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. Mandoukos v Allianz Australia Insurance Limited [2024] NSWCA 71
2. Wright v State of New South Wales [2024] NSWCA 77
3. Secretary, Department of Education v Uzunovska [2024] NSWPICPD 19
4. Hanson v Wilkie and Company Pty Ltd [2024] NSWPICPD 20
5. Edress v Giovanni Faraone (t/as Sydney Commercial Ventilation) [2024] NSWPIC 144

Court of Appeal Decisions

MAIA 2017 - Judicial review – jurisdictional error –delegate refused to refer MA's decision to a RP – primary judge found there was no jurisdictional error in MA's decision – held: the primary judge's decision did not turn on whether there was jurisdictional error in the MA's decision

Mandoukos v Allianz Australia Insurance Limited [2024] NSWCA 71 – Stern JA (Leeming & Kirk JJA agreeing) – 4/04/2024

The background to this matter was reported in Bulletin no 133, but the following summary is provided for easy reference.

On 8/01/2019, the plaintiff was involved in an MVA. He alleged that he injured his right knee and cervical spine, but his claims for compensation for those injuries were largely rejected.

On 25/11/2019, the MA issued a MAC, which contained the following key findings:

(a) that the plaintiff suffered a musculoligamentous strain of his cervical spine, as well as aggravation of pre-existing multilevel degenerative spondylosis caused by the motor accident, but that that injury was "*a minor injury*" within the terms of the MAIA; and

(b) that there was "*no objective medical evidence that he suffered any injury*" to his right knee in the motor vehicle accident, and any "*right knee symptoms [were] due to age related tricompartmental osteoarthritis … which is constitutional in origin*" and unrelated to the MVA.

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

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

On 8/09/2020, the insurer advised the plaintiff that based upon the NTS' report, which referred to an earlier MVA on 1/12/2010 that caused him significant personal injury (including right C5/6 foraminal stenosis and a small bulge at the C5/6 level), it did not consider that the "*surgery undertaken was as a result of the injuries sustained in the motor vehicle accident … but rather an aggravation of a pre-existing injury*".

The insurer also stated that the radicular symptoms did "*not meet the criteria as set out in the Motor Accident Guidelines as previously confirmed*" and that it considered the injuries to the "*cervical spine sustained in the accident to be soft tissue and therefore you have sustained a minor injury in line with*" s 1.6 of the MAIA.

The plaintiff requested an internal review, but the insurer declined to undertake it. He then applied to the PIC for a further medical assessment.

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

On/about 30/07/2021, the plaintiff lodged a second application for further medical assessment in the PIC, relying upon a report from his NTS dated 8/06/2021 as "*additional relevant information*" (so as to engage s 7.24(2) of the MAIA and cll 13(1) and (2) of the MAI Regulation 2017. He essentially argued that this report established that he had radicular pathology that resulted in surgical treatment.

On 22/11/2021, a delegate decided to refer the matter for further medical assessment, on the basis that there was additional relevant information that was capable of having a material effect on the outcome.. The delegate noted that the further assessment would involve consideration of "*all aspects of the previous assessment afresh and may include all injuries assessed by the original Assessor and any additional injuries listed on the application or reply*". The issues referred to the MA were:

(a) Whether the cervical spine injury – radiculopathy caused by the motor accident is a minor injury for the purposes of the Act; and

(b) Whether the right knee injury – chondral damage and bone oedema caused by the motor accident is a minor injury for the purposes of the Act.

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

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

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

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

Chen J dismissed the summons.

His Honour observed that the plaintiff's complaint essentially was that his "*claim*" in respect of his cervical spine injury had not been dealt with at all, as both the MA and the delegate failed to consider whether the cervical spine surgery in July 2020 constituted a "*consequential injury*". As a result, the cervical spine injury was found to be a "*minor injury*".

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

The plaintiff appealed to the Court of Appeal.

The Court (Stern JA, (Leeming and Kirk JJA agreeing)) dismissed the appeal.

