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. Secretary, Department of Planning and Environment v Lyons [2024] NSWPICPD 25
2. Cootamundra-Gundagai Regional Council v McInerney [2024] NSWPICPD 28
3. Secretary, Department of Communities & Justice v Cannell [2024] NSWPICPD 32

PIC - Presidential Decisions

Clause 44 of the 2016 Regulation – restriction on the number of medical reports allowed into proceedings – appeal upheld but s 60 dispute redetermined in the worker's favour

Secretary, Department of Planning and Environment v Lyons [2024] NSWPICPD 25 – President Judge Phillips – 2/05/2024

The worker commenced work with the appellant as a Field Officer in 2019. He had suffered 2 prior injuries to his right shoulder: (1) in 2009, when he underwent a keyhole right shoulder stabilisation performed by Dr Harper; and (2) in April or May 2021, a fractured right scapula while playing rugby league. His arm was placed in a sling for a few weeks and he then resumed work without restriction. The accepted work injury occurred on 30/12/2021, after which he was placed on light duties. On 29/03/2022, he dislocated his right shoulder while kicking a football with his son. He also suffered a dislocation while sleeping in June 2022 and a spontaneous dislocation in September 2022. He attributed these dislocations to the 2021 work injury.

On 1/08/2022, Dr Harper recommended a right shoulder arthroscopy and open latajet stabilisation with coracoid bone transfer. However, the appellant disputed the claim based on an opinion from Dr Cairns, that the right shoulder condition was the result of the football-kicking incident and not the 2021 work injury.

The worker sought a review of the appellant's decision based on an opinion from Dr Endrey-Walder. However, the appellant maintained the dispute.

Member Wynyard conducted an arbitration.

The worker sought to rely upon late documents, including a report from Dr Soo, orthopaedic surgeon, which meant that he sought to rely upon 2 reports from orthopaedic surgeons. The appellant objected under cl 44 of the Regulation and the worker withdrew his reliance on Dr Endrey-Walder's report.

On 20/06/2023, the Member issued a COD which found for the worker and ordered the appellant to pay for the surgery under s 60 WCA.

On appeal, the appellant alleged that the Member erred:

> (1) In law by relying upon Dr Endrey-Walder's report in circumstances where the report was specifically excluded from the proceedings; and
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> (2) in law by failing to take into account the evidence of the impact of the incident on 29/03/2022 and the subsequent incident on or about 7/06/2022, given the clear radiological evidence that failed to detect any abnormality that would suggest any instability or need for surgery as a result of the incident on 30/12/2021.

President Judge Phillips allowed the appeal.

His Honour held that Dr Endrey-Walder's reports were not before the Member for consideration and that an error in the sense referred to in *Raulston* had occurred. Therefore, there was a denial of procedural fairness and the sole issue for on appeal was whether the error affected the result.

Under c; 44 of the Regulation, the worker was limited to one forensic medical report from a practitioner of the same speciality and he elected to rely on Dr Soo's opinion. As a result of the Member referring to Dr Endrey-Walder's evidence, the worker effectively had 2 forensic medical reports from orthopaedic surgeons before the PIC, which was contrary to this restriction.

His Honour held that Dr Endrey-Walder's opinion was a constituent part of the overall evidentiary basis for the Member's ultimate conclusion in favour of the worker. In short, the offending opinion has been considered, weighed and played a role in the result. He stated:

> 39. The test I am called upon to apply is whether the offending opinions of Dr Endrey-Walder could not have possibly affected the result. Far from being satisfied that the doctor's opinion could not have possibly affected the result, I am of the opinion that it was a part of the overall evidentiary basis relied on by the Member to make the orders in this matter. There has been a failure to afford the parties procedural fairness in that neither had the opportunity to be heard on Dr Endrey-Walder's opinion. Secondly the use to which the opinion was put, in concert with the opinion of Dr Soo, was directly contrary to cl 44 of the 2016 Regulation.
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> 40. As a consequence, Ground One has been established. This being the case, it is necessary that I revoke the Certificate of Determination dated 20 June 2023.

His Honour stated that it was not necessary for him to consider ground (2).

However, his Honour decided to re-determine the matter. In doing so, he held that the phrase "*as a result of*", used in s 60 of the 1987 Act, does not connote a necessity for a cause to be direct rather than indirect. The words "*as a result of*" "*indicate a causal connexion*" which gives rise to a question of fact. He found that the effects of the 30/12/2021 injury had not abated by the time of the 29/03/2022 dislocation injury.

His Honour accepted the general thrust of the appellant's submissions that the GP's notes during this period reflect a gradual lessening of symptoms, indeed the respondent had performed some welding work. However, he found that the worker was never pain free and that the GP was considering a referral to a shoulder surgeon. Therefore, he did not accept Dr Cairns' opinion that the worker had recovered from the accepted injury within a period of 8 weeks.

