Bulletin

Edited by Michelle Riordan

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.

Decisions reported in this issue

1. Allianz Australia Insurance Ltd v Salucci [2023] NSWSC 1593
2. Ram v Pubcorp Pty Ltd [2024] NSWPICPD 1
3. BGV v Waverley Council [2024] NSWPICPD 2
4. Martsoukos v Secretary, Department of Education [2024] NSWPIC 16

Supreme Court of NSW – Judicial Review

Judicial review - decision of Medical Review Panel (MRP) about assessment of a compensation claim — Motor Accidents Compensation Act 1999 (NSW) — whether the MRP fell into jurisdictional error, failed to exercise its statutory powers and failed to give adequate reasons, failed to determine causation — constructive failure to exercise jurisdiction — the MRP's reasons were inadequate — relevant legal errors established

Allianz Australia Insurance Ltd v Salucci [2023] NSWSC 1593 – Schmidt AJ – 18/12/2023

The Plaintiff was the insurer of a motor vehicle that was involved in an accident in which the first defendant was injured in May 2017. It sought judicial review of a decision made by a MRP to review an assessment conducted by Dr Preston.

The first defendant originally claimed that he injured his mid-back/thoracic spine, low-back/lumbar spine and left hip, but he later claimed other injuries. In September 2022, Dr Preston assessed 5% WPI (low-back/lumbar spine) on the basis that the mid-back/thoracic spine was a soft tissue injury only and the left hip was an aggravation of underlying osteoarthritis.

The first defendant applied for review by a MRP. He was examined by 2 members of the MRP and it assessed 24% WPI as a result of injuries to the thoracic spine, lumbar spine, left hip, cervical spine and right ulnar nerve.

The Plaintiff applied to the Supreme Court for judicial review on grounds that the MRP's decision contains errors of law on the face of the record and that the MRP committed jurisdictional error, constructively failed to exercise jurisdiction and failed to give reasons.

Acting Justice Schmidt held that relevant error was established and that the MRP's decision must be quashed. Her reasons are summarised below.

- The MRP's reasons indicate that it misconceived its statutory task and the resultant jurisdictional error was apparent on the face of the record.
- As a result, it failed to respond to substantial, clearly articulated arguments advanced on established facts and it therefore constructively failed to exercise jurisdiction: *Dranichikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR 1088;
- There was no issue that causation was a live issue, which the Assessor had considered and resolve, for the reasons provided. The MRP was obliged to undertake its assessment afresh, given the cases the parties advanced. It was required to consider the first defendant's history, which included having been injured in an earlier MVA in which his injuries were assessed as causing 21% WPI.

- Dr Preston referred to the history of a debilitating prior whiplash injury in 1999 and symptoms suffered after the 2017 accident. She did not find that all of the injuries were caused by the 2017 accident and she assessed 0% thoracic spine, 5% lumbar spine and 0% left hip.
- There was no question that on the MRP's review, causation remained a live issue that it was required to consider and resolve. However, the MRP did not consider that this was a matter for it to consider or determine.
- Given the way in which the MRP structured its reasons, while it did not say so, it may be that it also concluded when it first met that not only should two of its members, those who were medically qualified, re-examine the first defendant, but that they would deal in their report both with the results of their re-examination and the matters which were in issue between the parties on the review, approaching them in the way explained at [60] and [61] of the reasons later given.
- That accords with the MRP adopting that report after it was provided, as indicated at [65], and earlier, setting it out before the short reasons given for its adoption.
- Whether this was a process which the legislative scheme contemplated that a MRP could pursue when it conducted the assessment afresh, does not arise for determination in these proceedings, given the issues lying between the parties. But the approach which was adopted does help explain the errors into which the Panel fell.
- Causation is a matter of law which Panel members must all understand, as the guidelines require, given what was in dispute, that is, "*whether the degree of permanent impairment Mr Salucci suffered as a result of the injuries caused by the motor accident was greater than 10%*": s 58(1)(d).
- Despite what was urged for the first defendant, her Honour was satisfied that what the MRP deliberately explained at [60] and [61], an approach with which the two medical assessor's report accords, does not permit the conclusion that the MRP did not act in accordance with its so expressed view. Namely, refraining from dealing with the causation issues which the parties had addressed in their submissions, because it considered that it had "*no ability*" to determine that the relevant injury was not caused by the motor accident.
- Not only did the MRP have that ability, as s 58 required and *Mills* explained, the guidelines dealt in detail with how that exercise had to be undertaken. But no reference was made to such considerations.
- It appears that like Wright J in *Wood*, the MP's attention was not drawn to relevant binding authority. *Wood* concerned an application for review of the decision of a proper officer refusing an application to refer an assessment for review, not being satisfied that there was reasonable cause to suspect that the medical assessment was incorrect in a material respect. There Wight J had to consider the requirements of the statutory scheme, observing at [50]:

> 50 The wording of s 61(1) is a little confusing as it describes, consistently with s 60(1), the thing which is referred for assessment as a "*medical dispute*" but it also states that a certificate is to be given "*as to the matters [rather than the medical dispute] referred for assessment*". The expression "*medical dispute*" is defined in s 57 as meaning "*a disagreement or issue to which this Part applies*" and s 58(1) describes the relevant types of "*disagreement*" and s 58(2) describes the relevant types of "*issue*". Taking into account this context, the expression "*the matters referred for assessment*" in s 61(1) should be construed as referring to the particular disagreement about, or issue arising about, one of the matters set out in s 58(1)(a), (b) or (d), which constitutes the relevant medical dispute referred for assessment under s 60(1). In other words, what is referred for assessment and what is required under s 61(1) to be the subject of a certificate is not the general matter of the type referred to in s 58(1)(a), (b) or (d) but rather is the specific disagreement or issue concerning such a matter in the particular case. Accordingly, if there is no dispute between the parties as to whether certain injuries were caused by a motor accident but there is a dispute as to whether the degree of impairment as a result of those injuries is greater than 10%, the medical assessor is only required to give a certificate as to whether the degree of impairment is greater than 10% and not as to causation.