As to the proper construction of "*medical dispute*", the Court held that:

> (1) A medical dispute, relevantly defined in s 7.17 as a dispute between a claimant and an insurer "*about a medical assessment matter*" is a dispute which has in fact arisen between a claimant and an insurer. This will be a question of fact depending upon the ambit of the dispute between the parties at the relevant time having regard to the competing claims made: [73], [78].

(2) The medical dispute referred for assessment under s 7.20, or referred again for assessment under s 7.24, is the actual medical dispute between the claimant and the insurer about the relevant medical assessment matter. That did not include whether the removal of bone during the foraminotomy meant that the injury to the cervical spine was not a minor injury at the time of either the first, or second, referrals for medical assessment. It was not part of the medical dispute referred for assessment on either occasion: [94].

As to the MA's decision, the Court held that under the MAIA, there was no obligation on him to consider whether the removal of bone during the foraminotomy was such that the appellant's injury could not be a soft tissue, or minor, injury. This was not included in the medical dispute referred "*again for assessment*" to the MA under s 7.24 of the MAIA. That was the medical dispute which had been initially referred for assessment under s 7.20 of the MAIA: [96]-[97].

The Court also held that it was unnecessary to decide whether the surgery could constitute an injury for the purposes of the MAIA. However, the provisional view was expressed that even if it could, in this case the removal of bone during the foraminotomy would be a "*different*" injury from the injury to the cervical spine sustained at the time of the MVA: [54], [99].

As to the Delegate's decision, the Court held that the question for the primary judge was whether, under the MAIA, it was open to the Delegate not to be "*satisfied that there [was] reasonable cause to suspect that the medical assessment was incorrect in a material respect having regard to the particulars set out in the application*", as provided in s 7.26(5). That was not a question which turned on whether there was jurisdictional error in the decision of the MA.

The Court held that the ambit of the referral to the MA was confined by the parameters of the "*medical dispute*" referred, which did not include any question as to whether part of the injury was the removal of bone during the foraminotomy. Therefore, there was no possible jurisdictional error in the delegate's conclusion under s 7.26(5): [102].

The Court ordered the appellant to pay the first respondent's costs.

Issue estoppel - medical assessment – Degree of WPI as a result of an injury – Held: the AMS exceeded his statutory jurisdiction having regard to an estoppel arising from the terms of a COD – appeal to Court of Appeal – Held: the Primary judge did not err in construing the COD

Wright v State of New South Wales [2024] NSWCA 77 – Stern JA (Gleeson & Mitchelmore JJA agreeing) – 11/04/2024

The appellant commenced employment with the respondent in August 2012. During the course of that employment, he experienced harassment, bullying and other forms of mistreatment, primarily inflicted by his supervisor. Following an incident on 5/12/2018.

The appellant ceased work due to psychiatric injury and claimed compensation. However, the respondent disputed liability and the appellant commenced PIC proceedings.

On 6/11/2020, the dispute was resolved by way of a COD – Consent Orders. Orders 1 amended the ARD to allege an aggravation and exacerbation of the appellant's psychological condition as a result of interactions at work and of his perceptions of his employment and that he was being bullied, after 5/12/2018 (Post 5 December 2018 Work-related Issues). Order 5 of the COD provided for an award for the respondent in respect that "*additional injury*". In 2022, the worker

The appellant then claimed compensation under s 66 WCA and the PIC referred the dispute to an AMS to assess the degree of WPI resulting from the injury on 5/12/2018. The AMS issued a MAC which assessed 19% WPI.

The respondent appealed against the MAC and argued that the AMS erred by including in his WPI assessment impairment that resulted from the "*additional injury*" described in the COD, regarding which the parties agreed that there should be an award for the respondent.

However, the MAP confirmed the MAC and the respondent applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Basten AJ held that the AMS exceeded his statutory jurisdiction by taking into account matters that he was required not to take into account, and that the MAP erred in failing to identify this.

The appellant sought leave to appeal to the Court of Appeal.

