellant did not dispute the injury, but on 29/06/2015 it disputed liability for weekly payments and s 60 expenses on the grounds that the effects of the accepted injury had ceased. The decision was based upon an opinion from Dr Vote, that the ongoing symptoms were "*mainly*" related to the underlying degenerative condition.

The worker's employment ceased in 2016 and on 13/05/2020, he underwent surgery (discectomy, rhizolysis and decompression at the L4/5 & L5/S1 levels.

On 15/02/2021, the worker claimed compensation under s 66 WCA for 21% WPI based on assessments from Dr Guirgis (lumbar spine, reproductive system & scarring). The appellant disputed the claim.

The worker commenced PIC proceedings and the ARD indicated a claim for lump sum compensation where permanent impairment was in dispute.

Member Wynyard conducted a teleconference during which the appellant argued that it was not liable for the costs of surgery or scarring and that resolution of the injury was a bar to the recovery of compensation under s 66 WCA.

On 22/08/2022, the Member issued a COD, which remitted the matter to the President for referral to a MA for assessment of WPI of the lumbar spine.

The appellant appealed and alleged that the Member erred as follows:

> (1) in proceeding upon the basis that he had power or jurisdiction to decide whether a medical assessment should take place;
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> (2) in deciding that he had power or jurisdiction to remit the matter to the President "*... for referral to a medical assessor for an assessment of Whole Person Impairment ...*";
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> (3) Alternatively or in addition to ground (2), in purporting to decide that it was open to him to make a determination committing the President to make a "*... referral to a Medical Assessor for assessment of Whole Person Impairment ...*"; and
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> (4) Alternatively to Grounds (1)-(3), if the Member had power or jurisdiction to decide whether a referral for medical assessment should take place: (a) He erred in not treating his power as a discretionary one; or (b) If he did not so err, his discretion miscarried in that he failed to take account of all relevant surrounding considerations and circumstances and restricted himself to what was an irrelevant antecedent matter, namely the existence of a power of referral.

President Judge Phillips identified the issues for determination as being: (1) whether the Member had power to decide the question of referral; and (2) if he had that power, the appellant argued that it was a discretionary exercise of power which was miscarried.

His Honour noted that the Member ultimately accepted the worker's argument that there was no impediment to the matter being referred for medical assessment and he rejected the appellant's argument "*that the term 'nature of injury' extends jurisdiction to a member to assess an applicant's medical condition*". While the Member considered that the 2018 amendments provided the Commission with power to make decisions regarding lump sum compensation, he considered they did not provide the power to determine medical disputes, and referred to the decision of Parker SC ADP of *Shankar v Ceva Logistics (Australia) Pty Ltd*, which he believed to be consistent with [25] of PD PIC 6, which provided for conciliation of disputes in relation to the degree of permanent impairment only "*in appropriate circumstances*".

On 23/06/2022, the Member issued a Direction that invited submissions on 2 issues. In each question, he sought views on whether there were any "*impediments*" with respect to a proposed referral to a medical assessor. The appellant quite correctly stated that it "*is not clear exactly what 'impediment' was taken to mean*" and argued that the Member was precluded from referring the dispute until causation for what it had described as consequential conditions had been determined.

His Honour dealt with all grounds of appeal together. He stated that the Member's decision was essentially a by-product of how he had characterised what he was called on to decide in his direction dated 23/06/2022. In short, this sought the answer to a fundamental question of whether he had power to do what he was being asked to do by the worker. He stated, relevantly:

> 38. I would record that the references in this paragraph of *Shankar* to "*Arbitrators*" and "*AMSs*" respectively apply equally to "*members*" and "*medical assessors*" as they are now designated under the 2020 Act. The Member at [42] has, with respect, conflated the respective roles of the member to determine matters of causation and the medical assessor to assess permanent impairment. At reasons [42] this conflation is apparent where he says: "*The causal nexus of treatment to injury was plain, subject to the view of the [medical assessor] as to whether …*". The Member was positing a view on the question of causation expressed to be subject to the view of the medical assessor. In the event that the medical assessor had stated a view on causation which the Member found determinative, this might have had the result of a challenge on the grounds of a denial of natural justice. Parties are not represented before a medical assessor, which is to be contrasted to a causation dispute taking place before a member with a subsequent right of appeal. Had the Member determined causation, as he is empowered to do after the 2018 Amendments, the referral may or may not have been necessary depending upon the answer to that question. In so doing, the Member has acted on a wrong principle in the *House v The King* sense.
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> 39. A problem with the argument before the Member was the terminology used. The appellant made reference to '*consequential conditions*' which was probably not an apt expression. The Member had the power to determine the 'nature of injury', which is a matter for the Commission member (see *Jaffarie*). The Member should have acted on this.
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> 40. I would also remark that under the 2020 Act proceedings are to be conducted "*justly, quickly, cost effectively and with as little formality as possible*". The Member deciding the question of causation before considering a referral to a medical assessor is completely in simpatico with these objects.
>
> 41. I have found error on the Member's part in the exercise of his discretion and will be revoking the Certificate of Determination. But before doing so I will say this about the appellant's submissions on s 293 of the 1998 Act. That provision refers to '*medical disputes*' as defined in Part 7. The definition then appears in s 319 of the 1998 Act, which defines a range of medical disputes, which includes inter alia permanent impairment disputes. The division of responsibility is that under s 293 of the 1998 Act, power in relation to all medical disputes (as defined in s 319 of the 1998 Act) resides with the President. But this power is not exclusive when it comes to permanent impairment disputes; s 321A vests limited power in a member's hands with respect to that discrete category of medical dispute.
>
> 42. The problem with the Member's decision is that it is not apparent which provision he was purporting to act under. He set out both provisions in his reasons. If it was s 321A, there is no need to remit the dispute to the President. If it was s 293 of the 1998 Act, he could within power remit it to the President and no more. The problem is that the Member seems to have gone beyond a mere remitter when he says in the Certificate of Determination that the remitter is for referral to a medical assessor. As I said, it is not clear which section was the operative provision for the Member's decision and this is an error. My assumption is that the remitter must be for the purposes of s 293 of the 1998 Act, as remitter is not required if s 321A were the source of power being relied upon. If this is correct, the problems identified in the appellant's submissions at paragraphs [8]–[12] arise. This is an error.