- But in *Mills* it had already been decided that "*Assessment of degree of permanent impairment without regard to causation from the motor accident was not relevant to determining whether the threshold in s 131 was reached, and would depart from the description of the matter in s 58(1)(d). A medical assessment of degree of permanent impairment without regard to causation from the motor accident had no statutory basis or function*.: at [61].
- It follows that contrary to the MRP's view, it was not bound to refrain from considering and resolving what lay in issue between the parties about causation. That had to be considered and resolved in accordance with the applicable guidelines and reasons had to be given for the conclusions reached about the resolution of that issue.
- The practical result of its misunderstanding of the law which [60] and [61] of its reasons revealed, was thus that the MRP failed to respond to substantial, clearly articulated arguments advanced about established facts, with the result that a constructive failure to exercise jurisdiction also resulted.
- Section s 58(1)(d) being concerned as it is with not only the question of the degree of permanent impairment which resulted from the first defendant's injuries, but also whether they were caused by the accident, even in a case where the parties are not in dispute about causation, it has to be considered in the assessment, as was actually also explained in *Brown*.
- When there are live issues about causation pursued by the parties, they have to be considered and resolved, whether on assessment of the dispute or review. This the MRP failed to do, having misunderstood the law as it did.
- Even if that conclusion were incorrect and the MRP did attempt to resolve the causation issues, the result of the reasons which it gave must be the conclusion that it failed to give the required reasons.
- Her Honour also found that the MRP's reasons were inadequate.

Accordingly her Honour quashed the MRP's decision and remitted the matter to the President of the PIC to be determined according to law. She ordered the first defendant to pay the plaintiff's costs.

PIC - Presidential Decision

Consideration of evidence – calling of applicant to give oral evidence – difference between credibility of witness's evidence and reliability of witness's evidence – held that there is a distinction between credibility of witness's evidence and reliability of witness's evidence

Ram v Pubcorp Pty Ltd [2024] NSWPICPD 1 – Acting Deputy President Nomchong – 8/01/2024

The appellant was employed by the respondent as a gardener/handyman at Warwick Farm between 19/01/2018 and August 2019. On 21/06/2019, he slipped and fell at work He lodged an incident report that day, but this was not before the Member.

On/about 13/11/2019 the appellant lodged a claim for workers compensation, in which he alleged that he injured his back and legs on 21/06/2019 and due to heavy lifting at work in July 2019. He resigned on 15/08/2019.

The respondent accepted liability for the back injury and paid compensation including s 60 expenses for an L5/S1 discectomy on 25/03/2020 and a left L4/L5 lumbar discectomy and decompression on 26/03/2021.

However, on 21/09/2021, the appellant claimed further s 60 expenses of $16,868.76 for a proposed anterior cervical discectomy and fusion at C5/6, which was recommended by Dr Darwish. He alleged that he had suffered injuries to his neck and right shoulder as a result of the frank incident on 21/06/2019.

The respondent disputed liability and denied that the appellant suffered a work-related neck injury.

The appellant filed an ARD and a statement dated 21/03/2022, which set out the salient factual matters, including statements about the onset of his neck pain and when he reported this to his manager and doctors.

Member Sweeney conducted an arbitration, during which the parties agreed that the ARD should be amended to delete reference to the upper extremities. The appellant's counsel sought leave for the appellant to give oral evidence, but the Member refused that application as there was no contention that he needed to address any omission or ambiguity in his written statement.

On 18/11/2022, the PIC issued a COD which determined that the appellant had not established that the need for surgery on the cervical spine result from the injury on 21/06/2019 or from the nature of his work on or prior to 15/08/2018.

On appeal, the appellant alleged that the Member erred as follows: (1) in failing to exercise his discretion to allow him to give oral evidence; (2) in law by rejecting his written evidence without the reasons for rejecting that evidence being put to him; (3) in conflating the absence of recorded complaints with the absence of complaints; and (4) in fact by concluding that there was a significant lapse of time between the claimed date of injury and his first complaints of neck pain.

Acting Deputy President Nomchong SC dismissed the appeal and confirmed the COD. Her reasons are summarised below.

- ADP Nomchong rejected ground (1). In the circumstances, the reason given by the Member was proper and open to him and the decision does not engage in any error of law or fact.
- She also stated, relevantly:

> 91. Although, during the hearing, counsel for the respondent argued that the appellant's credit was in issue, when considered objectively, the argument being propounded by the respondent during the hearing was, in reality, that the preponderance of the documentary and medical evidence was contrary to the appellant's assertion that he suffered an injury to his neck in 2019 as a result of his employment with the respondent. The respondent argued that the appellant ought not be accepted because of the lack of any corroborative evidence to support his claim and that the weight of the evidence was such that the Commission would not accept the appellant. In that regard the respondent relied on the decision in *Whelan*. There was no allegation that the appellant was being untruthful.
>
> 92. In that circumstance, I take the view that the respondent's argument was directed to the reliability of the appellant's statement, not his credit as a witness.
>
> 93. I reject the appellant's contention that credibility and reliability are synonymous. They are not the same. Credibility is directed to a person's truthfulness, including whether that person believes that they are telling the truth. On the other hand, the reliability of evidence is directed to the accuracy of the witness's evidence. In that regard, the determination of whether evidence is accurate involves a consideration of a number of factors including whether the witness has accurately observed or recalled the matter in issue. It follows therefore that a person, against whom an adverse credit finding has been made cannot give reliable evidence on the point on which he/she is found to lack credit (or sometimes generally). However, it does not follow that the absence of an adverse credit finding means that the Commission is bound to accept that witness's evidence. Put simply, a credible witness may give unreliable evidence. Further, some parts of a witness's evidence can be rejected and other parts accepted, depending on the nature of the reliability finding.
>
> 94. As it was, there was no finding made by the Member that the appellant lacked credit. The Member adopted the approach that it was not the truthfulness of the appellant but the reliability of his recollection that was at issue.