The appellant argued that the dislocations in March and June 2022 created new problems in the right shoulder, which resulted in the need for surgery, and that a commonsense evaluation of the causal chain was required (*Kooragang Cement Pty Ltd v Bates*). His Honour accepted that argument, but he found that at the time of the accepted injury (30/12/2021), the worker could work without restriction and that after that injury, his symptoms did not disappear. In March, June and September 2022, he suffered non-work-related dislocations to the same shoulder and Dr Cairns stated that there is doubt about the level of recovery from the accepted injury. He left open the possibility that the accepted injury created instability in the shoulder, meaning that the 2 later dislocations may have resulted from the accepted injury. This accords with Dr Harper's opinion of 1 August 2022 of "*recurrent right shoulder instability*".

For these reasons, his Honour was satisfied that the need for surgery resulted from the accepted injury. There was an unbroken record of complaints of right shoulder pain from the injury and the fact that the pain never went away supports the doctors' opinions about right shoulder instability arising from the accepted injury continuing at the time of the subsequent non-work related incidents.

Accordingly, his Honour awarded the worker compensation under s 60 WCA with respect to the cost of the proposed surgery.

Section 119 WIMA –refusal to attend an IME arranged by the insurer – s 44A WCA - suspension of weekly payments for failure to attend an IME - Part 7 of the Workers Compensation Guidelines

Cootamundra-Gundagai Regional Council v McInerney [2024] NSWPICPD 28 – Acting Deputy President Nomchong SC – 16/05/2024

The worker was employed as an Executive Assistant to the Appellant's General Manager from November 2016 until June 2022. She alleged that she suffered a psychological injury and claimed compensation (deemed date of injury: 29/05/2022) and also made a claim for a disease dated 1/06/2017.

The appellant obtained a report from Dr Hinze (NTD) and accepted provisional liability for weekly payments and s 60 expenses. It then asked the worker to attend an IME on 4 occasions, namely 18/08/2022, 19/10/2022, 18/01/2023 and during a conciliation teleconference on 18/08/2023. The worker refused all requests on the basis that liability had been declined and the appellant had not complied with Pt 7 of the Guidelines (although liability had not been disputed when the first request was made).

On 19/08/2022, the appellant disputed injury and, in the alternative, relied upon s 11A WCA and the dispute notice also required the worker to attend an IME under s 119 WIMA.

On 18/01/2023, when issuing its third request for the worker to attend an IME, the appellant expressly referred to ss 119(1) to (3) WIMA and asserted that it had complied with Pt 7 of the Guidelines. However, the worker's solicitor replied that she would not be attending the IME as there was no unavailability or inadequacy of the information from Dr Hinze.

On 10/02/2023, the appellant denied any failure to comply with the Guidelines and stated that a supplementary s 78 Notice would be issued that relied upon s 119(3) WCA and s 44A(6) WIMA.

Member Benk conducted an arbitration and on 23/11/2023, she issued a COD which found for the worker with respect to injury (deemed on 29/05/2022). She held that the worker had no current work capacity from 29/05/2022 and awarded weekly benefits under s 36 WCA from 19/05/2022 to 28/08/2022 and thereafter under s 37 WCA.

On appeal, the appellant alleged that the Member erred as follows:

> (1) In exercising her discretion on its application under s 289A(4) WIMA, by failing to take into account the following relevant considerations: (a) the worker's consent to the s 119 matter being raised; (b) the degree of difficulty or complexity to which the un-notified issues gave rise; (c) when the insurer notified that it wished to contest any un-notified issue; (d) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability; (e) any prejudice that may be occasioned to the worker; (f) the merit and substance of the issue, and (g) the circumstances in which the worker was first made award of the un-notified issue which is now sought to be raised.
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> (2) Taking into account an irrelevant consideration, namely prejudice to the respondent worker without identifying that prejudice.
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> (3) Founding the decision on an error of fact, namely the existence of prejudice to the respondent worker.

Acting Deputy President Nomchong SC granted leave to appeal.

The appellant argued that it was denied the ability to rely on both a procedural defence (the suspension of rights to compensation because of the operation of ss 119(3) and 44A(6) WCA) and a substantive defence on the merits - in particular to have an IME report which goes to the application of s 11A WCA to the worker's claim. However, the worker argued that it would be futile for the s 119(3) matter to be re-ventilated.

ADP Nomchong upheld ground (1). She held that there is an issue of principle as to whether the Member properly considered the question of leave under s 289A(4) WIMA and it was necessary and/or desirable for the decision to be reviewed for the proper and effective determination of the dispute.

The principles in *Mateus* constitute the correct test for determining an application as to whether or not it is in the interests of justice to determine an un-notified matter under s 2989A WIMA. The Member accepted that these principles applied and she expressly listed them, but in determining the issue she only made findings in relation to two of those factors. It was incumbent upon the Member to either address each of those arguments or to provide an explanation as to why she was not considering them. In the exercise of a statutory discretion, the High Court in *House v R* has determined that there will be an error of law if material considerations are not taken into account.

