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. Coca-Cola Europacific Partners API Pty Ltd v Pombinho [2024] NSWCA 191
2. Sawaneh v Flintwood Disability Services Ltd [2024] NSWCA 178
3. Middleton v Hyett t/as Phoenix Rising Cafe [2024] NSWSC 1201
4. Quintiliani-Johns v Secretary, Department of Education [2024] NSWSC 1200
5. Davoudi v Douglass Hanly Moir Pathology Pty Limited [2024] NSWPICPD 41
6. Ryan v Alto Pennant Hills Pty Ltd [2024] NSWPIC 352

Court of Appeal Decisions

Judicial review –jurisdictional error and error of law on the face of the record – Failure of medical assessor to assess relevant material and make deduction based on previous injury – Whether MAP exceeded the scope of the grounds of appeal – Whether an assessment de novo is within the grounds of appeal

Coca-Cola Europacific Partners API Pty Ltd v Pombinho [2024] NSWCA 191 – Ward P, White & Stern JJA – 1/08/2024

The worker claimed lump sum compensation under s 66 WCA for a psychological injuries allegedly suffered at work between 11/12/2017 and 30/11/2020.

The President of the PIC referred the worker to a MA, and on 26/10/2022, the MA issued a MAC and assessed 24% WPI, but made no deduction under s 323 WIMA.

The appellant appeal against the MAC and alleged that it was made on the basis of incorrect criteria, and contained a demonstrable error, as follows:

(1) The MA failed to consider the notation in the consent orders (that the medical assessor was to make such deduction as was appropriate in respect of a secondary psychological injury);

(2) the MA failed to consider the material annexed to the Form 10, which included reports by Dr Bisht and Dr Akkerman, and clinical records and notes from the NTD;

(3) the MA failed to consider the impact of the worker's physical injuries, including any medication he may be taking, as well as the impact of COVID-19 on the PIRS; and

(4) no deduction was made under to s 323 WIMA, despite evidence that the worker was suffering from a pre-existing psychological injury when he suffered the injuries in question.

The parties accepted that these submissions defined the ambit of the appeal to the MAP.

The MAP upheld the appeal and decided to conduct its own medical examination in order to re-assess the PIRS categories.

Dr Glozier then assessed 7% WPI, which he reduced by 10% under s 323 WIMA, and the MAP adopted his assessment.

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

The primary judge held that in embarking upon a reassessment of the WPI, the MAP did not limit its review "*to the grounds of appeal on which the appeal was made*". It therefore exceeded its jurisdiction under s 328(2) WIMA and he quashed the MAP's decision by reason of jurisdictional error.

On appeal, the only issue in dispute was the Judge's finding that the MAP had exceeded its jurisdiction by not limiting itself to the grounds of appeal before it. This turned on whether the MAP's finding that the MA did not consider the material referred to in Ground (2) permitted it to review the original assessment for the purpose of determining what deduction, if any, should be made under s 323 WIMA.

The Court (Ward P, White and Stern JJA agreeing) allowed the appeal and set aside the order quashing the MAP's decision. The Headnote indicates:

- To the extent that Ground (2) alleged a failure to consider all the material submitted by the appellant, it followed that the MAP was required to take into consideration all that material; this material being relevant to all of the PIRS categories that were to be taken into consideration in relation to the assessment of WPI: [84]-[85] (Ward P); [90] (White JA); [91] (Stern JA).
- In any event, Ground (4), on its own was sufficient to bring the assessment of WPI within the scope of the grounds of appeal, and hence within the jurisdiction of the MAP. In order to determine the impact of pre-existing injury on current WPI, a comparative exercise was necessary, and it would be logically incoherent simply to begin the exercise from the fixed starting point as set by the original MA, and then separately consider the extent to which pre-existing injury contributed to that WPI. It would be artificial if, having been required to consider all of the material that the medical assessor failed to consider, the MAP could not then revisit the starting point of the assessment: [86] (Ward P); [90] (White JA); [91] (Stern JA).

Judicial review - decision of MAP - where MAP revoked MA's MAC - whether primary judge erred in finding no jurisdictional error in MAP's decision - whether primary judge erred in finding no denial of procedural fairness MAP's decision - deduction for previous injury under s 323 WIMA -where ma did not refer to evidence of previous injury - powers of MAP to revoke and issue new certificate of assessment

Sawaneh v Flintwood Disability Services Ltd [2024] NSWCA 178

On 10/04/2020, the appellant injured her left knee and lumbar spine at work. She claimed compensation under s 66 WCA and the dispute was referred to a MA.

