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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PIC - Presidential Decisions

Issue estoppel – employer not estopped from denying injury as a result of a previous COD that entered consent orders –Member erred in finding the injury (the subject of the current proceedings) was the same injury as the subject of the previous consent orders

Inner West Council v BFZ [2023] NSWPICPD 62 – Acting Deputy President Nomchong SC – 6/10/2023

The worker alleged that she suffered a work-related a psychological injury. The appellant initially disputed injury and/or that employment was the main contributing factor. Alternatively, it disputed the claim under s 11A WCA (reasonable action … with respect to discipline), incapacity and the claim under s 60 WCA. The worker commenced PIC proceedings.

On 27/05/2020, the PIC issued a COD, which awarded the worker weekly payments under s 37 WCA from 18/03/2020 and 26/05/ 2020 (with an award for the appellant thereafter) and s 60 expenses up to $2,000 (with an award for the appellant thereafter). The PIC noted that the parties agreed that: (1) The worker resigned her employment effective from 26/05/2020; and (2) the appellant agreed not to seek credit for any payment of sick leave made since 18/03/2020.

In 2022, the worker made a claim under s 66 WCA, but the . However, the appellant disputed the claim.

Principal Member Bamber conducted a preliminary conference on 1/04/2022, at which the worker argued that the appellant was estopped from denying liability under ss 4(a), 4(b), 9A and 11A WCA by reason of the Consent Orders in 2020. The Principal Member directed the parties to file written submissions on the estoppel issue, after which she would determine the dispute on the papers.

On 27/07/2022, the Principal Member issued a COD, which determined that the appellant was estopped from relying on ss 4, 4(b), 9A, 11A(3) and 11A WCA as a result of the 2020 COD - Consent Orders. She remitted the s 66 dispute to the President for referral to a MA to assess permanent impairment as a result of a psychological injury sustained in the course of employment from 1/04/2018 to 11/12/2019 (deemed date: 11/12/2019).

On appeal, the appellant alleged that the Principal Member erred: (1) in determining that it was estopped from disputing liability for the injury alleged by the worker; and (2) in referring the assessment of permanent impairment to a MA in the terms set out in paragraph [50] of the COD.

Acting Deputy President Nomchong SC granted leave to appeal (against an interlocutory decision). She revoked the COD and remitted the matter to a different member for redetermination and her reasons are summarised below.

ADP Nomchong SC upheld ground (1) and she stated, relevantly:

- Issue estoppel extends to the decision of any tribunal which has the jurisdiction to finally decide a question arising between the parties.
- The Court of Appeal in *Miller v Secretary, Department of Communities and Justice (No. 10)* held that *Anshun* estoppel applies to the workers compensation statutory scheme.
- Issue estoppel arises where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided, and in subsequent proceedings, between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to re-open that issue.
- The necessary ingredients said to have been decided in the 2020 Determination are: (a) that the respondent suffered an injury; (b) that the said injury occurred during the course of her employment with the appellant; (c) that the employment was a substantial contributing factor to the development of that injury, and (d) being a psychological injury, it was not caused by the reasonable actions of the employer.
- It is well settled that for issue estoppel to apply there must be the requisite level of identity between the issues in the prior decision and the issues for determination in the current litigation.
- The issues under consideration must be the same because issue estoppel (and res judicata) are predicated on the desirability of finality in decision-making.
- Barwick CJ in *Ramsay v Pigram* held that it applies where:

    > that precise matter has already been necessarily and directly decided by a competent tribunal in resolving rights or obligations between the same parties ... The issue thus determined, as distinct from the cause of action in relation to which it arose, must have been identical in each case.