- ADP Nomchong rejected ground (2). She stated that she rejected the contention that the Member engaged in an error of law by finding that the appellant's version of events ought not be accepted without reasons being put to him. She stated, relevantly:

> 99. …The principle in *Nationwide News* at [112] is clear. It relies on the earlier decision of *Bulstrode v Trimble* where Newton J held that it was plainly not the law that a judge or jury was bound to accept unchallenged evidence where there was substantial evidence to the contrary.
>
> 100. This principle has been adopted in this Commission in Whelan and, as noted above, the respondent made it clear during the hearing that this principle was being relied upon in its case.
>
> 101. True it is that Dr Powell opined that the appellant did not engage in exaggeration during the course of his examinations. However, as stated above, it is not the truthfulness of the appellant that was in issue, it was the reliability of his recollection.
>
> 102. The exercise in which the Member engaged was not attended by any error. The Member considered all of the material he had before him and weighed that against the appellant's statement that he injured his neck during the course of his employment with the respondent and that he made contemporaneous complaints to that effect.

- The Member concluded that he preferred the opinion of Dr Powell (which was more consistent with the entirety of the medical records) over the appellant's recollection. That conclusion was open and available to the Member and there was no error of fact and law in his analysis, consideration or reasoning.
- ADP Nomchong rejected ground (3) and she held that the Member correctly informed himself of the appropriate legal principles and tests. He conducted a proper analysis of the contemporaneous records and there was no error of law or fact in his not accepting the appellant's evidence.
- ADP Nomchong also rejected ground (4). The factual finding that there was no complaint of neck pain over a period of almost two years was available on the evidence and the preponderance of the evidence supported the Member's finding.

The test for 'main contributing factor' (s 4(b)(ii) WCA) - application of AV v AW [2020] NSWWCCPD 9 - meaning of 'acceleration' in s 4(b)(ii) – onus of proof of 'injury' pursuant to s 4(b)(ii) where multifactorial causation – Commonwealth v Muratore [1978] HCA 47 - extent to which expert medical evidence is required in assessing causation of psychological injury – allegation of appealable error where issue not raised at first instance – weight of medical evidence

BGV v Waverley Council [2024] NSWPICPD 2 – Deputy President Snell – 11/01/2024

From November 1997, the appellant worked with the respondent as an "Open Spaces Team Member" and she remained in this role for about 22 years. At different times she performed gardening work in the nursery, outdoor duties at Waverley Cemetery and the cleaning of amenities, public spaces and work depots. She worked at Bondi Beach from 1998 and at Syd Einfeld depot from June 2019.

The appellant had previously undertaken certificate courses at TAFE, in greenkeeping, turf management and horticulture, whilst on day release from Silverwater Women's Correctional Centre (where she was an inmate for a number of years).

The appellant alleged that she was "*bullied and harassed*" by work colleagues, including abuse based on her gender and sexual orientation. She referred to an issue regarding the availability of toilet facilities for female employees, which led to a complaint to the Anti-Discrimination Board. She said that "*around 2000*" she found a deceased woman on the grassed area of North Bondi Beach, which she found "*extremely confronting*". She did not receive counselling or emotional support and felt "*completely lost and abandoned*". She alleged that she was not given the same opportunities for overtime as male employees. She also said that she performed unpaid voluntary work for "*NSW Police and Corrective Services in relation to domestic violence for about two to three hours per week*". She stated that on 2/04/2020, the respondent wrote to her saying (incorrectly) that she had not sought approval for this work. She felt that she had to constantly defend herself and that she was treated unfairly when the respondent investigated the allegations.

The appellant alleged that she was "*the subject of numerous derogatory and degrading comments about [her] appearance, gender and sexuality*" and that she felt "*disrespected, discriminated against and victimised as a woman throughout [her] employment*". When she was scheduled to undergo surgery for cervical cancer in December 2019, she was not sufficiently comfortable to report the upcoming procedure to her superior and she feared how her "*male supervisors would react*". She rescheduled the procedure to January 2020.

The appellant also alleged that she was "*significantly underpaid by approximately $1,000*" in December 2019, which she regarded this as a "*deliberate act to provoke or gaslight me*". She was suspended by way of a letter from the respondent dated 01/04/2020, and in the early hours of the following day she took an overdose of pills. She said that she regained consciousness on 3/04/2020 and she was then placed on special paid leave until 19/06/2020. There was a second suicide attempt on 26/01/2021 and she has remained off work.

The appellant claimed compensation, but the insurer "*reasonably* excused" the claim and disputed liability. It denied '*injury*' and raised a defence under s 11A *WCA*.

Member Burge conducted an arbitration on 26/09/2022.

The respondent sought leave to cross-examine the appellant on matters relating to the death of her late husband in 1989 (which led to her incarceration) and factual discrepancies between her evidence and other employees of the respondent regarding workplace events between late-2018 and April 2020. However, the Member declined that application.

The respondent tendered bank statements produced by the appellant, three letters of instructions from her solicitors to Associate-Professor Robertson and her consolidated wage records. It also sought to tender reasons of the Supreme Court and Court of Criminal Appeal in relation to matters involving the appellant. However, the Member ruled that "*it was a step too far to let judgments in as evidence*" and that submissions could be made regarding the appellant's credibility.

After hearing the respondent's address, the Member stood the matter over for further hearing on 24/11/2022, when the appellant's counsel addressed. During his address, he objected to the respondent relying upon two medicolegal reports from psychiatrists (Dr Millar & Dr Bertuchen). However, the Member declined to exclude the reports.