The Court (Stern JA (Gleeson & Mitchelmore agreeing) granted the appellant leave to appeal but dismissed the appeal.

The Court held that the matters raised in the grounds of appeal involved issues of principle as to the proper construction of consent orders which impact upon the appellant's entitlement to compensation under s 66 WCA.

Therefore, leave to appeal should be granted: *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164, considered.

The Court held that the natural meaning of the language the parties used in orders 1 and 5 of the COD is that they agreed that the appellant was not entitled to payments under the WCA in respect of the claimed aggravation and exacerbation of his psychological injury by reason of Post 5 December 2018 Work-related Issues. That construction of the orders is supported by the ambit of the dispute between the parties which was resolved by the COD.

The appellant's argument that Basten AJ erred as to the proper construction of the COD should be rejected.

It necessarily follows that the MAP erred in their construction of the COD and of the ambit of the estoppel arising therefrom.

Based on what was found to be the proper construction of the COD, it would not have been open to the AMS to find that any aggravation and exacerbation of the injury, resulting from Post 5 December 2018 Work-related Issues, was itself caused or contributed to the injury on 5/12/2018. That issue was resolved by orders 1 and 5 of the COD and the principles of causation had no further work to do. The appellant's argument that Basten AJ erred in this regard should thus be rejected.

It would have been open to the AMS to make an assessment of WPI having regard to aggravation and exacerbation of the injury on 5/12/2018, provided that he did not include in that assessment any aggravation and exacerbation that resulted from Post 5 December 2018 Work-related Issues. Had the AMS done so, there would be no demonstrable error in his decision.

There are several matters in support of the conclusion that the AMS did not exclude from consideration aggravation and exacerbation of the injury resulting from Post 5 December 2018 Work-related Issues. Therefore, as found by Basten AJ, the MAC contains a demonstrable error and it should be set aside.

In addition to the declaratory relief granted by Basten AJ, an order should be made remitting the matter to the President of the PIC, either for referral of the claim for WPI for further medical assessment under s 329 WIMA or for referral of the respondent's appeal against the decision of the MA to a differently constituted MAP under s 328 WIMA.

In either case, any further consideration of the claim should be made consistently with this Court's reasons. In the latter case, it would be incumbent upon any freshly constituted MAP to revoke the AMS' MAC and then to conduct its own assessment of WPI and reflect that assessment in a new MAC.

PIC - Presidential Decisions

Psychological injury – COVID-19 vaccine mandate – Held: injury was not wholly or predominantly caused by reasonable action taken or proposed with respect to discipline or dismissal

Secretary, Department of Education v Uzunovska [2024] NSWPICPD 19 – President Judge Phillips – 4/04/2024

On 27/08/2021, the worker received emails from the appellant regarding the requirement of school based staff to receive the vaccination, she consulted her GPs and complained of distress and anxiety around receiving the vaccination

The worker regularly consulted GP's for her mental health and gave histories of flare-ups of fear and panic attacks as a result of continuing correspondence regarding the vaccine mandate and the impact it might have on her employment. She said that in addition to the emails that made her feel pressured and gave rise to her anxiety, there were interactions with colleagues where she felt stigmatised and ostracised for her choice, including an occasion where a staff member said during a meeting "*these anti-vaxxers are keeping me at home on the couch and are the reason I can't go out and socialise*". The dates of these interactions are not specified in her statement.

Shortly before ceasing work on 13/10/2021, the worker consulted Dr Romeo, GP, and complained that she was "*panicky, feeling anxious after receiving many emails from work to get COVID-19 vaccination, felt harassed, palpitations, felt traumatized, poor sleep, early morning awakening, depressed mood, irrational fears*".

The worker claimed compensation for a psychological injury accompanied by a COC that attributed her injury to pressure at work regarding the COVID-19 vaccine.

The Principal then told her that he could not authorise a month off work, and attempted to negotiate her taking 3 weeks instead and HR advised her that this change was due to her being unvaccinated. She said that this left her feeling mistreated and degraded.