In February 2022, the MA issued a MAC that assessed 16% WPI, which included 11% for the lumbar spine WPI (12% less 1/10 under s 323 WIMA).

The respondent appealed against the MAC and argued that the assumption in s 323 WIMA was displaced and a greater deduction should be applied, based on imaging that pre-dated the 2020 injury and the NTD's clinical notes, which disclosed a history of significant prior back problems.

The Map allowed the appeal, revoked the MAC and issued a fresh MAC which applied a 50% deductible under s 323 WIMA.

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

Walton J dismissed the summons.

The appellant then sought leave to appeal on the grounds that the primary judge erred:

(1) in failing to find that the MAP did not meaningfully engage with her submissions (jurisdictional error or constructive failure to exercise jurisdiction);

(2) in failing to find that the MAP provided inadequate reasons such that she was denied procedural fairness; and

(3) in failing to find that the Appeal Panel committed jurisdictional error by forming an opinion as to WPI based on "*two unreferred injuries*".

The Court of Appeal (Adamson JA, Leeming JA and Price AJA agreeing, with additional observations of Leeming JA) granted leave to appeal, but dismissed the appeal and held:

Ground 1: alleged jurisdictional error by not meaningfully engaging with the applicant's submissions

(1) The MAP's reasons addressed the appellant's submission that the statutory assumption was not at odds with the evidence. Its reasons were adequate to explain its preference for a reduction of 50% over the 10% statutory assumption, noting that the Medical Assessor had not referred to the additional medical evidence: at [42], [44] (Adamson JA).

Campbelltown City Council v Vegan (2006) 67 NSWLR 372; [2006] NSWCA 284, cited.

(2) Having regard to its function, it was not necessary for the Appeal Panel to set out the applicant's submissions in terms since it sufficiently addressed the substance of those submissions: at [44] (Adamson JA).

Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480; [2013] HCA 43, applied.

Ground 2: alleged denial of procedural fairness resulting from inadequate reasons

(3) The Appeal Panel's reasons set out the actual path of reasoning by which it arrived at its opinion: at [48] (Adamson JA).

Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480; [2013] HCA 43, applied.

(4) Even if the applicant had demonstrated that the Appeal Panel's reasons were inadequate, this ground would still not have been made out. There is difficulty with accommodating a role for procedural fairness in the provision of reasons which accompany a decision after it has been made, in circumstances where the final instance of any entitlement of a party to procedural fairness is made at the concluding of their submissions: at [4]-[5] (Leeming JA).

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17 (2021) 272 CLR 329; [2021] HCA 6, applied.

Ground 3: alleged jurisdictional error by forming an opinion as to WPI on the basis of matters which had not been referred

(5) Once the Appeal Panel found error in the MAC, it was entitled to revoke the MAC, conduct its own review and issue a fresh certificate of its assessment. Section 323 required it, in undertaking this task, to make deductions for any previous injury or pre-existing condition, necessitating assessment of what proportion of the 2020 injury was due to the applicant's previous (unreferred) injury and condition: at [6] (Leeming JA); [53]-[55] (Adamson JA).

Supreme Court of NSW – Judicial Review Decisions

Referral of a medical dispute to a MA - claim for injury to right upper extremity (right thumb, right wrist, right elbow) causing CRPS - whether medical dispute included injury to right shoulder and peripheral nerve injuries — whether MAP mistaken in its understanding of the worker's claim and the resulting medical dispute

Middleton v Hyett t/as Phoenix Rising Cafe [2024] NSWSC 1201 – Mitchelmore J - 25/09/2024

On 9/11/2023, the worker commenced PIC proceedings claiming compensation under s 66 WCA. The dispute was referred to a MA and on 5/12/2023, the MA issued a MAC which assessed 37% WPI with respect to the right upper extremity (including reduced range of movement and neurological dysfunction of the right forequarter).

The respondent appealed against the MAC on the basis that the MA exceeded the scope of the referral (demonstrable error).

The MAP upheld the appeal, revoked the MAC and issued a new MAC which assessed 14% WPI.