Accordingly, ADP Nomchong held that the Member erred in law by failing to consider the following factors: (a) the worker's consent to the s 119 matter being raised; (b) the degree of difficulty or complexity to which the un-notified issues gave rise; (c) when the insurer notified that it wished to contest any un-notified issue; (d) the degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability; (e) any prejudice that may be occasioned to the worker; (f) the merit and substance of the issue, and (g) the circumstances in which the worker was first made award of the un-notified issue which now sought to be raised.

ADP Nomchong also upheld ground (2). She found that the Member did not elucidate her reasons for resolving the issue of prejudice, in circumstances where there was a contest between the parties regarding that issue. The Member erred in law because the unidentified prejudice was an irrelevant matter in the exercise of the discretion.

ADP Nomchong also upheld ground (3).

Accordingly, ADP Nomchong set aside the Member's ex-tempore decision and she decided to make a new decision by way of substitution under s 352(6A) WIMA. In so doing, she considered each of the *Mateus* factors, as follows:

(1) The degree of difficulty or complexity to which the un-notified issues gave rise.

This issue was the subject of much correspondence and had crystallised into two issues: (1) whether or not an insurer is able to direct a worker to attend an IME if the insurer has already denied liability; and (2) whether the insurer has complied with the Guidelines in relation to the requests made to the worker to attend an IME.

ADP Nomchong held that both parties are required to comply with the Guidelines and determination of the dispute will require an assessment of whether the insurer had a proper basis to make the request and whether it provided the information required by the Guidelines. It will also require an assessment of whether the worker provided appropriate reasons for her refusals to attend the IMEs. She concluded that the issues are well-defined and do not involve any complex issues of law or fact.

(2) When the insurer notified that it wished to contest any un-notified issue.

ADP Nomchong held that the insurer first made the request on 18/08/2022 and from 8/09/2022, the worker's solicitor actively engaged in the debate about the operation of s 119(3) and the content of the Guidelines. While it is correct that the appellant did not issue the amended s 78 notice until 9/08/2023, it could not be said that the amended notice took the worker by surprise. Therefore, the worker was on notice that the appellant intended to contest the s 119 issue at least as from 9/09/2022 and this intention was re-affirmed in its correspondence in January and February 2023.

(3) The degree to which the insurer has otherwise fulfilled its statutory obligation to notify the worker of its decision disputing liability

ADP Nomchong found that there was no dispute about this criterion.

(4) Any prejudice that may be occasioned to the worker

ADP Nomchong held that there was no evidence regarding prejudice to the worker should leave be granted to ventilate the additional issues under s 119(3) WIMA and s 44A(6) WCA. However, during the appeal, the worker argued that prejudice manifests in the delay in having the substantive matter heard and the risk of having the proceedings struck out. The appellant argued that there is no prejudice and if there was, it could have been cured by the worker attending an IME.

ADP Nomchong stated, relevantly:

> 223. am satisfied that there is a degree of prejudice to the respondent worker because leave, if granted, will result in both delay of the substantive matter being determined and a risk that her right to compensation and weekly payments will be suspended.
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> 224. However, there is also prejudice to the appellant in that the refusal of the respondent worker to attend an IME has meant that it has been unable to obtain a medical report which may support its defence under s 11A(1) of the 1987 Act.
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> 225. As such, I find that the prejudice is balanced as between the parties.

(5) Any other relevant matters arising from the particular circumstances of the case

ADP Nomchong noted that the worker expressly consented to leave being granted to agitate the un-notified issues and it was not until 11/10/2023 that her counsel objected to leave for the first time. The initial consent from the worker is relevant and militates in favour of a grant of leave.

(6) That the decision to dispute a claim for compensation should not be made lightly or without proper and careful consideration of the factual and legal issues involved

ADP Nomchong was satisfied that the decision to notify the dispute was not made lightly or without proper consideration.

(7) Whether the insurer acted promptly to bring the matter to the attention of the Commission and all other parties

ADP Nomchong was satisfied that this matter was brought to the worker's attention as early as September 2022, but that the appellant first notified the PIC that this was an issue in dispute when it filed its amended s 78 notice on 9/08/2023. This was not promptly brought to the PIC's attention.

(8) Whether there is any unreasonable or unexplained delay in giving notice of the un-notified matter

Nomchong ADP held that there was an unexplained delay in giving formal notification of the dispute in relation to the application of the ss 119(3) and 44A(6) issues.

(9) The merit and substance of the issue that is sought to be raised

ADP Nomchong stated that she must be satisfied that the argument has merit and substance and that it is not fanciful or remote. She held that there is a genuine dispute to be determined as to whether the appellant's insurer validly requested the worker to attend an IME in conformity with s 119 WIMA. She found that there was substance to the dispute and that there is merit in determining the issues. There were clearly arguments on both sides as to whether there has been a valid request and it needs to be determined so that the substantive rights of both parties are dealt with.

(10) Equity, good conscience and the substantial merits of the case

Nomchong ADP held that whilst she appreciates the difficulties that this poses for the worker, particularly in circumstances where there is medical evidence as to the nature of her psychological injuries, equity and good conscience and the substantial merits of the overall dispute favour that leave be granted to determine these issues.

