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.

Decisions reported in this issue

1. Fisher v Nonconformist Pty Ltd [2024] NSWCA 32
2. Scone Race Club Ltd v Cottom [2024] NSWCA 34
3. Zoric v Secretary, Department of Education & Ors [2024] NSWSC 131
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Court of Appeal Decisions

CAUSATION – meaning of "substantial contributing factor" s 9A WCA - Member found that causation not made out – issue of substantial contribution did not arise – requirement that risk "came home" – similarity to the position in tort – increase in risk insufficient of itself to establish causation for purposes of s 9A – meaning of "common sense" causation – common sense causation connotes a number of ideas – no error in use of common sense causation here

Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 – Kirk JA (Meagher JA & Simpson AJA agreeing) – 20/02/2024

The most-recent Presidential decision in this matter was reported in Bulletin 128, but the following summary is provided for easy reference.

The deceased worker was employed by the respondent as a courier driver. He was the sole director of the respondent company and performed courier services through a sub-contract arrangement between the respondent and Direct Couriers (Aust) Services Pty Ltd (Direct Couriers).

On 22/01/2016, in the course of his employment, the worker died while driving his van during his last delivery run for the day. The death certificate listed the cause of death as ischaemic heart disease and coronary artery atherosclerosis. The Autopsy report listed the direct cause of death as ischaemic heart disease with an underlying condition of coronary artery atherosclerosis as an antecedent cause.

The deceased's widow claimed lump sum death benefits and alleged that she was totally dependent upon the deceased and that 2 adult children alleged that they were partially dependent upon him at the date of death. However, the insurer disputed the claim under ss 4, 9A and 9B WCA.

In *Clifford no. 1,* ***Arbitrator Edwards*** found for the claimants and he remitted issues of dependency and apportionment to the Registrar to fix a date for further arbitration.

However, the insurer appealed.

In *Clifford no. 2,* ***Deputy President Wood*** allowed the appeal and found that the Arbitrator overlooked material evidence and fell into appealable error which affected his finding on causation. She revoked the COD and remitted the matter to another member for re-determination.

In *Clifford no. 3,* ***Member Sweeney*** entered an award for the respondent and held that he was satisfied that the appellants had established a personal injury within the meaning of s 4(a) WCA (rather than a disease), but he was not satisfied that employment was a substantial contributing factor to the injury within the meaning of s 9A WCA.

In the first appeal:

- The first appellant alleged that the Member erred as follows: (1) in law by misapplying the legal test pursuant to s 9A WCA; (2) in law by applying a more onerous standard of proof; (3) in fact by failing to address Dr Helprin's opinion; (4) in fact and/or law by making determinations that were not based on the evidence; and (5) in law by failing to respond to a substantial, clearly articulated argument.
- The Second appellant also alleged that the Member failed to provide lawful reasons and that he failed to apply the correct legal test concerning s 9A.
- The Third appellant adopted the grounds raised by the first and second appellants.

President Judge Phillips dismissed all appeals and confirmed the COD.

In relation to the first appellant's appeal, he dismissed ground (1) as not being a fair reading of the Member's approach. He rejected ground (2) and held that the Member grappled with the complexities of the medical expert evidence and performed the task required of him under the decision in *Nguyen*. He also rejected grounds (3) and (4).

His Honour rejected the second appellant's assertion that the Member failed to provide lawful reasons and/or that he applied the wrong test concerning s 9A WCA.

The appellants appealed to the Court of Appeal and argued that:

> (1) the Member and the President misdirected themselves as to the proper test of causation within ss 4, 9 and 9A WCA in various respects;
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> (2) the Member and the President constructively failed to exercise jurisdiction; and
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> (3) the Member failed to give adequate reasons, and the President erred in law in not finding that to be so.

The Court held that s 353(1) WIMA requires that the party appealing is "*aggrieved by a decision of the presidential member in point of law*". The provision can be read more broadly as referring to being aggrieved by the presidential member's decision where the grievance raises a point of law, or more narrowly as relating to a grievance where the presidential member has made an erroneous decision on a point of law. The former, broader view is the better construction.

The Court also stated that the focus in an appeal such as this should be on the President's decision, not the Member's decision. The appeal need not involve a decision made by the presidential member on a point of law so long as the grounds raised in this Court are on points of law. Relevant points of law include jurisdictional errors or other errors of law. Any error must be material in order to obtain relief.