- However, estoppel is to be applied strictly. Issue estoppel will apply only to prevent the assertion in later proceedings of the precise matter of fact or law that has already been necessarily and directly decided in the earlier decision. Issue estoppel will only arise if the determination of the issue was indispensable in the sense that it was so fundamental that the decision cannot stand without it.
- 134. There are three conditions which must exist for issue estoppel to apply: (a) the first decision was final; (b) the same question has been decided, and (c) the same parties, or at least parties with the same legal interest, are the same.
- In this matter, there is no doubt of conditions (a) and (c). Accordingly, the issue that the Principal Member was required to determine was whether the same question or questions (being those identified in paragraph [130] above) were decided in the 2020 Determination.
- It was a necessary step in the Principal Member's determination for her to identify precisely the issues that were determined by the 2020 Determination. That determination made no reference to the nature or extent of the respondent's injury. There had been no arbitration on the issues of liability and the orders were made by consent to resolve the dispute.
- The authorities referred to by Roche DP in *Bouchmouni,* including *Habib,* provide that in these circumstances an examination must take place of the evidence to ascertain what matters were in dispute and what matters were necessarily resolved in the actual decision assented to by the parties. The Principal Member recognised this and referred to these authorities.
- In terms of identification of injury in the 2020 Proceedings, the Principal Member referred to the fact that the appellant contended that the allegation of injury was that bullying and harassment during her employment led to the development of symptoms consistent with an adjustment disorder with depressed and anxious mood and that it had contended that the worker had suffered no psychological disorder at all. However, when determining the nature of the injury the subject of the 2020 Determination, the only factual finding made by the Principal Member was that the substance of the injury "*was a psychological injury that [the respondent] alleged was work related*."

- Later in the reasons, the Principal Member went on to analyse the arguments put by the appellant that the change in diagnosis by Dr Allan to one of a schizoaffective disorder meant that the injury the subject of the current claim was different to the injury for which the 2020 Determination was made. However, the Principal Member reached the conclusion that the only relevant characteristic for determining the nature of the injury was whether it was work-related.
- This constituted an error of law. As the appellant has submitted, the term "*injury*" refers to both the event that caused the injury and the pathology arising from it. Roche DP in that case (*Department of Juvenile Justice v Edmed*) also held that for the purposes of a determination of a lump sum entitlement, it is the pathology which must be determined.
- It was insufficient for the Principal Member to simply describe the injury the subject of the 2020 Determination as a psychological injury that was alleged to be work related. Specificity is required for the application of estoppel. In my opinion, the materials available in the 2020 Proceedings make it clear that the pathological injury that was claimed by the respondent and resolved by the 2020 Determination was an adjustment disorder with depressed and anxious mood and/or its constituent symptoms of anxiety, depression, stress, and/or PTSD.
- The Principal Member erred in not making that finding and also erred because she was required, under the principles in *Bouchmouni* and *Habib*, to conduct an analysis of the available material in the 2020 Proceedings to confirm the nature of the injury. Her determination appears to have been based only on a small proportion of those materials.
- The fact that the Principal Member found that there was an evolution over time into a different type of psychopathology necessarily means that there can be no issue estoppel. It is clear that the injury for which the worker now claims lump sum compensation is different in kind to the injury which was the subject of the 2020 Determination and it is a matter for a merits consideration as to whether there had been other incidents or events (workplace or otherwise) in the worker's life since the 2020 Determination.
- Accordingly, the Principal Member erred by referring the matter for assessment by a MA before the issues of injury and liability were determined.

Worker injured in dog attack while working from home – Held: injury occurred in the course of employment and employment was a substantial contributing factor to the injury

State of New South Wales (Western NSW Local Health District) v Knight [2023] NSWPICPD 63 – President Judge Phillips – 10/10/2023

The worker was a case worker in a court diversion program and her role involved counselling persons before sentencing. She was based in Orange with outreach to Parkes and Forbes.

During the COVID-19 pandemic, the worker worked from home as a result of the stay-at-home orders that were in place between July 2021 and October 2021 and because she was immunocompromised.

While working from home on 8/10/2021, the worker was bitten by a dog on her right hand as she attempted to intervene in a dog attack on her daughter's puppy outside her front door. She suffered severe lacerations on her right hand and was treated at Orange Hospital for her wounds. She has not worked since then and sought treatment from various medical providers for the physical injury and PTSD.

The worker claimed compensation but the appellant disputed the claim on the basis that the injury did not arise out of or in the course of employment and employment was not a substantial contributing factor. The appellant also argued that intervening in a dog attack was not part of or incidental to her duties and that she was not directed or expected by it to intervene.

The worker sought a review of the insurer's decision, but the insurer maintained the dispute and it argued that her employment was interrupted when she attended the dog attack. There was no dispute that the worker was incapacitated for work.

Member Homan determined the dispute at first instance and awarded the worker weekly payments and s 60 expenses for both the physical and psychological injuries. She was satisfied that the injuries arose out of or in the course of employment and that employment was a substantial contributing factor.