(11) The general conduct of the parties in the proceedings

ADP Nomchong noted that both sides engaged in a robust debate in favour of their respective clients, but there was no basis for finding that the conduct of either party was such that it should warrant a penalty against them in relation to the leave application.

Accordingly, ADP Nomchong found that it was in the interests of justice for the PIC to determine the issues under s 119(3) WIMA and s 44A(6) WCA and she remitted the matter to a different Member to determine those issues.

Appeal from reconsideration application under former ss 350 & 378 WIMA – s 66(1A) WCA – prior assessment of 12% WPI – subsequent total knee replacement – s 327(7) WIMA – worker sought to have COD rescinded so an appeal or reconsideration could be made – worker also sought a WPI assessment for the purposes of s 39 WCA - series of 'trial and error' attempts to have the WPI assessment reviewed or reconsidered – whether reconsideration application made and determined

Secretary, Department of Communities & Justice v Cannell [2024] NSWPICPD 32 – Acting Deputy President Nomchong SC – 31/05/2024

The worker injured her right lower leg during an incident at work on 3/10/2013. Since then, she received treatment, predominantly to her right knee. The appellant accepted liability.

The first claim

On 9/11/2017, the worker made a claim for 17% WPI under ss 66 & 67 WPA based on the report of Dr Bodel dated 1/11/2017, on the basis that she had positive signs of persisting complex regional pain syndrome (CRPS). Dr Bodel assessed 8% WPI for that condition. The appellant disputed the claim.

The amended claim

On 18/01/2018, the worker made an amended claim in the following terms: (1) 36% WPI under s 66 WCA for 36% WPI (CRPS Type 1 of the right lower limb)", based on a report from Dr Tame, pain management physician, dated 12/12/2017. He stated that he based his diagnosis on Dr Bodel's report. The appellant denied liability.

First WCC proceedings

The worker filed an ARD, which alleged an injury to the right knee, foot and ankle on 3/10/2013 and claimed compensation for 36% WPI. The appellant filed a Reply.

The WCC referred the matter to Dr Lewington, for assessment of WPI. However, following a teleconference, the WCC issued a COD – Consent Orders, as follows:

> (1) On the applicant's [respondent worker's] application the matter is discontinued and I dispense with the necessity for the [respondent worker] to lodge a notice of discontinuance.
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> (2) I direct that the appointment with the AMS for 23 April 2018 be cancelled."

Second claim

On 23/05/2018, the worker filed a fresh ARD, which was almost identical to the first ARD, although it identified that the s 66 claim was for "*CRPS Type 1 of the right lower extremity*." The date and nature of the injury was the same. The worker relied on Dr Tame's report and various clinical notes and reports from treating doctors and medical personnel. Dr Tame's report solely addressed CRPS.

The appellant filed a Reply and maintained the concerns it had with the worker being referred to an AMS in Matter No. 1436/18.[16]

The dispute was referred to Dr Lewington and a MAC dated 16/08/2018 assessed 15% WPI.

Appeals against the MAC

Both parties appealed against the MAC. The worker relied on ss 327(3)(a)–(d) WIMA, while the appellant relied on ss 327(3)(c) & (d) WIMA..

On 12/10/2018, Delegate McAdam issued a '*gatekeeper*' decision in which the worker's appeal was rejected on the basis that none of the grounds of appeal were capable of being made out.

The appellant's appeal was referred back to the AMS for reconsideration and on 2/11/2018, Dr Lewington issued an amended MAC which assessed 12% WPI.

Appeal against the amended MAC

The worker appealed against the Amended MAC and alleged that her condition had deteriorated and that there was fresh evidence available: ss 327(3)(a) & (b) WIMA. The appellant opposed the appeal.

On 25/01/2019 Delegate McGrowdie issued a '*gatekeeper*' decision and allowed the worker's appeal to proceed to a MAP.

On 27/02/2019, the MAP confirmed the Amended MAC and found no evidence of deterioration.

COD issued

The WCC issued a COD on 4/04/2019, which determined that the worker had suffered 12% WPI in respect of the injury to her right lower extremity, and awarded compensation under s 66 WCA.

First application for reconsideration

On 16/05/2019, the worker filed an application for reconsideration of the MAP's decision under ss 325(3); 327(6); 329(1)(a) and/or 350(3) WIMA (as those provisions then stood). The appellant opposed the application.

On 11/07/2019, Ms Annette Farrell (Director, Operations – WCC) sent an email to the parties stating that the request for reconsideration was declined because the COD dated 4/04/2019 had resolved the dispute and the matter could not be referred back to the MAP under s 378 WIMA. The worker took no further action in relation to that decision.

Further claim under s 66 WCA

On 15/12/2020, the worker made a further claim for 37% WPI in respect of the same injury to the right lower extremity arising from the accident on 3/10/2013, based on a diagnosis of CRPS and an opinion from Dr Walden dated 1/09/2020.

The appellant disputed that claim on the basis that only one COD could be issued for permanent impairment pursuant to s 66(1A) WCA by operation of s 322A WIMA.

On 16/03/2021, the worker sought a review pursuant to s 287A WIMA in respect of that decision.