The point of law need not necessarily have been raised below, for example if a pure issue of law is raised such as an argument that the presidential member has misconstrued the statute. Especially for issues which are not pure matters of law, it will often be the case that a presidential member will not have erred in law if an issue which could have been raised below was not.

If the presidential member has wrongly rejected an argument that the non-presidential member made jurisdictional or other legal error, then that will generally manifest legal error by the presidential member.

The Court rejected ground (1) and stated that ss 4(a) and 9 WCA establishes a test of causation insofar as it refers to "*personal injury arising out of … employment*", which involves consideration of whether the employment caused or to some material extent contributed to the injury, consistently with the approach in tort.

However, s 9A WCA also establishes a test of causation in requiring that "*the employment concerned was a substantial contributing factor to the injury*", where this imposes a more stringent causal requirement than that involved in the causal requirement in the first limb of s 4(a).

The Member did not misdirect himself in not referring in terms to the statement in *Badawi* that "*substantial contribution*" in s 9A involved a connection that was "*real and of substance*". The Member referred to and applied the statutory language.

Properly understood, the Member held that causation was not made out, even on the lower standard consistent with the common law approach in tort, because all that the evidence established was that exposure to TRAP increased the deceased's risk of heart attack and not that that risk came home. Issues of the substantiality of the contribution of the employment did not arise.

Making out an increase in risk is not enough of itself to establish causation in tort as that notion is currently understood in Australia. The same applies in relation to causation under s 9A WCA. The Member did not err, thus, in applying the principle articulated in *McGuiness*:.

Reference to "*common sense*" causation connote a number of ideas. One aspect of that usage, relating to normative or purposive limitations on factual causation, has fallen into disfavour. Here, the Member's references to common sense causation did not manifest error. The Member thus did not misdirect himself as to the test of causation in any of the ways asserted by the appellants, and the President thus did not err in finding accordingly.

The Court also rejected ground (2). The appellants raised a form of constructive failure of jurisdiction based on the alleged failure by the Member to respond to a critical argument. Yet they made little effort to identify a clear, material argument with which the President had not engaged, such that he made an error of law by failing to find a substantial, clearly articulated argument had been put to the Member in turn, and not addressed by him.

It is not sufficient to complain that the Member or President addressed something in an incorrect manner, as this may simply be an erroneous conclusion within jurisdiction. There was no relevant failure to deal with the medical evidence.

In relation to ground (3), whether or not the Member gave adequate reasons had to be assessed against the content of the applicable legal duty requiring the giving of reasons, which duty was found in s 294 WIMA and r 78 of the *Personal Injury Commission Rules 2021*. Even if it was assumed that that duty was to the same effect as the duty applying to a judge, the complaint about adequacy of reasons was not made out.

Accordingly, the Court dismissed each appeal.

Judicial review – jurisdictional error – extent of functions and powers of tribunal – PIC MAP – whether appropriate consideration given to late documents – no opportunity given to address MAP regarding late documents – whether late documents could materially affect decision - scope of functions and powers of MAP – MAP restricted to determining appeal on indicated grounds of appeal – MAP restricted to reviewing injury the subject of referral to the MA

Scone Race Club Ltd v Cottom [2024] NSWCA 34 – Basten AJA (Gleeson & Mitchelmore JJA agreeing) – 22/02/2024

The judicial review decision in this matter was reported in Bulletin 131, but the following summary is provided for ease of reference.

On 23/05/2008, the worker injured his right knee. In 2015, he claimed compensation under s 66 WCA for 20% WPI and the parties entered into a Complying Agreement.

In December 2017, weekly payments ceased under s 39 WCA and the worker unsuccessfully claimed WIDs. However, during those proceedings he received a copy of a report from Dr Isaacs (qualified by the appellant) which assessed 41% WPI. He then filed an ARD seeking to have WPI assessed by an AMS in order to determine whether it was greater than 20% WPI.

By consent, the Arbitrator referred the dispute to the Registrar for referral to an AMS to determine the degree of WPI of the right lower extremity (right knee, peripheral nerve damage and scarring).

Dr Burns then assessed 20% WPI, but before a COD was issued, the worker applied for reconsideration of the MAC under s 329(1)(b) WIMA. However, he subsequently discontinued that application and appealed against the MAC.