The appellant disputed the claim under ss 4 & 9A WCA and that the cause of the injury was not employment, but rather the "*actions of the NSW Government generally and personal concerns regarding the COVID-10 vaccine*".

Dr Hong, treating psychiatrist, issued a report dated 6/12/2021. He noted a history of "*increasing distress and anxiety and depressive symptoms, in the context of COVID vaccine mandate and various emails with threats of termination of employment and disciplinary action, as she is not vaccinated*". He diagnosed panic attacks and an adjustment disorder.

The worker's employment was terminated in January 2022, following disciplinary action.

On 4/04/2022, Dr Hong reported that the termination was due to "*alleged misconduct*". However, that aspect of disciplinary action and termination were not subject of either the compensation claim or the s 11A defence.

Dr Rastogi subsequently diagnosed panic adjustment disorder with anxious distress and panic attacks as a result, which required intensive treatment, to which employment was the main contributing factor.

Member Wood held that the worker suffered a psychological injury arising out of, or in the course of employment to which employment was a substantial contributing factor and that no s 11A defence was available to the appellant.

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

(a) in finding that employment was a substantial contributing factor to the injury;

(b) (i) in failing to give sufficient weight to evidence that, at the relevant time, the worker knew that she would ultimately suffer disciplinary action and dismissal.

(ii) in failing to construe the meaning of the relevant email as it would be understood by a person in the position of the worker.

(iii) in finding that the appellant had failed to meet its evidentiary burden to establish its intent to propose action in respect of discipline or dismissal.

(iv) in failing to consider that proposed action in respect of discipline or dismissal must be perceived as such by a worker against whom the action is directed.

(c) by having regard to evidence that failed to meet the standard of being rationally probative in finding:

(i) That the alleged bullying and harassment of the worker by the appellant was a substantial contributing factor to the respondent's injury; and

(ii) That the alleged bullying and harassment of the respondent by the appellant occurred at a time consistent with the alleged bullying being a substantial contributing factor to the worker's injury of 27/08/2021, when there was no evidence of the time when the alleged bullying occurred;

(iii) That the appellant had not proved that the injury was '*wholly or predominantly*' caused by action for which s11A WCA provided a defence.

President Judge Phillips dismissed the appeal and confirmed the COD.

His Honour rejected ground (a). He noted that while the appellant relied upon the decision in *Bjekic*, the transcript indicates that it was not raised during the hearing and it is not an error to fail to deal with an argument that was not put.

His Honour also noted that Wood DP dealt with issues of judicial comity in *Dawking,* namely that the Member's conclusions were findings of fact and judicial comity applies to questions of law and statutory interpretation. In any event, the appellant had not shown a failure to apply comity could constitute error of the kind required by s 352(5) WIMA.

His Honour rejected ground (b)(i). The appellant argued that a clinical note from a GP was evidence that the worker was aware of the existence of a process that could lead to her dismissal. However, it called no evidence to support its assertion as at 30/08/2021, it had initiated disciplinary action against the respondent. Rather, it invited the Member to infer this from the clinical notes.

His Honour stated that reading the emails about the vaccine mandate, it would be hard to draw any conclusion that they were disciplinary in content or tone. No issue was taken with the Member's finding that they were "supportive if not pastoral". This was a factual finding that was within the Member's ability to make at first instance. The appellant had not pointed to any salient aspect of the emails as constituting the commencement of, or a proposal to commence, disciplinary action before the email dated 5/10/2021, which suggested that disciplinary action "may" be taken.

His Honour held that the Member was right to not accept that record as evidence of the commencement of a process, or a proposed process, of disciplinary action based on the worker's highly subjective fear as recorded in the clinical notes. The appellant could have led evidence on that point but it did nt.

His Honour rejected ground (b)(ii). His Honour rejected the suggestion that disciplinary action depends on the subjective interpretation of the email by the worker. The appellant did not lead any evidence to support its proposition that as a teacher of 17 years, the worker must have been thoroughly familiar with the management speak that it used. That assertion was not supported by evidence.