On 29/03/2021, the appellant's insurer denied the request for review on the basis that s 66(1A) WCA prevented the worker from pursuing any further claim for lump sum compensation in respect of the injury on 3/10/2013. It also stated that ss 322A and 350 of the 1998 Act prevented the worker from being assessed again in relation to the degree of WPI.

No further action was taken by the respondent worker at that time.

Application for assessment by Medical Assessor

On 18/06/2021, the worker filed an application (Form 7) for an assessment by a medical assessor in the PIC, which sought a further assessment of WPI to determine whether she had more than 20% WPI for the purposes of s 39 WCA.

The appellant responded to that application and on 19/07/2021, the worker discontinued it.

Request for a threshold assessment

On 13/08/2021, the worker wrote to the appellant seeking a further assessment to determine whether she satisfied s 39 WCA and the WIDs threshold and she relied on Dr Walden's report.

The appellant disputed that application and the worker did not further pursue it.

Second application for reconsideration

On 6/09/2021, the worker filed an application for reconsideration of the Amended MAC and the COD dated 4/04/2019, based upon submissions, a large volume of medical reports including Dr Walden's report and a statement from the worker dated 28/05/2021.

The appellant opposed the application and filed detailed submissions dated 27/09/2021.

The worker discontinued this application at a conciliation/arbitration on 25/07/2022 before Member Wright.

On 27/01/2022, Member Wright issued a COD making orders that the application was discontinued.

Request to appellant to concede that the threshold for high needs worker was exceeded

On 15/06/2022, the worker sought agreement from the appellant that the high needs worker threshold had been exceeded. The appellant disputed this.

Further miscellaneous application

On 8/07/2022, the worker filed an application to determine whether she was entitled to a further assessment by a medical assessor. However, that application was dismissed by Member Wright at the preliminary conference on 9/08/2022.

Further request for reconsideration

On 23/08/2022, the worker wrote a letter to the PIC in respect of the Second Claim proceedings, which sought a reconsideration of the COD dated 4/04/2019 "*and any previous Certificates of Determination that may prevent the [respondent] worker from filing an Appeal Against the Medical Assessment Certificate of Dr Lewington*".

The appellant opposed this application and the matter was listed for a conciliation/arbitration hearing on 15/11/2022 before Member Inglis, after which a direction was made for additional written submissions. However, Member Inglis was unable to complete the matter and it was transferred to Senior Member Beilby.

On 9/05/2023, ***Senior Member Beilby issued a COD and Statement of Reasons***, which set aside the COD "*dated 25 January 2017*". The date was a typographical error and it was corrected on 24/07/to refer to the COD dated 4/04/2019.

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

(1) In exercising the discretion to set aside the COD;

(2) At law in her application of Sch 1, cl 14D of the *Personal Injury Commission Act 2020* (the PIC Act) and subsequently committed jurisdictional error by exercising a discretion under s 350(3) WIMA;

(3) At law in finding that this matter amounted to a '*threshold dispute*' that was distinct from a claim for lump sum compensation, and that the MAC dated 2/11/2018 could be appealed to determine a threshold dispute; and

(4) At law in failing to address its argument relating to the impermissibility of a second appeal of the MAC dated 2/11/2018.

Acting Deputy President Nomchong SC allowed the appeal.

ADP Nomchong upheld all grounds of the appeal for reasons that are summarised below.

In relation to ground (2), both parties accepted that for the PIC to entertain the reconsideration application, the Senior Member had to be satisfied that the application fell within the savings and transitional provisions in Div 4A, Pt 2 of Sch 1 of the PIC Act.

The Senior Member held that the power to reconsider (and rescind, alter or amend) the COD dated 4/04/2019 was found in the former s 350(3) WIMA. She then characterised the current application as one seeking an order to rescind the COD dated 4/04/2019 pursuant to s 350(3) WIMA Act so that an appeal against the MAC could be filed pursuant to s 327 WIMA. However, the Senior Member did not identify that the worker had altered her application in October 2022 to one seeking to have the Amended MAC reconsidered under the former s 378 WIMA. Accordingly, she only dealt with the application as one under s 350(3) WIMA.

Accordingly, the first question addressed by the Senior Member was whether the worker had exercised her right to have the COD reconsidered under the former s 350(3) WIMA prior to making the current application? She commenced her consideration by identifying what she titled "*Prior Proceedings*". However, her recitation was inaccurate and incomplete and it was confined to the 2019 Reconsideration Application.

ADP Nomchong held that the Senior Member turned her mind to the wrong question when she characterised the '*unexercised right*' in Sch 1, cl 14D of the PIC Act, as the MAP's decision was made

because the worker appealed against the Amended MAC based on s 327(3)(a) and (b) WIMA, and the MAP rejected the appeal and confirmed the Amended MAC.

When the 2019 reconsideration application was made (16 May 2019), the WCC had already issued the COD dated 4/04/2019, after which the worker had only one legal entitlement to have the Amended MAC dated 27/11/2018 set aside, and that was to make an application to reconsider the COD under the former s 350(3) WIMA.