The appellant appealed on the following grounds: (1) The Member erred in concluding that the worker sustained injury in the course of employment; (2) The Member failed to make a comparative assessment of competing factors; (3) The Member failed to consider "of substance"; and (4) The Member failed to take into account relevant matters, as mandated by the legislation.

President Judge Phillips dismissed the appeal and confirmed the COD. His reasons are summarised below.

His Honour dismissed ground (1).

- The appellant argued that the Member erred in finding that the injury took place on the worker's property. However, that argument was without merit as the evidence indicated that the puppy was tied up about one metre from the worker's front door. There was also other evidence that supported the Member's finding.
- The appellant argued that it was not put to the Member that it would have had the expectation that the worker would disregard the distress of the puppy and continue with her work and it was incorrect for the Member to state that she did not accept a proposition that was not made. Therefore, the Member misdirected herself in regarding as significant or determinative that it would not have had that expectation.
- His Honour noted that the worker's counsel put this to the Member and that the appellant's counsel neither responded to it nor challenged it. Accordingly, there was no misdirection and there was no error in the Member's approach. He accepted that the only reason that the puppy had been placed outside the house was to facilitate the worker's work in a proper manner.

His Honour rejected ground (2).

- The appellant argued that in finding that employment was a substantial contributing factor to the injury, the Member failed to evaluate the factors to the injury that were non-work related, but he found that these matters were not argued before the Member.

His Honour rejected ground (3).

- The appellant argued that the Member "*failed to consider, whether employment in the present case was more than a real contributing factor. It was imperative for her to consider whether employment was, in addition, of substance in the sense use[d] by Justice Meagher. She did not there so [sic] and that failure has affected the result of the case.*" It relied upon extracts from *Badawi* and *Dayton* (per Meagher JA) and the principle of employment being "*real and of substance*" to satisfy substantial contributing factor under s 9A WCA.
- His Honour found that the appellant made a broad allegation of error without specifying the sections of the decision that are infected by the alleged error. The decision needs to be read as a whole and she set out the relevant provision (s 9A WCA) and cited the relevant authorities (*Kelly* and *Badawi*) before applying them to the current matter.

His Honour also rejected ground (4) and he stated that a fair reading of the decision reveals that the Member undertook precisely the tasks required by s 9A(2) WCA and as stated in the authorities.

PIC – Member Decisions

Workers Compensation

Federal Diversity Jurisdiction – dispute between an interstate resident worker and an entity of the State of NSW – Injury disputed under s 4(b) WCA – Held: federal jurisdiction is clearly arguable and the PIC would be exercising judicial power in determining the dispute – Proceedings dismissed under s 54 of the PIC Act

Chetty v Queanbeyan-Palerang Regional Council [2023] NSWPIC 528 – Principal Member Harris – 6/10/2023

The worker was employed by the respondent as an engagement officer. She alleged that she suffered a psychological injury as a result of the nature and conditions of her employment. The respondent disputed injury and also argued that the matter was potentially federally impacted and that the matter should be dismissed and proceedings commenced in the District Court.

Principal Member Harris determined the dispute. He found that the federal jurisdiction argument was clearly arguable and he dismissed the matter under s 54 of the PIC Act. His reasons are summarised below.

- There are three requirements in determining whether a claim is potentially federally impacted, namely: (1) Jurisdiction can only be exercised by a Court of a State; (2) the resolution of the dispute requires the exercise of judicial power (as understood in the Constitutional sense); and (3) the matter is between residents of different States, or between a State and a resident of another State.
- A Tribunal cannot decide whether the determination involves an exercise of federal jurisdiction and should express a view consistent with the test set out in *Citta Hobart Pty Ltd v Cawthorn (Citta)*. If the matter is potentially federally impacted then it is for a court of a State to decide whether the determination does in fact involve such an exercise.
- Accordingly, it is for a Member to decide whether the defence that federal jurisdiction exists is arguable, colourable or the argument amounts to judicial nonsense.
- At a teleconference on 29/09/2023, he advised the worker her submissions did not address the test in *Citta* and granted her leave to file further submissions. He also advised the worker that his preliminary view was that the issue of federal jurisdiction was arguable.
- The worker then sought to refer a question of law to the President for a determination of whether employment is the main contributing factor to an injury is an exercise of administrative or judicial power, that the PIC "*can determine that it has jurisdiction*". She argued that the PIC can determine that it has jurisdiction and any aggrieved party can bring judicial review proceedings.
- The worker made submissions regarding the effect of the Court of Appeal's decision in *Kanajenahalli v State of NSW (Western New South Wales Local Health District)*, in which the Court stated:

> 9. That is to say, 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 Mr Kanajenahalli'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, Mr Kanajenahalli 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]…

> 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.
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> 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 worker argued that a dispute under s 4(b) WCA was analogous and administrative because: (1) the principles in *Kanajenahalli* were "*of general application*"; (2) the s 4(b) dispute was a statutory clause preventing the applicant from "*recovering statutory benefits*" which is "*considerably removed from the traditional aspects of judicial power*", and (3) the determination of that issue does not require "consideration of breach, duty or causation
- The Principal Member stated that the argument (1) lacks merit and the argument regarding (2) is inconsistent with various authorities and is otherwise self-evident from the legislation.
- In *Australian Padding Co Pty Ltd v Zarb* the Court of Appeal analysed various authorities on the issue of s 4(b)(ii) and upheld the finding of "*causation of disability … in terms of the definition of injury in section 4, this was that the employment of the respondent during the relevant period as a contributing factor 'to the aggravation, acceleration, exacerbation or deterioration' of his disease"*.
- The 2012 amendment to s 4(b)(ii) by the addition of the words "*main contributing factor*" created a "*more stringent test*" of causation. As Snell DP stated in *AV v AW*:

  > On the other hand, the requirement in s 4(b) inserted by the 2012 amendments, that employment be 'the main contributing factor' (emphasis added) permits the existence of only one such factor. The requirement of 'the main contributing factor' involves a more stringent connection with the employment than the requirement of a '*a substantial contributing factor*' that applied to 'disease' injuries prior to the 2012 amendments.

- Section 4(b)(i) requires that the worker contracted a disease to which that employment was the main contributing factor. Causation is a necessary element of making that finding.
- While he was not required to make positive findings, it was difficult to accept the argument that s 4 is analogous to s 11A due to the absence of considerations of breach, duty or causation. Issues of causation of injury, albeit in a statutory text, require determination in a s 4 dispute. To the extent that he was required to form an opinion, it was at least arguable that there are significant differences between findings under s 4(b) and s 11A.
- Classifying an exercise of power as administrative or judicial is difficult. In *Citta* the plurality described the test as:

  > A '*matter*' referred to in s 75 or s 76 of *the Constitution* encompasses a justiciable controversy about a legal right or legal duty having an existence that is not dependent on the commencement of a proceeding in the forum in which that controversy might come to be adjudicated.

- In *Searle v McGregor,* Kirk JA expressed obiter comments whether the determination of a claim for statutory benefits in the Workers Compensation Division of the Commission is an exercise of judicial power and noted that this was "*open to substantial doubt*". His Honour left that question open whilst making clearer observations about the exercise of various powers in the Motor Accidents Division.
- In *Orellana-Fuentes*, Ipp JA opined that the Workers Compensation Commission was "*undoubtedly*" exercising judicial powers. Sackville AJA expressed similar observations in *Sabanayagam v St George Bank Ltd*. The comments of Ipp JA were queried (to use a neutral expression) by the Court of Appeal in *Kanajenahalli*.
- A worker's cause of action and the employer's liability vests at the time of injury even though the entitlements are not immediately ascertainable. Settlements can otherwise be made outside the forum such as s 66A complying agreements or by way of deed. This indicates, adapting the test in *Citta* referenced above, that the controversy between the parties concerning workers' entitlements exists independently of the forum.
- In *Searle* Kirk JA described the federal scheme for statutory workers compensation benefits as administrative. For the above reasons it is arguable that the exercise of administrative powers at the federal level may not be analogous to the determination of disputes in the Commission due to the existence of a worker's independent cause of action under the State legislation.
- Workers compensation decisions are "*final and binding*" subject to rights of reconsideration and an appeal to a Presidential Member. The nature of the reconsideration power was mentioned by the Court of Appeal in *Kanajenahalli* and referred by the applicant as detracting from the principle of finality.
- Whilst there is an undoubted broad reconsideration power, it is not one which results in decisions being readily overturned. This is because a relevant factor in the exercise of the discretionary power is the finality of litigation.
- The applicant references various decisions of the District Court where it has been held that decisions in the Motor Accidents Division and medical assessments are administrative decisions. Save as *Kanajenahalli*, there is no decision determining whether the Commission exercises judicial power when deciding workers compensation disputes. The distinction between damages assessments in the Motor Accidents Division, which are not final and binding (an "*advisory opinion*") and those undertaken in the Workers Compensation Division are significant and mean that the decisions between the respective Divisions are not comparable.
- There are various factors which suggest that a determination under s 4 may be judicial or an exercise of administrative power. The applicant may be correct that the Commission is not exercising judicial power when considering a dispute under s 4(b) WCA. However, that is not the relevant test for my consideration. The respondent's defence that the matter is federally impacted is arguable, and the determination of the issue must be made by a court of a State.