43. I would also remark that the respondent has pursued a claim in relation to three body systems; the lumbar spine, scarring, and urinary and reproductive systems. Yet the Direction and the Certificate of Determination only make reference to the lumbar spine. It is not obvious if this limitation was by design, agreement or error. This matter will need attention on remitter.

44. At reasons [42], the Member has posited a view about causation. In the circumstances, given that causation of what the appellant described as the 'consequential condition' had neither been accepted nor argued in full, the only submissions being about the Direction, it is preferable that the matter be remitted to another member to decide.

His Honour granted the appellant leave to appeal, granted an extension of time for lodging the appeal, revoked the COD and remitted the matter to another Member "*to hear the dispute in accordance with these reasons*".

PIC – Merit Review Decision

MAIA - dispute about the amount of weekly payments of statutory benefits under Div 3.3; determination of PAWE under cl 4 of Sch 1; Uber delivery driver; during the 12 months before the MVA the claimant travelled overseas from 26/08/2022 to 16/11/2022; claimant was earning continuously from 19/11/2022 to the day of the MVA; insurer determined PAWE under sub-cl 4(1); whether the claimant's PAWE should be determined under sub-clause 4(2)(a) – Decision set aside & costs allowed on the basis of exceptional circumstances under s 8.10(4)(b).

Helweh v Youi Pty Limited [2023] NSWPICMR 42 – Merit Reviewer Catagnet – 15/08/2023

On 26/12/2022, the claimant was injured in a MVA. On 29/12/2022, he made a claim for personal injury benefits including weekly payments for loss of earnings. He said that at the time of the accident he was self-employed as a delivery driver with Uber and Menulog.

The insurer accepted the claim and commenced weekly payments at an interim rate of $559.50, while awaiting a report from a forensic accountant it had engaged to calculate pre-accident weekly earnings (PAWE). On 3/02/2023, after receiving that report, the insurer notified the claimant that his PAWE had been calculated as $170.62 and that he was overpaid by an amount of $1,742.05, which would be deducted from his future payments.

The claimant disagreed with the insurer's decision and on 6/02/2023, he sought an internal review. On 16/02/2023, the insurer affirmed its original decision.

On 19/05/2023, the claimant lodged a claim with the PIC seeking a merit review of the review decision.

Member Castagnet conducted a merit review.

The Member stated that ss 3.6 and 3.7 of the MAIA provide that the amount of weekly payments that the claimant might be eligible to receive as an "*earner*" in respect to loss of earnings during the first two entitlement periods is determined by calculating the difference between their PAWE and their post-accident earning capacity. While there was no material before him to show that the insurer had accepted that the claimant was an "*earner*", this was likely as it had made a determination of PAWE. He was therefore eligible to receive statutory benefits for loss of earnings.

The Member held that the Insurer had applied sub-cl (1), but based on all of the evidence before him, sub-cl 4(2)(a) applied. He stated, relevantly:

29. Sub-clause 4(2)(a) provides that if, on the day of the motor accident, the claimant as an earner was earning continuously, but had not been earning continuously for at least 12 months, the claimant's PAWE are the weekly average gross earnings received by the claimant as an earner during the period from when the claimant started to earn continuously to the day before the motor accident.

30. In this case, the evidence shows that the claimant was earning continuously on the day of the accident as a delivery driver and since 19 November 2022. He had not been earning continuously for at least 12 months because he did not work from 29 August 2022 to 18 November 2022. Sub-clause 4(2)(a) is therefore satisfied.

31. Sub-clause 4(4) provides that for the purposes of cl 4, the claimant as an earner earns continuously if he obtains earnings from a source that, on the day of the motor accident, was likely to continue for a period of at least six months to provide earnings to him on the same, or a similar basis to the basis on which the earnings were being provided as at that day.

32. The evidence shows that the claimant was working as a delivery driver on the day of the accident. He says that he was likely to have continued to work as a delivery driver for a period of at least 12 months. The claimant's evidence is that he returned to Australia with his family in November 2022. He is an Australian citizen. He intended to reside in Australia. His partner had applied for permanent residency. In the circumstances, there is no reason for me not to accept the claimant's evidence that he was likely to have continued to work as a delivery driver in Australia for a period of at least six months after the accident.

34. For the above reasons, I find that the claimant's circumstances satisfy the provision of sub-cl 4(2)(a) for Schedule 1 of the MAI Act and that subclause should be applied to determine the claimant's PAWE.

The Member noted that the insurer relied upon the decision of Harrison AsJ in *Shahmiri* and its reliance was misguided. He found that unlike the claimant, in *Shahmiri* sub-cl 4(2)(a) did not apply because the claimant was not employed at the time of the accident and was not earning continuously on the day of the accident.

Accordingly, the Member determined that PAWE was $935.86 ($5,080.38 divided by 5 weeks and 3 days or 38 days = $935.86 average gross per week).