The appellant alleged that the Arbitrator erred:

> (1) by misconceiving his task and in the exercise of his discretion by accepting that a referral to an occupational physician was within the Registrar's power and then concluding that the "*interests of justice*" favoured a reconsideration;
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> (2) in fact by finding that the respondent "*mistakenly*" agreed to the assessment with Dr Burns, which finding was material and central to the Arbitrator's decision;
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> (3) by failing to afford it procedural fairness by exercising his discretion on a basis not put to him by either party, and
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> (4) by wrongly withholding the assessment by Dr Burns from the AMS appointed to conduct the reconsideration.

Deputy President Wood granted the appellant leave to appeal on an interlocutory matter.

The appellant sought to adduce fresh evidence in the appeal (a complete chain of emails passing between it, the worker and the PIC on 17/09/2020 regarding Dr Burns' appointment as AMS, in which it stated that the Arbitrator specifically requested an assessment by an orthopaedic surgeon).

Wood DP revoked the COD and remitted the matter to another Member for re-determination.

On 28 April 2022, ***Member Wynyard*** granted the worker leave to issue a Direction for Production to the PIC for production of the medical assessment file (relating to Dr Burns' assessment).

On 31 March 2022, a MAP (Member Sweeney, Dr D Dixon & Dr M Davies) issued a MAC, which confirmed the MAC. The MAP reported that on 18/11/2020, the worker appealed against the MAC under ss 327(3)(b), (c) and (d) WIMA. It held that it was not necessary to re-examine the worker because it could not find a demonstrable error or the application of incorrect criteria on the face of the MAC.

As to the issue of "*fresh evidence*", the MAP noted that the worker sought to rely upon his supplementary statement dated 16/11/2020, which asserted that he "*felt that Dr Burns would not listen*". He also alleged that Dr Burns would "*not listen to important things that I was telling him*" and that while he explained to Dr Burns that he had numbness from his "*right knee down the outside of my leg and into the top of my foot and ankle*", the doctor only examined the inside of his leg.

The worker also alleged that the scar on his leg "*gets discoloured sometimes and turns a red/white blotchy colour. My scar is numb and is longer when I bend my knee*" and he complained that he did not get a "*proper assessment done by Dr Burns*".

The MAP held that the worker's supplementary statement was of no assistance and it was unable to accept the allegation that Dr Burns ignored what he was being told during the examination, or that he did not examine aspects of the right leg, as these were inconsistent with the detailed history and examination recorded in the MAC. In particular, the MAP stated:

> 49. The above excerpts from the MAC plainly demonstrate that the appellant's argument that the MA failed to examine him in accordance with the Referral is completely bereft of any factual foundation. Similarly, there is no factual basis for the assertion that the MA failed to examine the area of the lateral leg where he was directed by the appellant. On the contrary, the MA tested the entirety of the right leg for neurological signs including sensory loss. He reported "*repeated testing*" of the right lower limb demonstrated loss of sensation "*in the entire leg below the knee*." Testing the entirety of the right limb below the knee for sensory loss must involve testing of the lateral aspect of the leg.

> 50. Then, the appellant asserts that the finding of sensory loss below the knee on the right side is consistent with the presence of "*peripheral nerve disorder*". That flies in the face of the finding of the MA that it was not consistent with peripheral nerve disorder. The MA was at pains to point out that the sensory testing did not "follow a peripheral nerve distribution or a nerve root distribution".

The MAP held that Dr Burns dealt extensively with the "*neuropathic pain*" aspect of the referral and there was nothing to suggest an error on his examination. His conclusion on neuropathic pain was the only conclusion open on the basis of his clear findings. There was also no evidence that the appellant has suffered injury to a peripheral nerve in his right leg either in the incident or as a result of the subsequent surgery. Therefore, the appellant's submission on this issue had no basis in the medical evidence. The MAP stated:

> 54. …It is difficult to imagine circumstances in which the recollection of a worker recorded a month after the consultation would cast doubt on, or be preferred to, the history, complaints, and examination findings recorded by the MA. More so in this case, where the MA has explored each of these areas in detail and set out his findings with commendable clarity.

The MAP concluded that the supplementary statement was irrelevant and should not be admitted and that there was no basis for ground (2) of the appeal.

In relation to scarring, the MAP held that it was open to the MA to assess 0% WPI as there was no competing assessment for scarring before him. The MA provided reasons for his assessment, which complied with the instruction in Wingfoot and the appellant had not proved error on this ground.

Accordingly, the MAP confirmed the MAC.

The worker applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Acting Justice Schmidt identified the issues for determination as:

> (1) whether the MAP ever saw the plaintiff's application;
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> (2) whether the MAP failed to deal with his application as it was required to do;
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> (3) whether the MAP so erred in the exercise of its powers, that orders quashing its decision should be made; and
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> (4) whether those orders should be refused, because even if the application had been dealt with by the MAP, it could not have resulted in a decision any different to that to which it came.