On 10/01/2023, the PIC published a COD, which found that the causes of the appellant's condition were "*complex and multifactorial*" and he was not satisfied that employment was the main contributing factor to the aggravation of an underlying condition. Therefore, there was an award for the respondent. However, the Member also stated that if the appellant succeeded on "*injury*", the s 11A defence would not have succeeded and he "*would not have found the [appellant's] injury to have been wholly or predominantly caused by the allegedly reasonable actions of the respondent with respect to performance appraisal and/or discipline*".

The appellant appealed and alleged that the Member erred as follows: (1) He misdirected himself regarding the test for causation of injury pursuant to s 4 *WCA;* (2) In finding that the evidence did not demonstrate that work was the main contributing factor to injury; and (3) by failing to give adequate reasons.

Deputy President Snell dismissed the appeal and confirmed the COD. His reasons are summarised below.

- The Member noted that the injury was pleaded as "*an aggravation of pre-existing major depressive disorder comorbid with post-traumatic stress disorder*" (deemed date: 2/04/2020).
- The respondent disputed the claim on the basis that employment was not the main contributing factor to either the onset of that a condition, or to the aggravation of a pre-existing condition. It also argued any work-related injury was caused by reasonable actions in respect of performance appraisal and/or discipline.

- The Member referred to the appellant's background, referring to her late husband's death, her conviction for manslaughter and the 8 years she spent incarcerated. He said both sides accepted the appellant had underlying psychological issues and he found that the evidence "*overwhelmingly supports a finding that there was an aggravation of a pre-existing condition … The primary initial question for determination is whether the main contributing factor to that aggravation was work-related*". She quoted from the reasons of Kitto J in *Federal Broom Co Pty Ltd v Semlitch* that dealt with the 'exacerbation of a disease' and he quoted from a passage in *AV v AW* dealing with the test of '*main contributing factor*' in s 4(b) *WCA*. He also quoted from the decision of Roche DP in *Attorney-General's Department v K*.
- The Member said the dispute before him largely concerned the issue of '*main contributing factor*'. There were "*a number of non-work-related factors*" which the respondent alleged affected whether the employment, on the totality of the evidence, was "*the main contributing factor to any injury*". He said the appellant's statement centred on the issues at work as the cause of the deterioration of her condition, but other material revealed "*a multitude of stressors at the time*". He noted that a diary of the alleged incidents of bullying and harassment, which the appellant stated that she had kept, was not put into evidence and he stated that the respondent's lay evidence in reply "*largely traversed*" the allegations. However, there were "*obviously very real issues and tensions within the workplace*".
- The Member briefly summarised issues raised by the appellant. She accepted that the appellant's mental health deteriorated markedly after her suspension, such that she attempted suicide. She was admitted to Wollongong Hospital, Shellharbour Hospital and then a clinic at Nowra Hospital. There was "*further attempted self-harm on 26 January 2021*" followed by an admission to Wollongong Hospital. He described the "*first question*" as "*whether the [appellant's] employment was the main contributing factor to the aggravation of her condition*". The respondent submitted the causes of the deterioration were "*multifactorial*". The appellant had been diagnosed with cervical cancer and was going through a relationship breakdown and her partner moved to Singapore in about September 2019. He found that this "*was clearly affecting the [appellant] from at least that time*".
- The Member referred to a meeting on 10/10/2019 and quoted from the notes of the meeting which summarised the issues that were discussed. He quoted a number of text messages between the appellant and Ms Vicki Parry, HR partner for the respondent, which raised a mixture of work-related and private subject matter. These included the appellant saying "*it does not matter, you have turned on me*". The reasons referred to the appellant completing a 'Skills and Performance Assessment' (SAPA) on 17/11/2019. On 4/12/2019, the appellant sent a text message to Ms Parry advising she had "*[j]ust been diagnosed with cervical cancer and breast cancer, so a really good woman [referring to Ms Lazzarini, a co-worker] will have my job after all*".
- The Member referred to an exchange of text messages between the appellant and Ms Parry, from 20/12/2019, following the appellant's discovery that she had been underpaid $1,000. The appellant's message used offensive language.
- The Member referred to the respondent's submission, that the appellant was "*understandably affected*" by non-work-related traumatic events, mentioned in the notes of the general practitioner on 7/08/2019. On 22/08/2019 her personal issues were resolved and she was able to return to work. Then her partner moved away, there was relationship breakdown and a diagnosis of breast and cervical cancer in December 2019.
- The Member referred to the appellant's submission that, given her background, she would be a target for bullying. She had worked with the respondent for many years until the workplace incidents between 2018 and 2020. The aggravation had already been set in train before the cancer diagnosis in December 2019. Complaints had been made about her by a work colleague, Mr Christiansen, in 2018 and then withdrawn.
- The appellant referred to her troubled relationship with Ms Lazzarini. Even if her perception of these interactions was wrong, there were contentious real events which placed her reaction within the realms of *Chemler*. The Member accepted this submission.

- The Member referred to the appellant's submission that the diagnosis of Ms Skinner, psychologist, supported a diagnosis of work-related injury. He quoted from Ms Skinner's report:

  > [The appellant] presented with symptoms of depression and anxiety. [The appellant] reported a recent serious overdose and ongoing suicidal ideation, precipitated and perpetuated by psychosocial pressure, reporting workplace bullying and harassment and stress of a toxic workplace environment.