His Honour rejected ground (b)(iii). The appellant argued that it does not bear the onus of proof under s 11A WCA, as that proposition has been established sin *Sinclair* and *Pirie*. As to the argument that PIC proceedings are inquisitorial in nature, his Honour stated, relevantly:

> 74. I would also note that a Member's decision is, subject to the 2020 Act or its enabling legislation, "*final and binding*", which is more suggestive of an exercise of judicial power rather than the outcome of an inquisitorial process. Findings of fact can create estoppels inter partes in workers compensation matters, and this is not a feature of inquisitorial proceedings. The way that applications are commenced and responded to is modelled on adversarial rather than inquisitorial proceedings. A recent Court of Appeal decision has noted the primacy that Parliament has given to the Commission as a fact-finder and a specialist tribunal.
>
> 75. Whilst I accept that there are some aspects of the Commission's legislative framework that have an inquisitorial colour, for example s 43(2) of the 2020 Act is classically inquisitorial, such a power is still subject to the principles of natural justice.

> 76. It appears that the essence of this aspect of the appellant's argument is that if the Commission operates an inquisitorial dispute model, then neither party bears an onus of proof. For the reasons set out above, I do not accept this submission. Employers are afforded a defence under s 11A of the 1987 Act, which absolves them from liability. The employer (appellant in this matter) must prove the constituent elements of s 11A in order to avail itself of the benefit of the defence.

In any event, this issue was not argued before the Member.

His Honour rejected ground (b)(iv). He held that this was another way of advancing the arguments in grounds (b)(i) and (b)(ii), which were both dismissed. Reading the decision as a whole, the Member was not satisfied that the appellant had proven that action with respect to discipline and/or termination had commenced in August.

His Honour rejected ground (c)(i). He stated, relevantly:

> 107. There were other pieces of evidence available to the Member to augment the respondent's statement. These formed a rational basis for the Member to find facts, even having regard to the deficiencies of the respondent's statement. As discussed in *Sutton* (above), once this material was before the Member, the weight to be ascribed to it was a matter for the Member.
>
> 108. The type of reasoning undertaken by the Member was an evaluative one and of the type discussed by Allsop J in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* where the following was said at [28]: "*in [the] process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge*." This was precisely the task that the Member undertook.

His Honour rejected ground (c)(ii). He found that he could not identify the finding that was sought to be impugned, namely the inferring of a fact that bullying occurred shortly before 27/08/2021. The ground did not identify the asserted error in a meaningful way and, in *Raulston*, it was held that intervention on appeal requires the identification of error.

His Honour also alleged ground (c)(iii). He stated, relevantly:

> 116. The problem with this ground is manifest. No error said to have been committed by the Member is articulated. Rather, the ground is an impermissible attempt to re-prosecute the merits. Intervention on appeal requires the identification and establishment of error.
>
> 117. The ground also suffers from the problem that the finding about the true nature of the email on 27 August 2021 has not been successfully challenged. It was not accepted by the Member that this email was action, or proposed action, with respect to discipline or dismissal. This finding has not been upset on appeal and to the extent that this ground relies upon the appellant's preferred characterisation of the 27 August 2021 email carrying the day, the ground must fail.

His Honour amended the COD to indicate that the correct date of injury was 13/10/2021, but he otherwise confirmed the COD.

Section 261 WIMA – compensation claim made more than 23 years after the alleged injury - whether employer paid taxi fare for worker to attend hospital after incident – whether seeking payment of taxi fare to hospital constituted giving notice of injury

Hanson v Wilkie and Company Pty Ltd [2024] NSWPICPD 20 – Acting Deputy President Parker SC – 10/04/2024

The appellant was a printer employed by the respondent. On 14/09/1998, he injured his right hand when it became caught in the printing machine.

On 11/05/2022, the appellant claimed compensation under s 66 WCA for 4% WPI. The claim was made 23 years after the injury.