In relation to issue (1), her Honour noted that s 378 WIMA had permitted an application to a MAP for reconsideration where evidence of deterioration came to light after an appeal. However, s 378 had been repealed.

Her Honour found that the alleged deterioration of the knee and further injury to the spine, which the plaintiff sought to advance by relying on further evidence on his appeal, was advanced before the MAP made its decision.

Section 328(3) WIMA provided that evidence "*that is fresh evidence or evidence in addition to or in substitution for the evidence received in relation to the medical assessment appealed against may not be given on an appeal by a party to the appeal unless the evidence was not available to the party before that medical assessment and could not reasonably have been obtained by the party before that medical assessment*".

Therefore, s 328(3) expressly provided for the plaintiff's application, so long as the documents he wished to rely on were not available or could not reasonably have been obtained before Dr Burns' assessment. If the statutory criteria were satisfied, the relevance of those documents and what they established could also be put in issue before the panel and if raised by the Race Club, would also be for it to resolve.

Her Honour held that the MAP erred because it failed to consider the worker's application to admit further evidence.

It was not a matter for the Supreme Court to determine what conclusion the MAP would have reached in relation to the if it had been considered, but there was a prospect that it might have succeeded. She therefore set aside the MAP's decision and remitted the matter for determination by a differently constituted MAP.

However, the appellant appealed to the Court of Appeal.

Basten AJA stated that the complaint underlying the appeal is that the MAP either failed to access, or, if accessed, failed to consider the worker's AALD which was available electronically. Apart from one oblique reference in the statement of reasons of the MAP, there was no direct evidence of consideration of the application. The primary judge was satisfied that the MAP did not in fact consider the application, or resolve it. If it were necessary to address the AALD to resolve the appeal, it might be said that there had been a constructive failure on the part of the MAP to exercise its proper function according to law.

The appellant challenged the court's finding and also sought to dispose of the factual issue on the basis that, had the documents sought to be relied upon by the worker in fact been considered by the MAP, they could not have affected the outcome. Indeed, the submission went one stage further, contending that it would have been wrong in law for the MAP to have had regard to the documents.

His Honour decided to address the latter argument first as if it was upheld it would provide a complete answer to the dispute.

The appellant argued that the matters raised by the AALD did not affect the outcome because they did not fall within the proper function of the MAP. The MAP was therefore legally obliged to disregard them so that, even if in other circumstances procedural fairness would have required attention to the matters raised, that was not so in the present circumstances. In applying the relevant principles, an important matter was the scope of the referral for medical assessment. This required the AMS to assess WPI of the right lower extremity (right knee, peripheral nerve damage and TEMSKI scarring) regarding an injury on 23/05/2018.

The appellant argued that the MAP's statement that a lumbar spine injury was not part of the medical dispute that was referred for assessment was correct and the MAP would have erred if it had considered the documents attached to the AALD. His Honour accepted that argument and he stated:

> 53. As the Appeal Panel was restricted to the grounds of appeal raised in the referral (and any submissions accompanying the referral) and to the injury the subject of the referral (namely to the right knee), it could not properly have dealt with either of the matters raised in the late documents accompanying the application of 9 March 2022.
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> 54. It is not in doubt that a ground of the appeal to the Appeal Panel in the present case did not involve "*deterioration*" of the worker's condition, resulting in an increase in the degree of permanent impairment. Secondly, it is beyond doubt that the locus of the injury which was the subject of the medical assessment certificate was the right knee: it did not include a separate injury to the lumbar spine.
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> 55. Perhaps more correctly, reliance should be placed upon the fact that the Appeal Panel itself stated that "*a lumbar spine injury is not part of the medical dispute referred for assessment*". The Club relied upon that finding; the respondent did not seek to contradict it. Indeed, contradiction, had it been attempted, might have run into an insuperable obstacle. As noted in *Skates*, "*once it is accepted that the scope of the referral was properly capable of restriction by reference to body parts/systems, the question as to how the appeal panel read the referral may well have been a matter for its professional judgment and not one involving reviewable error*".
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> 56. Accordingly, on its own views as to the scope of its functions, which involved no legal error, the two matters raised in the additional documents were beyond the scope of the appeal. On the basis that, even if considered, they could not, consistently with legal principle, have affected the outcome of the appeal in any respect, any failure to consider them was immaterial and did not give rise to reviewable error…

59. In the present case, the assumed failure was to consider material which was not directed to an issue that required consideration. Not only did the two issues raised by the additional documents not require consideration, they addressed issues the consideration of which was not permitted. They were fundamentally irrelevant.