- The Member referred to the report of Dr Stephens, GP, who took over care of the appellant from 2019. He noted that Dr Stephens reported that he considered that employment was contributing to her anxiety, depression and distress receiving the third letter of suspension was a significant contributing factor resulting in her taking the overdose in April 2020.
- The Member referred to the report of Dr Lavalle, clinical psychologist, dated 5/01/2021. Dr Lavalle took a history of bullying in the workplace since 2018, noting that people implied that the appellant was not a good person due to her past. Dr Lavalle considered there was a depressive disorder, the likely cause of which was the workplace situation.
- The Member referred to Associate Professor Robertson's report, which did not refer to the relationship breakdown or non-work-related stressors between 2018 and 2020. He described employment as the "*primary exacerbating factor*" for the "*chronic depressive illness turning into more severe and protracted depression*". He described the cervical cancer diagnosis as a "*partial contributor*" to the aggravation, not one that "*overshadowed the work-related factors*". He said that employment was the main contributing factor to the aggravation of the pre-existing condition.
- The Member referred to the report dated 12/09/2020 from Dr Miller (qualified by the respondent). He recorded a history of abuse in the appellant's childhood and marriage, but not of recent life problems in 2019 or 2020 which could have contributed to the current psychiatric state. He was not given a history of the relationship breakdown, the cancer diagnosis, or the underlying issues that led to trauma counselling in 2019. The Member found that this was significant in considering the weight to be given to Dr Miller's report. Dr Miller considered the appellant suffered from borderline personality disorder and she stated that the main contributing factor to the aggravation of this condition was the performance improvement plan. Dr Miller considered aggravation and exacerbation of the borderline personality disorder resulted from the respondent's actions with respect to the investigation report dated 29/11/2018, the subsequent warning letter dated 10/12/2018 and all the events that followed.
- The Member said that Dr Bertucen (qualified by the respondent in 2022) was the only retained expert with a history of the relationship breakdown. He described the breakup as a "*significant competing psychosocial stressor which has contributed to her depressed mood and suicidality over the last few years*." He also diagnosed borderline personality disorder/chronic complex post-traumatic stress disorder.
- The Member referred to a statement from Ms Lazzarini that "*described interpersonal issues*" with the appellant, but he did not make a finding of which version he preferred. He referred to the decision in *Chemler* and found there were "*plainly real issues and events*" between the appellant and Ms Lazzarini, the appellant's perception of which contributed to the aggravation of her underlying condition. He said the lay evidence showed issues in the workplace to which the appellant had "*adverse reactions*", including interactions with her manager Mr Smith, her supervisor Mr Davis, her colleague Mr Christopher and her manager Mr Gilchrist.
- The Member said he had no difficulty finding that events at work were "*at least a substantial contributing factor to the aggravation of the [appellant's] condition*", but the issue was "*whether her employment was the main contributing factor to the aggravation*".
- The Member said the absence of the appellant's diary rendered its "*existence and contents of little weight*".

- The Member accepted the respondent's submission that there was no medical evidence that suggested incidents between 1998 and 2000 caused or contributed to the condition and Drs Lavalle and Robertson primarily referred to matters in and from 2018.
- The Member found that the views of Associate Professor Robertson "*must be discounted*" as that doctor "*did not have an accurate history of the personal matters affecting the [appellant] in 2018 and 2019*". This was important given the presence of "*competing work and non-work-related matters which are said to have contributed to the aggravation*". The appellant failed to give him an accurate history of her relationship breakup, involvement with the police, attendance at trauma clinics and her cancer diagnosis. Dr Miller's opinion suffered from "*the same relative disadvantage*", but Dr Bertucen had a history of these matters and their effect.
- The Member rejected the appellant's argument that her condition "*might constitute a s 4(b)(i) injury*", as opposed to an aggravation pursuant to s 4(b)(ii) as the prevailing expert opinion dealt with the alleged injury as "*one of aggravation to a very serious and long-standing underlying condition*".
- The Member found that the appellant's version of events regarding causation was placed squarely in issue and he was not satisfied that she had discharged her onus of proving employment was the main contributing factor to the aggravation of her pre-existing condition. He said there were "*very real issues at play in the workplace to which the [appellant's] perception was a substantial contributing factor in aggravating her condition*". He was "*not satisfied in light of the contemporaneous evidence that those work-related issues were the main contributing factor*".
- The Member noted the appellant relied on a Presidential decision of *Mieth v Sydney Trains* for the proposition that the appellant's perception of events is sufficient to ground a finding of injury. He accepted that proposition, but said *Mieth* was distinguishable. In this matter there was "*a raft of evidence which demonstrates personal matters substantially contributed to the decline in the [appellant's] well-being*".
- The Member said that although he accepted that an erroneous perception of events can establish an injury, it was still necessary that the perception of events be the main contributing factor to the injury. The medical experts expressed their views without being appraised of external factors which affected the appellant at the relevant time. Where there were "*clearly competing factors at play which contributed to the aggravation of the [appellant's] condition*", it was important that the experts be aware of, and comment on, all of the potentially relevant factors. In the absence of such opinion evidence, the views of the doctors who supported the appellant were unpersuasive.
- The Member referred to the "contemporary documents". He described the causes as "*complex and multifactorial*". The appellant carried the onus and the fact that her own experts were not appraised of extraneous, but relevant matters is, was fatal to her case.
- In relation to the s 11A defence, the Member found that the work-related component of the aggravation of the appellant's condition was not wholly or predominantly caused by the respondent's reasonable actions with regard to performance appraisal or discipline. A number of work-related factors that contributed to the appellant's decline, including a "*toxic relationship*" with Ms Lazzarini, and difficult interpersonal relationships with Ms Parry, Mr Jones, Mr Christopher and Mr Gilchrist, "*among others*". Many of the issues did not relate to performance appraisal or discipline.
- Snell DP rejected ground (1). The Member clearly recognised the nature of the test he was required to apply. He referred to relevant principles and cases and there was no meaningful argument that the Member failed to apply the principles and erred.
- Snell DP rejected ground (2). He noted that an initial argument is that the respondent carries the burden if "*disentangling*" the work injury as a cause". He referred to decisions in *Watts* and *Purkess v Crittenden*. He stated:

99. *Watts* and *Purkess* are authorities dealing with the assessment of damages. That part of the above quote, in italics, makes it clear that the reasoning in those authorities is not analogous to the argument which the appellant seeks to bring it in aid of. The test of '*main contributing factor*' in s 4(b)(ii) does not relate to pre-existing conditions. The causation issue in the current proceedings is different, it involves satisfaction of the statutory test of '*injury*' in s 4(b)(ii) of the 1987 Act where causation of an '*aggravation, etc*' is multifactorial. Authorities such as *Watts* and *Purkess* cannot, in my view, be appropriately applied in determining whether the appellant has discharged her onus of proving '*injury*' within the meaning of s 4(b)(ii). In *AV* I sought to interpret the subsection by reference to conventional principles of statutory interpretation. The appellant offers no reasoned submission why the statutory test should be construed in the fashion for which it now argues. The appellant has not referred to authority that supports such an approach. It is relatively common, in cases involving psychological injury, to find a mixture of causative factors, both work-related and not. If the appellant were correct on this point, then the burden of proving '*main contributing factor*' in such circumstances would effectively be borne by the employer. The employer would carry the onus of "*disentangling*" the work-related component of the injury as a cause. I do not accept that s 4(b)(ii) should be read in this way. I accept the respondent's submission that the appellant carried the onus of proving 'injury' within the meaning of the subsection: "*he who asserts must prove*".

- As for the appellant failing to discharge her onus of proof, Snell DP stated that the Member's reasoning was consistent with the Court of Appeal's decision in *Paric* and its effect in the current matter is that the appellant's medical case on causation was deprived of probative force, with the consequence that the Member was not satisfied her employment was the main contributing factor to the aggravation.
- Snell DP rejected to appellant's argument that the Member was required to describe each of the instances and *"[attribute] causation to each of them*". The reasons at [26] made it clear that the Member had read and considered the instances referred to and it is not necessary to refer to every piece of evidence. The necessary extent and content of reasons will depend on the particular case and the matters in issue. It is necessary that the reasons be read as a whole. In this matter, the difficulty was that the evidence overall, but particularly the medical evidence, was not adequate to support a finding of '*main contributing factor*'. The reason was the found inadequacies in the appellant's medical case, due to the failure to comply with the principles in *Paric*.
- Snell DP stated:

  112. I accept that the appellant's submissions, referred to at [108] above, go to the appellant's preference for a different result more than the identification of error. To this extent, they do not assist. The appellant's complaints about the fact finding are essentially futile. The Member's reasons made it clear that the case failed due to the lack of probative force of the appellant's medical evidence, due to the application of *Paric*. The appellant's other points, if accepted, would not affect the final result.

- Snell DP also rejected ground (3). He stated, relevantly:

  127. The parties in the current proceedings do not challenge the correctness of the reasoning in *AV*, dealing with the requirement in s 4(b)(ii) of the 1987 Act, that employment be '*the main contributing factor*' to the '*aggravation, etc*.'. The Commission is plainly bound by the decision of the High Court in *Paric*, which is discussed above. The appellant's case did not fail due to a preference on the Member's part for the respondent's lay case on '*injury*'. There is no serious challenge to how the Member, dealing with the requirement that employment be the '*main contributing factor*', described the test:

> As the Deputy President noted at [76] in *AV v AW*, where a relevant aggravation involves, as is the case in this matter, both employment and non-employment factors, the evaluative process involves a consideration of the causative role of both. It is necessary to consider firstly, whether there were competing causal factors (employment and non-employment related) of the aggravation, and in considering those relevant contributing factors, whether employment represented the main one. The onus of proving employment was the main contributing factor rests with the [appellant].

- The reasons that are required depend on the circumstances of the particular case and are to be read as a whole… It is not necessary to refer to every piece of evidence and the reasons referred to the evidence that was considered. The reasons stated the basis on which the Member arrived at the decision and why the respondent's case was accepted over that of the appellant. The reasons were adequate for the conduct of the appeal and informed the losing party of why they lost. The Member's reasons were adequate.

PIC – Member Decisions

Workers Compensation

Claim by a schoolteacher for a psychological injury as a result of the Public Health Order mandating compulsory vaccination - whether section 11A defence available - whether Hamad v Q Catering Limited complied with as to proof that the respondent was wholly or predominantly the cause of injury - whether employer able to rely on events following the alleged injurious event (receipt of an email) - whether employer's actions related to discipline as defined by authorities - whether employers actions reasonable. Held – medical evidence demonstrated that injury was predominantly caused by actions of employer, Hamad v Q Catering Limited considered and applied - in relation to discipline, the whole process (the emails and guidelines) was relevant; Webb v State of New South Wales considered and applied - actions reasonable on the evidence - award for the respondent.

Martsoukos v Secretary, Department of Education [2024] NSWPIC 16 – Member Wynyard – 11/01/2024

Member Wynyard conducted an arbitration hearing over 2 days. At the commencement of the arbitration, the respondent admitted that the worker suffered a psychological injury following receipt of emails from the respondent on 27/08/2021, advising her that she would have to be fully vaccinated as a condition of returning to her occupation as a teacher. However, it asserted that the injury was wholly or predominantly caused by its actions regarding discipline and that its actions were reasonable.

The worker sought to rely upon a transcript of cross-examination of Paul Brian Wood (Executive Director, Educational Standards) of the respondent dated 29 August 2022, in another matter in which the worker claimed that she had been injured by the Public Health Order mandating vaccinations for school teachers. The respondent objected, but the Member admitted it on the basis that could ascribe as much weight to it as he thought fit.

The worker's statements indicated that she was medically retired on 17/08/2023. She stated that prior to 27/08/2021, she suffered anxiety and trauma from workplace incidents over a period of five years, but these symptoms were notably exacerbated and compounded on 27/08/2021 following the announcement of mandatory vaccination as a new condition of her employment.