The Principal Member refused to refer a question of law to the President for determination because, the President cannot determine the issue other that finding whether the issue is arguable. The preferable course is that there is a binding decision which can only be provided by a court of a State on this important issue.

The Principal Member concluded:

> 58. To avoid any misunderstanding, I am not deciding whether the Commission is exercising judicial power in a dispute involving s 4(b) of *the 1987 Act*. I am expressing an opinion that the respondent's defence that the Commission is exercising judicial power is arguable. The applicant's submission that these issues are removed (or sent) to the Court of Appeal misconstrues the scope of the Commission's incidental power to only express an opinion.

Section 11A WCA – psychological injury wholly or predominantly caused by reasonable action with respect to discipline

Reid v State of New South Wales (NSW Police Force) [2023] NSWPIC 535 – Member Sweeney – 13/10/2023

The worker was attested as a Police Officer in May 1998 and as at 3/09/2020, he had attained the rank of Senior Sergeant level 2.

On 3/09/2022, the worker was served with a Notice dated 31/08/2020, which was signed by the Commissioner of Police), which stated that the Commissioner was considering making an order for his removal from the NSWPF under s 181D of the *Police Act 1990 (NSW)*. The worker was given 21 days in which to make written submissions regarding the proposed action.

On 12/10/2020, the worker's solicitor provided a response to the Commissioner, but the worker resigned from the NSWPF on 19/02/2021 (before the Commissioner made a final decision).

In May 2021, the worker commenced employment with the Office of Fair Trading.

There was no dispute that the worker suffered a psychological injury as a result of his service with the respondent, but the respondent disputed the claim under s 11A WCA and asserted that the injury was wholly or predominantly caused by reasonable action with respect to discipline and/or dismissal.

Member Sweeney determined the dispute. He found that the predominant cause of the worker's psychological injury were the actions taken by the respondent with respect to discipline and dismissal that commenced on 14/08/2019.

The Member stated, relevantly:

> 145. It is, of course, necessary to consider the process as a whole in reaching a conclusion as to reasonableness. In the oft quoted passage from *Department of Education & Training v Sinclair*, Spigelman CJ at [97] said this:
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> > His Honour's analysis, as that of the Arbitrator, appears to assume that any specific blemish in the disciplinary process, however material in a causative sense or not, was such as to deprive the whole course of conduct of the characterisation '*reasonable action with respect to discipline*'. In my opinion, a course of conduct may still be '*reasonable action*', even if particular steps are not. If the 'whole or predominant cause' was the entirety of the disciplinary process, as much of the evidence suggested and his Honour appeared to assume, his Honour did not determine whether the whole process was, notwithstanding the blemishes, '*reasonable action*'. For this alternative reason the appeal should be allowed.
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> 146. Notwithstanding, the flaws in the process, I have reached the conclusion that it was reasonable action with respect to discipline or dismissal. The gravity of the allegations and their impact on the applicant and the respondent's operations almost certainly mean that the process would be a long one. The applicant was entitled to respond to the allegations of misconduct and to the s181D Notice. On the other hand, the respondent had to balance both the rights of the applicant and the need to ensure that its operations, particularly the prosecution of LR, which had not concluded, was not tainted by the applicant's actions. These are complex matters that involve the consideration of a great deal of evidence collected over several months prior to the applicant's suspension. The nature of the allegations necessitated that the applicant be suspended from an active policing role. In my opinion, the respondent has proven that its actions with respect to discipline and dismissal were reasonable.

Accordingly, the Member entered an award for the respondent.