His Honour then considered Schmidt AJ's reasoning, as follows:

61. The primary judge made an affirmative finding that the Appeal Panel did not consider the AALD, nor give consideration to the content of those documents. The judge addressed the consequence of the Appeal Panel's error in the following passages:

> 56 It is not for this Court to determine what conclusion the panel would have reached in relation to Mr Cottom's application, had it and the Race Club's opposition to it been considered. But I am satisfied that there was a prospect that it might have succeeded, given what he sought to pursue.
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> 57 As must the possibility that the appeal might then have taken a different course, an injury to Mr Cottom's spine then arising for consideration for the first time. That flows from the statutory requirement that not only all impairments which result from the same injury, but all impairments resulting from more than one injury arising out of the same incident, all be assessed together. That is required in order that the injured worker's resulting degree of permanent impairment is assessed at the one time.

62. With respect to the first proposition (at [56]) the conclusory form may be misleading: the basis for the conclusion appears to have been an earlier finding that if the documents had been considered, an issue would have arisen as to whether they could be relied upon by Mr Cottom, in the absence of an amendment to the grounds of appeal. Had that issue been raised, Mr Cottom would probably have sought to amend the appeal, and the primary judge stated that it was "*difficult to see why such an amendment could not have been made or allowed*".

63. The point raised in the second passage at [57] relies upon the provisions of s 322 requiring that impairments that result from the same injury are to be assessed together and that impairments that result from more than one injury arising out of the same incident are to be assessed together. Section 322 does not, however, override the provisions discussed above relating to the scope of a medical assessment and the scope of an appeal…

67. Whether or not the Registrar in *Sleiman* acted in a manner which was procedurally unfair, so that his decision could be set aside for jurisdictional error, may be put to one side. To justify that conclusion, there should be a finding that an officer has failed "*to respond to a substantial, clearly articulated argument, relying upon established facts*", in order to demonstrate procedural unfairness; or has failed to consider the substance of an application which he or she could only have failed to do because of a misunderstanding of what is involved in the legal principles to be applied; or has otherwise made a mistake which is "*essentially definitional, and amounts to a basic misunderstanding of the case brought by an applicant, [so that] the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way*". Otherwise a constructive failure to exercise jurisdiction will not have been proven. In any event, the role of the Registrar in determining whether to open the gate to a hearing by an appeal panel stands in a different category from the function of the appeal panel exercising a medical judgment as to the correctness of a medical assessment, and confined to the grounds raised before it. To permit an appeal panel to consider other grounds which did not pass through the gateway of the Registrar's consideration and, indeed, to require an appeal panel to take such a step if it thinks another ground could have been successful, would be not merely to deny procedural fairness to the respondent to the appeal, but would be to subvert the construction of the statute accepted by this Court in the cases set out above. The reasoning below in this regard should not be accepted.

His Honour also noted that the issue raised by the worker on judicial review was the subject of a determination by Member Wynyard. The PIC determined that the AALD was received by the MAP but did not resolve the question of whether the MAP addressed it.

This was because the deterioration of the referred injury was not reviewable as it was not part of the medical dispute that was referred for assessment. The status of that determination was not raised before Schmidt AJ, but in the absence of any challenge to the determination, its existence may have provided a sound basis for a discretionary refusal of relief by way of judicial review.

Accordingly, his Honour set aside the decision of Schmidt AJ and confirmed the decision of the MAP and its MAC. He ordered the worker to pay the appellant's costs.

Supreme Court of NSW Decisions – Judicial review

Judicial review of MAP – where MA failed to consider cl 1.32 of the Guidelines for the Evaluation of Permanent Impairment – where MAP found that MA erred in failing to consider cl. 1.32 but not in failing to make an allowance for treatment – whether MAP failed to apply, or failed to correctly apply cl 1.32 when determining WPI – whether MAP failed to give adequate reasons

Zoric v Secretary, Department of Education & Ors [2024] NSWSC 131 – Chen J – 21/02/2024

In late 2017, the plaintiff commenced employment as a teacher. Initially, she was a provisional teacher, but from early 2018, she was a special education teacher.