The worker referred to the *Public Health Order 2021 (COVID 19 Vaccination of Education and Care Workers)*, noting that it required staff to be fully vaccinated by 8/11/2021, or earlier if attending work on school grounds. She stated that "*ongoing workplace pressure, harassment, coercion and bullying to comply and respond against my will and under duress to everchanging circumstances and threatening directives that I did not feel comfortable, safe or adequately informed about*" had caused this exacerbation.

The worker noted the terms of the Public Health Order, including that an exemption was available if a worker was "*unable to be vaccinated in the rare situation of a medical contraindication*." She stated that as a result of the vaccination mandate and her decision to not be fully vaccinated, she started to fourteen listed symptoms, including that she felt "*duress, powerless, harassed, coerced, bullied and threatened*".

The worker said that she decided not to be double vaccinated because she believed that the Mandatory COVID vaccination order could not be justified as it impinged on her liberties and rights. She said that it has been widely accepted that for the overwhelming majority of Australians, vaccinations should be voluntary and the commonly accepted definition of voluntary includes acting on one's free will, optional or non-compulsory. She also expressed her belief that the NSW Government "*who forced my employer to mandate vaccinations*" should be liable for her adverse reactions as it was a foreseeable outcome when making the mandate. She also stated:

> I believe the COVID-19 vaccination mandate denies me my fundamental right to work, as the mandate to be vaccinated restricts or removes my basic liberties and this must be proportionate and necessary to manage the risk and must be the minimum necessary to achieve the public health aims.

The worker also stated that it is not proportionate, reasonable or necessary "*to lock myself out because I decided to be unvaccinated and the State Government and my employer have removed my ability to work and contribute to society*". She concluded that she is strongly opposed to the vaccine mandate.

After discussing the evidence at significant length, the Member referred to the medical evidence.

He noted that Dr Boulton, a psychiatrist retained by the insurer, took a history that the worker was subjected to bullying and harassment for a period of 5 years before she received the email dated 27/08/2021. He noted that the worker reported a strong physical reaction when the mandate was announced and that the worker spoke to doctors and was told not to get vaccinated "*given how anxious she was*". He felt that the worker's main issue with the mandate was around the lack of choice. He diagnosed a major depressive disorder with anxious distress and assessed the worker unfit for work.

Dr Abeya, psychiatrist, conducted a fitness for work assessment on behalf of the respondent in January 2023. He took a consistent history, also noting that the worker was experiencing workplace stress when she realised that the respondent would not treat her emails to them "*in a reasonable manner when it came to the vaccine mandate*." This occurred whilst she was working from home and she said that it had "*been quite difficult and would have contributed further to her resilience breaking down*" She heard about the mandate on a day that she had been homeschooling. He assessed the worker "*temporarily unfit*," whilst she received more intensive treatment.

Dr Abeya reviewed the worker in June 2023. He confirmed his previous view and stated that the worker had no capacity to return to work as a High School English teacher.

The Member stated that the onus is on the respondent to make out its defence. He identified the issues for determination as: (1) Has the respondent established that the injury was wholly or predominantly caused by its actions? (2) If so, do they relate to discipline? (3) What were those actions taken or proposed to be taken? And (4) Were they reasonable?

In relation to the meaning of "*wholly or predominantly*", the Member referred to the decision of Snell DP in *Hamad* at [88]:

> The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof

of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience.

The Member noted there was no evidence to suggest that there was any other cause of the injury than receipt of the email on 27/08/2021 and based on Dr Boulton's evidence, he was satisfied that the medical evidence established that the respondent's actions were the predominant cause of the injury.

The Member noted that the ARD alleged that injury occurred as a result of events at work concerning the mandate to be vaccinated on 27/08/2021 to 8/11/2021, and it pleaded the date of injury as 27/08/2021. While the worker's counsel argued that the respondent's actions could only be viewed within the worker's knowledge when she received that email, the Member noted that the pleadings appeared to indicate a contrary intention.

There was a="*a good deal of argument*" that the worker could not have known that the respondent's actions on 27/08/2021 were concerned with discipline.

In *Webb*, Wood DP stated:

> 139. I have discussed the authorities in *Heggie* and *Sinclair* above, that require the whole process involved in the employer's action to be taken into account in the assessment of whether that action constituted 'discipline' for the purposes of s 11A of the 1987 Act. In accordance with those authorities, the initial meeting on 21 April 2017 (which was agreed to be the cause of the appellant's psychological injury) cannot be considered in isolation from the respondent's action in investigating the allegation, when determining whether the action can be characterised as action with respect to discipline…
>
> 141. The more recent authorities indicate that what is involved in '*discipline*' stems from action taken in respect of the worker's conduct or performance in the workplace, or arising out of the worker's employment (*Dennis*). Discipline can include offering support and training to improve performance (*Soutar*). As Snell AP determined in *Mascaro*, communicating adverse findings as to conduct in employment, requiring and administering a mentor program intended to improve performance, and advising that the worker's mentoring program was to continue because of the worker's unsatisfactory progress are all matters that fall within the scope of '*discipline*.' Of course, what was referred to by Neilson CCJ in *Kushwaha* as the narrow definition of discipline, chastisement, and actions implementing adverse consequences for inappropriate behaviour in the workplace will also be matters of discipline.

The Member stated that the circumstances of this matter are consistent with the latter description, except that the adverse consequences were not implemented because the worker became ill before 8/11/2021 (the date for compliance with the mandate). She remained on sick leave until she was medically retired on 117/08/2023. Therefore, no disciplinary action was taken. However, the respondent argued that the worker's failure to comply with the vaccine mandate was inappropriate behaviour and the proposed actions set out in the respondent's evidence in order to implement adverse consequences were therefore a matter of discipline.

The worker's counsel argued that *Webb* can be distinguished on its facts, but the Member rejected that argument. He stated that counsel did not consider the more-narrow definition that actions implementing adverse consequences for inappropriate behaviour in the workplace were matters of discipline. He found that actions taken after the receipt of the email were relevant in considering discipline.