The plaintiff then applied to the Supreme Court of NSW for juridical review of the MAP's decision. She argued that the MAP committed an error of law on the face of the record and a jurisdictional error as follows:

(1) in "*determining that the dispute between the plaintiff and the first defendant concerning permanent impairment did not encompass the right shoulder, right medial nerve, right ulnar nerve, and right radial nerve*"; and

(2) in making that determination, the MAP constructively failed to exercise jurisdiction.

Justice Mitchelmore heard the summons and found that the MAP did not err as alleged. She therefore dismissed the Summons. Her reasons are summarised as follows:

- The MAP's construction of the referral was central to the plaintiff's case. Her counsel argued that it had read the referral too narrowly and he referred to Dr Kwong's assessment involving the evaluation of sensory deficits and pain associated with the plaintiff's right elbow, wrist, and thumb, together with the language of the referral, which identified the "*Right upper extremity*" and "*chronic pain*" in those specific areas.
- He argued that as Dr Kwong's assessment included sensory deficits and pain, the MA had not exceeded the scope of the referral in relying on injury to the medial nerve, radial nerve and ulnar nerve.
- He also argued that the MA had not exceeded the scope of the referral in including loss of movement in the right shoulder in his assessment of WPI, given the right shoulder was part of the "*right upper extremity*".
- Her Honour noted that the grounds of review ultimately rested on the plaintiff's contention that the medical dispute, as it "*crystallised*", included the right shoulder and peripheral nerve injuries that the medical assessor found is not made out on the documents. She held that the underlying premise was not made out in this matter.
- Dr Kwong diagnosed "*Repetitive right wrist and right thumb injuries with tenosynovitis documented objectively by ultrasound and MRI-complicated by complex regional pain syndrome (CRPS)*". However, neither the right shoulder any peripheral nerve injuries that were independent of CRPS, formed part of that diagnosis.
- The MAP observed in its reasons, specifically in relation to nerve damage, that the three peripheral nerves that the MA identified in assessing WPI "*were shown to be normal in Nerve Conduction Studies performed on 26 April 2019*".
- The plaintiff also submitted that as the referral included "*chronic pain*" to the right thumb, elbow, and wrist, and CRPS involving the right arm, it was necessary for the MAP to assess the permanent impairment that flowed from that "*chronic pain"*. However, her Honour held that this submission is not consistent with the Guidelines, which expressly exclude the chapter in AMA5 on pain.
- Her Honour held that the MAP's approach was consistent with the approach of the MAP in *Skates*, in respect of which the majority of the Court of Appeal found no error. She stated, relevantly:

  55. …The aspect of the Appeal Panel's decision in *Skates* that was the subject of the appeal was its conclusion that the approved medical specialist (AMS) (as a medical assessor was then known) had, in his assessment, gone beyond assessment of the medical dispute which had been referred to him. The employer's insurer had noted, in its submissions accompanying its application to appeal, that the claim the subject of the medical dispute was an injury to Mr Skates' left wrist, ring finger and scarring. The referral to the AMS specified "*body part/s referred*" as "*Left Upper Extremity (joint ring finger), scarring (TEMSKI)*": at [24].

56. The insurer accepted that there was an error in the body parts identified in the referral, in so far as the left wrist had been omitted. However, it submitted that the AMS had erred "in assessing impairment of restriction of the left shoulder, left elbow, left thumb, index, middle and little fingers": at [22]. The Appeal Panel accepted that the AMS had relied on the severity of the diminished movement of the whole arm, shoulder, elbow, wrist and fingers, and that that involved error: at [23]. As I noted above, the primary judge had set aside the Appeal Panel's decision on the basis that it should have considered the left wrist injury. However, her Honour did not find error in the Appeal Panel's conclusion that the AMS had otherwise exceeded the scope of the referral.

57. As Basten JA set out in his Honour's reasons, Mr Skates contended in his application for leave to appeal "*that the scope of the referral was identified by reference to the matters generically stated by reference to the paragraphs in s 319 which, it submitted, were not, and could not be restricted by the non-statutory reference to 'body parts'*". This approach, his Honour noted, "*did not challenge the proposition that the scope of the referral to the AMS was limited by the terms of the referral: it was merely a question of the proper understanding of the referral itself*": at [25].