The plaintiff alleged that she suffered a psychological injury in the nature of Complex PTSD, Dissociative Personality Disorder and Chronic Persistent Adjustment Disorder with anxiety on 14/09/2020 (deemed). She claimed compensation under s 66 WCA for 17% WPI.

The respondent disputed that claim based on an opinion of Dr Vickery, that there was no permanent impairment resulting from a workplace injury on 14/09/2020.

By consent, the PIC remitted the dispute to the President for referral to a MA to assess WPI in relation to a primary psychological injury.

The President appointed Dr Blom and he issued a MAC, which diagnosed Complex PTSD/Borderline Personality and polysubstance abuse and assessed 15% WPI. However, he applied a deduction of 25% under s 323 WIMA due to pre-existing disorders in multiple levels of functioning, but he did not address para 1.32 of the Guidelines.

The plaintiff appealed against the MAC under ss 327(3)(c) and (d) WIMA. She asserted that the MA failed to make allowance for [the] effects of treatment, or did not provide adequate reasons for doing so and that he provided inconsistent reasons for his deduction under s 323 WIMA, and that the 25% deduction was excessive.

On 20/03/2023, a delegate determined that the ground under s 327(3)(d) WIMA was capable of being made out and therefore referred the appeal to a MAP.

In relation to ground 1, the MAP accepted the plaintiff's submission that the MA "*did not consider whether the [plaintiff's] impairment would increase were her treatment withdrawn, as required by the Guidelines.*" It then found: (a) that the plaintiff "*is undergoing an extensive treatment regime*"; (b) the history taken by the MA "*does reflect an improvement*" in her condition "*as a consequence of treatment*"; (c) an "*improvement per se is not sufficient to satisfy the requirements*" of cl 1.32; rather, it is necessary "*that the treatment results in 'apparent substantial or total elimination of the claimant's permanent impairment'*"; that "*the evidence does not support*" a finding that the plaintiff has "*demonstrated an elimination of her WPI that could meet the definition of 'substantial'*"; and that with "*such a significant permanent WPI still remaining despite this treatment*", there was not apparent substantial elimination of the plaintiff's permanent impairment.

Therefore, the MAP did not accept that the MA "*erred in failing to make an allowance for the effects of treatment for the reasons stated above*".

In relation to ground 2, the MAP agreed "*with the thrust*" of the plaintiff's submissions, and that the MA erred when considering the extent to which any permanent impairment was "*due*" to any pre-existing injury, condition or abnormality.

The MAP considered that the MA made a number of errors, including: (a) the medical assessor "*has focussed [sic] too heavily on the circumstances surrounding her condition in her 20's*", and any substance abuse had been in remission, and "*remained so at the time of his assessment*"; and (b) despite the plaintiff being diagnosed with ADHD, she was "*was able to obtain employment as a teacher*."

The MAP then dealt with the "*deduction*" in the following terms:

> Having carefully considered both parties' submissions, and the totality of the evidence we consider that a deduction is warranted, but we are satisfied that a one-tenth deduction is appropriate for the reasons outlined above.

The MAP "*revoked*" the MAC dated 10/01/2023 and issued a fresh MAC, which assessed 15% WPI, but it applied a deduction of 10% under s 323 WIMA, which reduced the assessment to 14% WPI. As a result, the plaintiff was not entitled to recover compensation under s 66 WCA.

The plaintiff applied for judicial review and argued that the MAP erred as follows:

> 1. It constructively failed to exercise jurisdiction when determining the extent to which her permanent impairment had been improved by treatment as required by cl 1.32 of the Guidelines; and
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> 2. It failed to give legally sufficient reasons when dealing with cl 1.32 of the Guidelines.

Chen J held that the MAP had either failed to apply or misapplied cl 1.32 of the Guidelines.

His Honour upheld ground 1 and his reasons included:

> 1. the fact that the MAP gave itself a direction in the terms recorded in its reasons at [33] does not, in and of itself, demonstrate that it correctly applied it. That is because formulaic or mere recitation of the test is neither sufficient nor decisive in determining whether the correct legal test has been applied; rather, whether the correct legal test has been applied is to be determined as a matter of substance, reading the reasons fairly and as a whole: *Chahoud* at [62].
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> 2. It is relevant to note that the MAP did not seek to define the various matters that would inform its ultimate holding on the second step: there is no reference to the decision in *Peachey*, nor any of the organising principles that guide the approach to the second step.
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> 3. To the extent that it is evident what informed the MAP in determining that the plaintiff had not satisfied the second step, it was by reference to "*WPI*". This, in my view, is apparent from the two findings the MAP made about the plaintiff's WPI: the first was that they were unpersuaded that the plaintiff "*has demonstrated an elimination of her WPI that could meet the definition of 'substantial'*"; the second was that with "*such a significant permanent WPI still remaining despite this treatment this test is not met*". Whilst it may be accepted that the degree of WPI was not irrelevant (it could be considered as part of the "*qualitative and quantitative*" assessment, as the plaintiff submitted), it was certainly not the sole consideration, nor a decisive one. To the extent that the MAP sought to introduce a definition of "*substantial*", it did not suggest that it properly considered the second step. In any event, from the structure of the MAP's reasons, this definition was anchored to "*elimination of her WPI*". That is not the correct enquiry required by cl 1.32.

His Honour noted that in *Peachey* at [56], cl 1.32 was not "*intended to be satisfied by a mere mathematical comparison of assessments of % WPI at different times*". Rather, what is required is a comparative exercise between the plaintiff's original degree of impairment before the "*effective treatment*" and the degree of impairment following that treatment: it is only by undertaking that comparison at those times can a medical assessor (or a MAP) determine whether the treatment "*results in apparent substantial… elimination*" of the permanent impairment. The MAP failed to undertake that task.

His Honour also upheld ground 2. He stated, relevantly:

> 90. Put simply, insufficiency of reasons arises where a finding is made, but the basis for the finding is not explained, which can be contrasted with a situation where it is complained that no finding has been made: *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816; [2005] HCA 57 at [129]-[130]; *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [42] ('*Wilkinson*'). An

error of this last kind is not properly one relating to reasons, "*but of a failure to address and determine a necessary issue*": in circumstances where that finding is a necessary step in support of the decision, "*the failure to make the finding may constitute an actual failure to exercise the jurisdiction conferred on the court, despite the appearance of exercise*": *Wilkinson* at [42].

90. In my view, the following matters illustrate the inadequacy of the reasons given by the Appeal Panel, as well as its failure to address and determine a necessary issue in the sense discussed above…

94. In my view, even though it may be accepted that the Appeal Panel proceeded on the basis that "effective long-term treatment" had been established, the Appeal Panel simply did not explain, and make the necessary findings about, that matter. I consider the reasons of the Appeal Panel in this respect to be legally insufficient.

By consent, His Honour made no order as to costs.

PIC - Presidential Decisions

Section 11A WCA - action taken by an employer in respect of discipline held to be reasonable action – Northern NSW Local Health Network v Heggie [2013] NSWCA 255 considered

BHK v Secretary, Department of Education [2024] NSWPICPD 10 – President Judge Phillips – 15/02/2024

The appellant commenced employment in 2020 and taught at various high schools in northern NSW.

On 8/12/2021, the appellant was informed by letter of a complaint made against him asserting various inappropriate interactions with students. Particulars of the complaint were not provided to him due to the ongoing investigation, but he was directed to maintain professional conduct with students, amongst other things, until investigations were completed. He was advised that further inappropriate conduct may result in additional action being taken against him, and that he would have an opportunity to respond once the allegations were investigated and put to him.

The appellant continued to work and in 2022, he began working at another high school campus within the same District.

Between December 2021 and March 2022, interviews took place with the stakeholders, during which further allegations of seriously improper and sexualised comments to students were made against the appellant.

Accordingly, on 4/04/2022, he was issued with a letter dated 29/03/2022, which informed him that his permission to work in any of the respondent's schools or facilities was temporarily withdrawn, and he was placed on a list of people who were not to be employed (NTBE) in any capacity.

The appellant was reminded of the directions given in the prior letter. He was informed that investigations would continue and evidence would be gathered, and that he would be given a breakdown of the allegations in due course. He was verbally informed that a timeframe could not be guaranteed, particularly as some of the children and families involved in the allegations were affected by the floods which had devasted Northern NSW at that time.

On 13/09/2022, the allegations against the appellant were particularised in a detailed letter.

The worker claimed compensation for a disease injury (deemed date: 4/04/2022) due to alleged bullying and harassment, interpersonal differences and unfair treatment by the respondent. Injury was not disputed, but the respondent relied upon s 11A WCA.

Senior Member Haddock determined the dispute and entered an award for the respondent as she found that the injury was caused by reasonable action taken by the respondent in respect of discipline.