The Member noted that the actual Public Health Order was issued on 23/09/2021 and it provided that Education and Care Workers must be vaccinated. The subsequent issue of the Vaccination Guidelines on 5/10/2021 made it quite clear that unless there was a medical contraindication, staff would not be allowed to attend school sites, and after 8/11/2021 they were required to comply with the Public Health Order.

The determination under the *Teaching Service Act* on 18/10/2021 required vaccination evidence or a medical contraindication certificate and the Management of Conduct document dated 12/11/2021 wade non-compliance with the Vaccination Guidelines misconduct.

The Member stated, relevantly:

> 117. This documentary evidence demonstrates that the respondent took care to notify Ms Martsoukos (and all staff) that vaccination was to be made compulsory in plenty of time for its staff (including Ms Martsoukos) to organise the necessary certification.
>
> 118. Taking the whole process involved in the respondent's actions into account, the documentary evidence constitutes proof of those actions. I reject Mr Dodd's submission that because Ms Martsoukos went off work before the deadline of 8 November 2021, the respondent's actions no longer applied to her, and her injury accordingly had not been caused by those actions.
>
> 119. In the first place, the words of the Statute speak of "***reasonable action taken or proposed to be taken***." (Emphasis added.) The actions of the respondent as set out above were concerned with action proposed to be taken in regard to the enforcement of the Public Health Order. Its action in notifying all its staff that this announcement was to be made by the Premier on 27 August 2021 was reasonable, as it alerted staff to a significant development in the response of the NSW Government to the COVID-19, compliance with which was going to necessitate some inconvenience and organisation.
>
> 120. Secondly, the pleadings in the ARD included in the alternative that Ms Martsoukos' injury had been caused by either the contraction or the aggravation of a disease. The onus was on the respondent therefore to show that the cause of Ms Martsoukos' injury (to paraphrase) was its actions. In meeting that onus it was entitled to assume that it was the whole of its conduct that the applicant alleged had been the cause when it pleaded that "*the injury occurred as a result of events arising out of or in the course of employment concerning the mandate to be vaccinated commencing on 27 August 2021 to 8 November 2021*."
>
> 121. Thirdly, as I have found above, the issue of "*discipline*" in any event requires the whole process to be taken into account, as a matter of law.
>
> 122. I have already found that Ms Martsoukos would have realised that the emails of 27 August 2021, speaking as they did of NSW public school staff being "*required to be fully vaccinated*," and of the Premier announcing "*mandatory double doses of vaccination*," were indicative of a disciplinary process, as it followed that if a compulsory requirement were not followed, then there would be consequences of a disciplinary nature.
>
> 123. The enquiries Ms Martsoukos listed in her chronology demonstrated that she was in contact with the Minister of Education on 3 September 2021, and indeed that she "*wrote to NESA with a complaint re mandatory vaccination*". These communications were not before me, but they reveal the concern by Ms Martsoukos at the mandatory nature of the requirement to vaccinate. In that chronology she also referred to her communications with Mr Bordado.
>
> 124. Mr Bordado related these communications in his statement, as related above. He did not in terms define when it was that Ms Martsoukos spoke to him about the difficulties she was having in making a decision towards whether to get vaccinated, other than it was "*in the lead up to 8 November 2021*." Nor did he define what those difficulties were. However, Ms Martsoukos did take two weeks sick leave from 1 November 2021, and on 3 November 2021 Mr Bordado rejected her medical exemption certificate. It seems Ms Martsoukos remained off on sick leave and did not return to work, until she was medically retired. Mr Bordado's response to Ms Martsoukos' anxiety about the process was reasonable. Ms Martsoukos did not allege that he acted unreasonably in rejecting her application for a medical vaccine contraindication exemption, and no submissions were made impugning Mr Bordado's actions.

125. Mr Dodd made some submissions to the effect that the actions of the respondent were unreasonable because, at the time Ms Martsoukos received the emails of 27 August 2021, she was working from home. Dr Abeya gave the only reliable history, which was that with the lockdowns there were continued changes of working from home and then being back at school. Dr Abeya recorded that it had been on a day she had been homeschooling that Ms Martsoukos heard about the mandate. It was clear from the documentation Ms Martsoukos received that there would be a return to face-to-face teaching and Ms Martsoukos' whereabouts when she received the emails is neither here nor there.

The Member concluded that the respondent had established the application of s 11A to a prima facie level and if the issues raised by the worker's counsel were to overcome that case, more was required than cross-examination in another case which did no more than raise possibilities based on unreliable documentation. The evidence does not indicate that the worker applied for any non-school-based position and the thrust of her case is that it was the deprivation of the opportunity to teach in school that caused her injury.

The Member stated:

139. In *Bjekic,* whilst considering whether the applicant had established that he had suffered an injury, I said:

46. At the time of these events, no less than now, the world was in the grip of an unprecedented pandemic. To protect their populations, most governments passed Covid orders that severely restricted the free movement of people. One of the governments to enact such restrictive regulations was the Government of New South Wales. It was the view of those responsible for the safety and protection of the populace that emergency regulations had to be promulgated as a matter of public policy. These regulations amongst other things mandated the wearing of personal protective equipment in hospitals, including that where Mr Bjekic was working.

140. Those comments also apply to the vaccination mandate of the Public Health Order of 23 September 2021, except that the pandemic has now, in 2024, eased its grip to an extent. The Public Health Order itself spoke of the emergency, noting the highly contagious and potentially fatal nature of COVID-19, and the ongoing risk of its spreading in New South Wales. The protection of children was of paramount importance and the NSW Government empowered the Department to do so by virtue of the Public Health Order. Neither the Order, nor the directions issued by the Department as a result, required vaccination where a care worker was not carrying out work in a government school.

Accordingly, the Member concluded that the respondent's actions were reasonable and he entered an award for the respondent.