The respondent disputed the claim under ss 254 and 261 WIMA, on the basis that the appellant failed to give notice of the injury and he failed to claim compensation within the prescribed time.

Senior Member Haddock found in favour of the appellant with respect to s 254 WIMA, but she found against him with respect to s 261 WIMA.

On appeal, the appellant argued that the Senior Member erred as follows:

> 1. in law because she misconstrued the provisions of s 261(3) WIMA by giving it a narrow construction, leading her into error in respect of her determination of whether the Appellant had made any claim for compensation prior to making the claim for permanent impairment sufficient to bring him within the terms of s 261(3), thus not being barred to recover compensation for the work-related injury to his right upper extremity.
>
> 2. in fact and law by failing to draw the compelling inference that '*arranged*' meant, on the balance of probabilities, '*called and paid for*' the taxi to take the Appellant to the hospital, having found that the Appellant had notified the Respondent of the work injury.
>
> 3. in fact and law by failing to find that the Appellant had '*made a claim*' within the terms of s 261(3) WIMA by informing the Respondent of the injury and requiring treatment at the hospital for which the Respondent arranged a taxi and handing in a medical certificate to his employer, and being told that he could go home and rest and that he would be paid for the day.

Acting Deputy President Parker SC dismissed the appeal.

Parker ADP rejected ground 1. He noted that the Senior Member did not articulate any particular construction for s 261(3), but rather she applied the subsection on its terms. The appellant did not offer any particular construction of s 261(3), but complained that the Senior Member construed it "*narrowly*". This was no more than a complaint that the Senior Member rejected his contention based on the taxi journey.

The appellant argued that because a taxi was "*arranged*" by the respondent to take him from the workplace to the hospital it should be inferred that it was paid for by the respondent. If that were so, then a further inference was that the appellant had made a "*claim for compensation*".

However, those inferences were not necessarily drawn and they were not the only inferences that were available. The Senior Member was not prepared to infer from the use of the word "*arranged*" by the appellant that the employer paid for the taxi. There was no error on her part.

More importantly the Senior Member expressly rejected the submission under s 261(3) because the appellant "*did not say it [Wilke] arranged and paid for the taxi*". She held that the appellant failed to persuade her because he failed to adduce sufficient evidence. The conclusion as to what inferences might be drawn from the appellant's evidence was for the Senior Member to determine.

Furthermore, the Senior Member's conclusion at [177] of the reasons to the effect that there was an absence of evidence from the appellant on this point is correct. If the appellant's proposition was that the employer had paid for the taxi ride or indeed had paid for the attendance on the Emergency Department at the hospital or in some other way satisfied a demand for compensation, then it was open to him to give evidence to that effect. He did not give that evidence.

Parker ADP concluded that the appellant's complaint is not as to the construction of s 261(3) adopted by the Senior Member, but as to the application of the subsection to the facts of the matter. No error is demonstrated.

Parker ADP rejected ground 2, for the same reasons as ground 1.

Parker ADP also rejected ground 3. He stated that the established primary facts were that the appellant was absent from work for several hours on 14/09/1998 and he was told that he should go home that that he would be paid. The Senior Member was not prepared to infer from those primary facts that a claim for compensation had been made. The statement from his supervisor simply meant that he did not lose would not lose any part of his wages.

Accordingly, Parker ADP dismissed the appeal and confirmed the COD.

PIC – Member Decisions

Workers Compensation

Claim for weekly benefits for injury as a result of exposure to caustic chemicals at work - the respondent argued that the effects of the injury had ceased and the worker has no entitlement to weekly benefits – Held: the worker's medical evidence failed to deal with pre-injury rhinitis and treatment- respondent's medical evidence was preferred - the work-injury had ceased

Edress v Giovanni Faraone (t/as Sydney Commercial Ventilation) [2024] NSWPIC 144 – Principal Member Bamber – 25/03/2024

The worker migrated to Australia in 2013 and he has been employed by the respondent as a full time cleaner since November 2021. He used caustic chemicals for cleaning such as potassium hydroxide and alleged that these chemicals released fumes that burned his skin and caused respiratory irritation.