ADP Nomchong held that the Senior Member erred in law in construing the "*unexercised right*" in the context of this matter. She misdirected herself when she stipulated that the test for whether or not the worker had an "*unexercised right*" was dependent on the nature of her condition at the time of the current application and held that because the current condition had not been assessed, her rights had not been exercised.

The Senior Member's construction of the savings and transitional provisions, that the worker had not exercised her right '*to be reassessed after surgery*' was erroneous, as the current application was not an application for assessment of her current condition or for an assessment of her condition subsequent to her TKR surgery, but was one that sought a reconsideration of the COD dated 4/04/2019 "*and any previous Certificates of Determination that may prevent the [respondent] worker from filing an Appeal Against the Medical Assessment Certificate of Dr Lewington*".

Therefore, the Senior Member was required to direct her decision-making to whether the worker had exercised her right to seek a reconsideration of that COD before making this application.

ADP Nomchong held that the worker amended her application in her submissions dated 24/10/2022, to seek that the MAC (presumably but not expressly the Amended MAC) and the COD dated 4/04/2019 be revoked, on the grounds that her WPI had not reached MMI pursuant to the former s 378 WIMA, and an alternative application that the appeal be remitted to the President, for referral to a medical assessor appointed to reassess her WPI, again under the former s 378 WIMA. However, the Senior Member did not engage with those amendments.

The PIC only has power to determine the current application if the criteria in Sch 1, cl 14D of the PIC Act are satisfied.

The appellant alleged jurisdictional error by the Senior Member and ADP Nomchong stated, relevantly:

> 245. In my view, the Senior Member failed to properly determine the jurisdictional fact as to whether the respondent worker was pursuing an unexercised right within the meaning of Sch 1, cl 14D of the 2020 Act. That jurisdictional fact was whether the respondent worker had, prior to the Current Reconsideration Application, exercised her right to make an application for reconsideration of the COD dated 4 April 2019 under s 350(3) of the 1998 Act, for the purposes of appealing against the Amended MAC, in order to have an increased WPI made in its place. The failure of the Senior Member to ask herself the correct question rendered her determination of the jurisdictional fact erroneous.

Accordingly, ADP Nomchong found that the Senior Member engaged in jurisdictional error, or if I am wrong on that, that she engaged in an error of law within jurisdiction.

In relation to ground (3), ADP Nomchong found that the Senior Member erred in law, as the amended MAC which resolved the medical dispute for the purposes of the claim that was in dispute (being the claim for under s 66 WCA), cannot be appealed for a different purpose than that which underscored the medical dispute, such as a threshold issue. She also stated, relevantly:

> 260. Further, if it needs to be said, the decision in *Cram Fluid* (as applied in *Robin-True*) applies so that s 66(1A) prevents any further claim for lump sum compensation. It is also my view, but this is not central to my decision-making, that the decision in *Galea* ought be restricted to matters where the underpinning '*dispute*' incorporates claims for WPI assessment for both lump sum compensation and threshold issues such as those for WID and/or applications under s 39 of the 1987 Act.

In relation to ground (4), ADP Nomchong stated, relevantly:

> 263. The Amended MAC was made on 2 November 2018. The respondent worker lodged an appeal against that Amended MAC on 27 November 2018 on the basis that there had been a deterioration of her condition and that fresh evidence was available. The respondent worker relied on ss 327(3)(a) and (b) of the 1998 Act. On 27 February 2019, the MAP dismissed the respondent worker's appeal and confirmed the Amended MAC.
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> 264. The appellant's arguments before the Senior Member in this matter included a submission that the respondent worker is estopped from pursuing a second appeal on the same grounds. The appellant argued that if there was no estoppel, it could lead to an unlimited number of appeals against an MAC. Both res judicata and issue estoppel were put forward, on alternate bases, by the appellant.
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> 265. The Senior Member held that there was "*no estoppel in a changing situation*" and cited the decision in *Abou-Haidar* at [66]. The Senior Member then proceeded to make a finding that there had been a significant change in the WPI.
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> 266. Further it is not clear whether that statement was made in support of the Senior Member's view about estoppel not being available in a changing situation or whether it was in support of her view that the respondent worker has a strong case for showing "*a deterioration in her assessment of permanent impairment*."
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> 267. I am of the view that it was erroneous of the Senior Member to make the finding about a significant change in the respondent worker's WPI because that is the very factual finding that has not yet been determined by any MAC or by the Commission. That finding was not open to the Senior Member to make and it is set aside.
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> 268. Further, I find that the Senior Member did not engage with the appellant's argument about whether multiple appeals against the Amended MAC were permissible, or the merits of the appellant's arguments about the application of res judicata or issue estoppel.
>
> 269. The appellant argues that the Senior Member erred in law by failing to properly engage with its arguments in relation to estoppel…
>
> 271. In the recent decision of the NSW Court of Appeal, in *Fisher v Nonconformist Pty Ltd*, the Court looked at whether the Commission was required to give reasons and the nature of the test for adequacy of reasons:
>
> > "There is no general common law duty on executive decision-makers to give reasons for their decisions: *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 at 662; *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; (2013) 252 CLR 480 at [43]. The position is different for judges, for whom the requirement to give reasons is a normal, though not universal, incident of the judicial process: see *Osmond* at 666–667. Not infrequently, however, some statutory duty is imposed on executive decision-makers.
> >
> > Such a duty is found in s 294 of the [1998] Act…
>
> 272. The Court of Appeal held that the standard was summarised in *Ming v Director of Public Prosecutions (NSW)* as follows:
>
> > What can be seen is that the judicial duty to give reasons does not extend to referring to every argument or piece of evidence. Relevantly for current purposes, what is required is that the judge expose the reasons for resolving a point critical to the contest between the parties, do justice to the issues posed by the parties' cases, refer to evidence that is important or critical to the proper determination of the matter, and generally explain any conclusion on a significant factual or evidential dispute that is a necessary step to the final decision.