58. In rejecting Mr Skates' contention, Basten JA (with whom Leeming JA agreed, adding what his Honour did "*by way of emphasis*": at [43]) gave as the short explanation that a claim under s 66 of the 1987 Act is not at large, but is made with respect to a specific injury, occurring in the course of employment on a specified date: at [27]. After referring to the claim form submitted on Mr Skates' behalf and the medical reports he submitted, which referred to specific injuries of the left wrist and hand (as to which the insurer had admitted liability and made an offer), his Honour noted that this material defined the proper scope of the referral. In the present case, contrary to the plaintiff's submissions, the Appeal Panel's conclusion did not involve a misunderstanding of the medical dispute and the underlying materials.

59. The plaintiff also relied on the decision of Schmidt AJ in *Klement v Bull 'N' Bush Nurseries Pty Ltd* [2024] NSWSC 466. In that case, her Honour concluded that the Appeal Panel had erred in failing to consider a report that was attached to the plaintiff's claim, which supported that his claim for injury was not confined in the manner for which the employer had contended in the Appeal Panel: at [55]. As her Honour stated at [56], that involved relevant error. Additionally, the Appeal Panel had misunderstood that the plaintiff had claimed injury to his left upper extremity and submitted documents that showed he had suffered an injury to his left shoulder (being part of the left upper extremity), for which he had received treatment: at [57]. Her Honour concluded that the Appeal Panel was thus "*plainly mistaken in its understanding of what Mr Klement's claim had advanced*": at [58].

60. By contrast, in the present case, the right shoulder and injury to the specific nerves on which the medical assessor relied did not form part of the diagnosis of Dr Kwong, on which the plaintiff placed primary reliance, or of the medical specialists upon whose reports Phoenix relied. The premise on which the plaintiff advanced the grounds of review is not made out, and the grounds can be dismissed on that basis.

Deduction for previous injury or pre-existing condition or abnormality — where worker's pre-existing condition was symptomatic before the onset of work-related stressors — whether the MAP applied the correct test to determine extent of deduction

Quintiliani-Johns v Secretary, Department of Education [2024] NSWSC 1200 – Mitchelmore J – 25/09/2024

The plaintiff sought judicial review of a decision made by a MAP, which concerned a MAC issued by a MA with respect to a psychological injury. The MAP concluded that there was a rounding error in the WPI assessment found by the MA, but otherwise dismissed the arguments that the MA's determination was affected by demonstrable error and involved the application of incorrect criteria.

The plaintiff argued that the MAP's decision was infected by an error of law on the face of the record and/or jurisdictional error on 4 grounds:

(1) It failed to engage with substantial and clearly articulated arguments that she advanced before it, in respect of the MA's assessment for "*self-care and personal hygiene*";

(2) It failed to engage with substantial and clearly articulated arguments that she advanced before it, in respect of the MA's assessment for "social and recreational activities";

(3) It MAP took into account an irrelevant consideration, namely its own views as to her degree of impairment with respect to those two criteria ; and

(4) The Appeal Panel erred in failing to find error in the MA's approach to making a deduction for a pre-existing condition.

Justice Mitchelmore heard the summons and she held that the MAP's decision of the Appeal Panel was affected by jurisdictional error and must be set aside. She remitted the matter to the President of the PIC for re-determination by a differently constituted MAP. Her Honour's reasons are summarised below.

Her Honour allowed ground (1).

- The MAP set out the criteria for class 2 and class 3 of the two disputed categories, extracted the reasons of the MA in the PIRS form (at [11]), and noted the history he had taken of the plaintiff in relation to her social activities addressed (at [12]). It acknowledged that some of the history that the MA had recorded "*was not quoted in the reasons given in the PIRS Table for assessing a class 1 impairment*", but said that the MA's reasons were "*to be read as a whole*" (at [13]) and continued (at [14]):

  > In summary, the Medical Assessor found that the appellant showers at least every second day, and brushes her teeth daily, though she often or sometimes skips a day; that she cooks once a week relying on her husband to cook the rest of the time; that she leaves most of the housework to her husband and daughter; that [she] does not visit the dentist or optician as often as previously; and that the frequency of haircuts, visits to the beautician and changing of jewellery has been adversely affected by the fact that she has become indifferent to her appearance.