The appellant appealed and asserted that the Senior Member erred in fact and law in making that finding, as follows:

Errors of law

1. Should the Commission disregard any events relevant to causation of injury that post-date the '*deemed*' date of injury in terms of whether the injury arises '*wholly or predominantly*' out of a disciplinary matter.

2. Should the Commission disregard any events that post-date the '*deemed*' date of injury when considering '*reasonableness*' for s 11A of that disciplinary matter.

Errors of fact

1. The Senior Member erred in finding the respondent's disciplinary action on or up to 4/04/2022 was "*reasonable*".

2. The Senior Member erred in failing to consider the causes of injury beyond the deemed date of injury.

President Judge Phillips dismissed the appeal and confirmed the COD.

In relation to the first alleged error of law, the appellant relied upon the Court of Appeal's decisions in *Heggie* and *Sinclair*, and argued that while reasonableness for s 11A purposes is to be judged at the time of the injury, the entire process needs to be examined when deciding causation. This is a wider period going beyond the deemed date of injury and the Senior Member erred by failing to consider events beyond the deemed date of injury.

The respondent argued that the appellant was bound by the manner in which the case was conducted before the Senior Member. The appellant made a number of concessions at the hearing which cannot be withdrawn and the focus at the hearing was on the period between December 2021 and 4/04/2022, with particular attention to the period from 16/02/2022 to 4/04/2022.

His Honour rejected ground (1) and held that a fair reading of the decision would lead to the conclusion that the offending section of the decision is that appearing at paras [232] – [239], where the Senior Member made specific findings in respect of what action wholly or predominantly caused the injury.

The claim, as particularised, did not rely on matters after 4/04/2022 and the Senior Member did not disregard events that post-date the injury. The findings that were made do not amount to a misapplication of either *Heggie* or *Sinclair*. The Senior Member made factual findings that were open and available on an evaluation of the evidence. The matter was pleaded and argued in a particular way and this cannot be altered on appeal.

His Honour rejected ground 2. He stated that while the facts in *Heggie* are different, they are broadly analogous to those in this matter, For the reasons set out in *Heggie*, the relevant time when reasonableness is considered is the time when the action is taken. In this case, that is 4/04/2022, when the appellant was suspended and advised that he was to be placed temporarily on the NTBE list. The Senior Member was not in error and she correctly applied this aspect of *Heggie*.

In relation to the first alleged error of fact, the appellant argued that he was not afforded procedural fairness by the respondent and that the process was not reasonable as the respondent failed to provide information regarding the progress of the investigation before 4/04/2022.

His Honour stated:

> 58. Before embarking upon a consideration of this ground, given the way the ground has been argued in the submissions, I will briefly state the well settled principles to be applied to appeals before the Commission. An appeal is pursued under s 352(5) of the 1998 Act. Under this provision error must established. As the provision states, an appeal is not a review or new hearing. The leading case on the operation of this section is *Raulston v Toll Pty Ltd*. In summary, this case requires an appellant to show that the Member was wrong.

His Honour stated that the appellant had not identified the error that the Senior Member is said to have made. Rather the appellant's submissions were of a type that would usually be made at first instance. An appeal is not a review or new hearing. The appellant did complain about delay in being provided with the details of the allegations, about being stood down, and about being reported to the Children's Guardian and being placed on the NTBE list, which was described as "*pre-emptive*".

The Senior Member's ultimate finding on these issues is at reasons [261]. He considered the weight to be given to the appellant's rights following such allegations in circumstances where the respondent's paramount duty is to the safety of children. The Senior Member ultimately found that in weighing this up, the respondent was reasonable in its action, to remove him from teaching whilst investigations continued before the allegations were particularised for his response. The appellant did not argue and did not show how the Senior Member erred in this reasoning or conclusion. The appellant had not shown why this was wrong in the *Raulston* sense.

His Honour also dismissed ground 2, and he stated, relevantly:

> 73. The submission that the Senior Member failed to consider the events said to have occurred after 4 April 2022 as causes of injury cannot be substantiated. In the passages I have extracted and referred to above, it is clear that the Senior Member examined those matters before deciding that such events were not relevant. The Senior Member did this by accepting Dr Young's opinion in the knowledge of the appellant's acceptance of that expert opinion. It is not appropriate on appeal to invite an approach contrary to that concession.
>
> 74. The appellant has failed to prove why the Senior Member was in error in terms of failing to consider events (or "*stressors*") post 4 April 2022. The Senior Member clearly considered them and rejected their relevance for the reasons set out in the decision. The allegation that they were not considered is incorrect.