> 273. I find that the Senior Member did not elucidate her reasons for resolving the argument put to her by the appellant as to whether or not multiple appeals were available or whether res judicata or issue estoppel arose and that this failure occurred in circumstances where there was a contest between the parties on that issue.
>
> 274. In my view, the argument on estoppel was a '*substantial' argument*'. The submissions of the appellant also disclose that it was a *'clearly articulated argument*'.
>
> 275. It is well settled that a decision-maker must address substantial, clearly articulated claims and that a failure to consider and engage with such claims may constitute jurisdictional error.
>
> 276. Whilst it is not necessary for a decision-maker to address each and every submission in detail, it is necessary for the decision-maker to engage with and make decisions about substantive arguments that are raised in the proceedings, providing reasons for either accepting or rejecting those submissions.

ADP Nomchong found that the Senior Member erred in law in failing to engage with this argument and to provide reasons. Accordingly, she revoked the COD dated 24/07/2023 and decided to make a new decision by way of substitution, as it was in the interests of the administration of justice to do so.

As the substance of the current application is reconsideration of the COD dated 4/04/2019, in order to get to an application under s 378 WIMA, she proceeded determined the issue of jurisdiction on the basis of the power available under the former s 350(2) WIMA. This requires that she is satisfied that the provisions of Div 4A, Pt 2 of Sch 1 of the PIC Act are met, which means that the worker had an '*unexercised right to commence these proceedings*' under s 350(3) WIMA (being the functions that could have been exercised by the WCC: see cl 14D(2) of Div 4A, Pt 2 of Sch 1 of the PIC Act).

Section 350(3) WIMA provided a power to the WCC to reconsider any decision that has been dealt with by the WCC and rescind, alter or amend any such decision. Section 350(3) WIMA was repealed on 1/03/2021 and the right to commence proceedings under s 350(3) WIMA Act was available to be exercised immediately before the establishment day. Such an application was permitted under the WIMA to be dealt with by the WCC or a member of the WCC. Accordingly, the requirement that "*pre-establishment proceedings*" were available has also been met.

Therefore, the issue for determination is whether the worker had, prior to the current application, exercised her right to make an application for reconsideration of the COD dated 4/04/2019 under s 350(3) WIMA, for the purposes of appealing against the Amended MAC, in order to have an increased WPI made in its place.

The 2019 reconsideration application stipulated that it was being made pursuant to ss 325(3), 327(6), 329(1)(a) and/or 350(3) WIMA (as those provisions then stood). It stated that it relied on the report of Dr Osborne dated 1/04/2019, which opined that the respondent worker required a right TKR.

The WCC refused that application and the worker made no complaint about that decision at the time. Rather, she worker accepted the decision and took no further steps to agitate her claim for a higher WPI assessment until about 17 months later.

ADP Nomchong found that in the 2019 application, the worker sought reconsideration of the Amended MAC and **not the COD** dated 4/04/2019, and she therefore had an unexercised right to apply for a reconsideration of the COD.

In any event, the decision made by Ms Farrell on 11/07/2019 was not a decision of the WCC as:

> 339. Firstly, although Ms Farrell's email dismissed the 2019 Reconsideration Application and was therefore a decision affecting the respondent worker's rights, I find, on the balance of probabilities, that the decision was not an exercise of delegated power from the Registrar or the WCC. I note the appellant in its submissions dated 11 November 2022 contended that the decision could only have been made exercising delegated power from the Registrar but I do not agree with that submission.

340. Whilst the content of the email made it clear that Ms Farrell was determining the 2019 Reconsideration Application and that she had taken into account the respondent worker's application as well as the appellant's submissions, Ms Farrell conveyed the decision using the signature block of her role as Director, Operations of the WCC. It was open and available to Ms Farrell to have considered that application in her role as an arbitrator (as she had done when she issued the COD dated 4 April 2019) or to have referred the application for consideration to another arbitrator of the WCC but she did not. Further, if the decision had been an exercise of delegated power from the Registrar, that was not evident on the face of the email from Ms Farrell. It cannot be assumed to be so.