In the ARD, the worker described the cause of injury as *"exposure to caustic chemicals over a prolonged period of time led to occupational-induced chronic rhinosinusitis which is causing upper airway cough syndrome and chronic cough*". He alleged that the deemed date of injury is 10/06/2022.

The worker claimed continuing weekly benefits from 10/09/2023 under s 37 WCA, but he later amended the commencement date to 8/08/2023. In response, the insurer issued several dispute notices.

Principal Member Bamber conducted an arbitration, at which the respondent identified the issues in dispute as being:

(1) whether or not the injury is ongoing, whether whatever that injury might be; and

(2) If there is any ongoing injury, is there any incapacity for work?

The respondent bases relied upon evidence from Professor Thomas that the worker had pre-existing allergic rhinosinusitis which may have been exacerbated by exposure to potassium hydroxide. Also that his condition is atopic which is secondary to a genetic tendency. Exposure to potassium hydroxide will cause mucosal irritation and can exacerbate any pre-existing upper airway inflammation, but that exposure has ceased and the remaining inflammation would more likely than not be associated with the atopic disease.

The worker argued that there is no evidence to support Professor Thomas's opinion of an atopic pre-disposition and that he developed the conditions when working.

However, the Principal Member noted that the records of Dr Sinha show that the worker suffered from perennial rhinitis, mild asthma and was using regular corticosteroid nasal sprays well before he started work for the respondent,. He also had been prescribed Nasonex/Dymista/promethazine, Panafcort and Phenergan tablets and a Symbicort Turbuhaler. He consulted Dr Sinha between June 2020 and 16/08/2021.

The worker argued that Professor Thomas accepts there was an injury which would come within s 4(b)(ii) WCA, whereas Dr Subramanyam says the entire cause of the conditions are due to his work and Professor Thomas has misunderstood the law. He also argued that Dr Dimitri's view is that he has occupationally induced chronic rhinosinusitis. He told Dr Dimitri that he was asymptomatic before he commenced work.

The Principal Member noted that Dr Dimitri was clearly unaware of Dr Sinha's records. She found it very significant that he had been treated for perennial rhinitis and mild asthma well before he started work for the respondent including on 16/08/2021, only 3 months before he commenced work. Dr Subramanyam also had a history that his symptoms started after working with caustic chemicals and he did not seem aware of the pre-employment medical history revealed in Dr Sinha's notes.

The respondent referred to the worker's statements, which failed to mention his previous symptoms and asserted that he first noticed his symptoms on 31/04/2022 (5 months after he commenced work). It argued that no weight can be given to Dr Dimitri's reports because he did not know about the prior history.

The respondent also noted that when the worker saw Dr Sinha in May 2022, he did not give a history of any work causes for his symptoms. Further, he did not tell Dr Assem on 31/03/2022 about his prior history.

The respondent argued that the worker had not discharged his onus of proof of establishing that his work related injury is ongoing. The Principal Member accepted that argument and held that she is unable to rely on the opinions of Dr Dimitri, Dr Subramanyam and Dr Assem as such highly relevant medical treatment in 2020 and 2021 was not considered by them.

The Principal Member found that Professor Thomas gave a carefully reasoned opinion and in his supplementary report he explains that the worker is atopic (which is secondary to a genetic tendency and he has sensitisation to common aeroallergens). The exposure to caustic chemicals will cause mucosal irritation and can exacerbate any pre-existing upper airway irritation. Dr Sinha's records support that opinion and Professor Thomas is the only doctor to consider that a pre-existing condition.

Professor Thomas concluded that the exacerbation by exposure to the potassium hydroxide and other cleaning material has ceased because the exposure has ceased and any remaining inflammation is more likely than not associated with his atopic disease.

The Principal Member preferred Professor Thomas's opinions and entered an award for the respondent.