341. Secondly, the purported decision was itself attended by an error of law in that Ms Farrell failed to treat the application as the commencement of an application in proceedings and failed to engage at all with the arguments put forward by the respondent worker or the statutory provisions on which the 2019 Reconsideration Application were based. Similarly, Ms Farrell did not engage with the appellant's submissions dated 5 June 2019.

342. I have referred to the recent decision of the NSW Court of Appeal in Fisher and set out the salient findings in paragraph [271] above.

343. As at 11 July 2019, s 294 of the 1998 Act was in the same form. Rule 15.6 of the Workers Compensation Commission Rules 2011 was in substantially the same form as r 78 of the Personal Injury Commission Rules 2021. Accordingly, I find that there was a duty on Ms Farrell to give reasons as to why the provisions relied on by the respondent worker to support her application were rejected.

344. Thirdly, and significantly, there was a failure to accord procedural fairness to the respondent worker and to the appellant. Ms Farrell did not advise the parties that she intended to determine the matter solely on the basis of s 378 of the 1998 Act and she did not give the parties an opportunity to make submissions on that issue.

345. This is particularly egregious when neither party had raised s 378…

346. Accordingly, I find that even if the 2019 Reconsideration Application could be considered to have encapsulated an application to reconsider the COD dated 4 April 2019, the right to make such an application had not been 'exercised' because of the failure of Ms Farrell in determining that application in accordance with the statutory role of the WCC.

ADP Nomchong held that the 2021 reconsideration application was in identical terms to the current application. She stated, relevantly:

535. As I have indicated, on 24 October 2022, the respondent worker changed the grounds of her application in the proceedings and asserted that the application was now for a reconsideration under s 378 of the 1998 Act, relying on the principles in Sleiman, and sought an order under that section for the MAC and COD to be revoked and that the matter be remitted to the President for remittal to a medical assessor. Putting aside the fact that s 378 is not available to revoke a COD, the application encapsulated a reconsideration of the MAC under s 378. Accordingly, I find that, for abundant caution, I should also determine whether or not the respondent worker had exercised a right to commence proceedings under s 378 of the 1998 Act to seek a reconsideration of the Amended MAC, prior to commencing these proceedings.

354. As set out above, no part of the 2019 Reconsideration Application referred to s 378 and yet, that was the basis on which it was declined by Ms Farrell. As I have said, the 'decision' of Ms Farrell, even if it could be seen to be an exercise of delegated power from the Registrar, accorded no procedural fairness to the parties in relation to her decision based on s 378 and as such was vitiated by jurisdictional error or an error of law. It was 'no decision at all'. For the reasons that I have expressed in paragraph [347] above, I find that the respondent worker had an unexercised right to commence proceedings for a reconsideration of the Amended MAC under s 378 of the 1998 Act.

Accordingly, she concluded that she has jurisdiction to determine the current application.

As an application for reconsideration is discretionary, it was necessary to determine whether the discretion under s 350(3) WIMA should be exercised so as to allow reconsideration of the COD. In *Samuel* ADP Roche (as he then was) discussed the matters to be taken into account in an application for reconsideration under s 350(3):

> (1) the section gives the Commission a wide discretion to reconsider its previous decisions:
>
> (2) while the word "*decision*" is not defined in s 350, it is defined for the purposes of s 352 to include "an award, order, determination, ruling and direction". In Roche ADP's view, "*decision*" in s 350(3) included, but was not necessarily limited to, any award, order or determination of the Commission;
>
> (3) while the discretion is a wide one, it must be exercised fairly, with due regard to relevant considerations, including the reason for and extent of any delay in bringing the applicant for reconsideration;
>
> (4) one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;
>
> (5) reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained during the first proceedings is later obtained and that new evidence, if it had been put before an arbitrator in the first hearing, would have been likely to lead to a different result;
>
> (6) given the broad power of "*review*" in s 352 (which was not universally available in the Compensation Court of New South Wales) the reconsideration provision in s 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by arbitrators;
>
> (7) depending on the facts of the particular case the principles enunciated by the High Court in Anshun may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;
>
> (8) a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration, and
>
> (9) the Commission has a duty to do justice between the parties according to the substantial merits of the case.
>
> The principles in *Samuel* were approved in *RailCorp NSW v Registrar of the WCC of NSW*, *Ljubisavljevic v Workers Compensation Commission of New South Wales*, *Ali Ali v Rockdale City Council* and *Martinovic v Workers Compensation Commission of New South Wales*. In *RailCorp* Harrison AsJ held:
>
> > It is my view that the discretion of the Court, when it conducts a reconsideration, is wide ranging. Overall, the task of the Court is to balance the policy requirement of finality of litigation with the obligation to rectify any clear cut injustice. One of the circumstances where a reconsideration can take place is where there is fresh evidence (as opposed to more evidence).

Accordingly, ADP Nomchong held that these are the appropriate principles to apply when considering the exercise of the discretion under s 350(3) WIMA and in applying them, it is necessary to look at the whole of the proceedings.

ADP Nomchong concluded that her consideration of the Samuel factors weighed against the exercise of the discretion under s 350(3) WIMA and she dismissed the current application.