- The MAP's summary did not reflect the MA's reasons, but it proceeded on the basis of its summary, stating:

  > [15] It was the task of the Medical Assessor to determine in which category the behavioural consequences of psychological injury best fit, by applying the descriptors in each class of impairment as examples: Guidelines at [11.12].
  >
  > [16] Whether the facts fit better into class 2 or class 3 is a matter of opinion on which reasonable minds might differ. In our view, they fit better into class 2, because the history was consistent with a class 2 impairment, and no history was taken to the effect that a community nurse has to visit to ensure minimum levels of hygiene and nutrition, or that the worker skips meals (as distinct from eating meals prepared by others), or that the worker needs prompting to wear clean clothes – which might be consistent with class 3 impairment.
  >
  > [17] The criteria in each class are not prescriptive, but they must be considered in determining into which of two classes a given set of behavioural consequences best fits.
  >
  > [18] In our view, it was well open to the Medical Assessor to assess a class 2 on the history taken, even if reasonable minds might differ. A mere difference of opinion does not demonstrate error or the application of incorrect criteria. We can discern neither. This ground fails.

- In *Fisher v Nonconformist Pty Ltd* [2024] NSWCA 32, Kirk JA (Meagher JA and Simpson AJA agreeing) recently summarised the principles which are relevant to an allegation of constructive failure to exercise jurisdiction of the nature that the plaintiff has advanced. His Honour stated:

  > [117] Constructive failure to exercise jurisdiction arises where a decision-maker purports to have exercised the jurisdiction but in substance has not undertaken or completed the task of doing so because of failure to address some essential matter.
  >
  > [118] Here the appellants raise a form of constructive failure based on the alleged failure by the Member to respond to a critical argument. This is the variant of constructive failure of jurisdiction discussed by members of the High Court in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088. In that case Gummow and Callinan JJ, with whom Hayne J agreed, held that for an administrative decision-maker '[t]o fail to respond to a substantial, clearly articulated argument relying upon established facts' was both a constructive failure to exercise jurisdiction and a failure to accord natural justice (at [23]-[25]). Kirby J similarly held that where, as in that case, the decision-maker's mistake '*amounts to a basic misunderstanding of the case brought by an applicant, the resulting flaw is so serious as to undermine the lawfulness of the decision in question in a fundamental way*' (at [88])."

- His Honour quoted with approval the following passage from the reasons of Meagher JA in *Day v SAS Trustee Corporation* [2021] NSWCA 71 at [37] (Payne and White JJA agreeing):

  > … a constructive failure to exercise jurisdiction (or a purported exercise, in the sense that there is an appearance of an exercise of jurisdiction) as alleged by the appellant is not a mere failure to consider evidence or to address an argument or submission, which may be contingent or otherwise insignificant, but a failure to understand and determine a case or claim. The ultimate question is whether a failure to consider and address certain issues or arguments involved a failure to address central or critical elements of the case or claim: compare, in relation to failures to consider evidence, *Minister for Immigration and Citizenship v SZRKT* (2013) 212 FCR 99; [2012] FCA 317 at [69], [111]. It will be insufficient for the appellant to show that his '*three key issues*' were not stated and determined discretely. What he must show is that they raised '*substantial*' (in the sense of clearly material) arguments or questions which the primary judge in substance failed to address in determining the appellant's claim …

- The plaintiff argued that on all of the relevant material before the MA, she would properly be assessed as class 3. However, the MAP did not engage with that submission. It emphasised that it was "*the task of the Medical Assessor to determine in which category the behavioural consequences of psychological injury best fit*", when the point the plaintiff was making was that the MA had undertaken that task in relation to self-care and personal hygiene without considering all of the material that was relevant to that scale.

- The MAP's statement that where the facts fit "*is a matter of opinion on which reasonable minds might differ*" might be relevant when considering whether demonstrable error has been shown (see *Vannini v Worldwide Demolitions Pty Ltd* [2018] NSWCA 324 at [87] (Gleeson JA, Macfarlan JA and Barrett AJA agreeing) ("*Vannini*")), but it was not an answer to the plaintiff's point, that the MA had omitted relevant material from his assessment. It was not a case of the MA having "*not quoted*" some of the history in his reasons in the PIRS table.

- Although the respondent argued that the MAP did not fail to engage with the plaintiff's submissions, and made written and oral submissions that defended the ground based on the merits of the decisions of the MA and MAP, it did not answer the ground the plaintiff advanced.

Her Honour allowed ground (2)

- In relation to ground (2), her Honour noted that in *Ballas v Department of Education (State of NSW)* (2020) 102 NSWLR 783; [2020] NSWCA 86 ("*Ballas*"), the Court of Appeal (Bell P and Payne JA (with whom Emmett AJA agreed) considered this issue. The Court held:

> [93] Whilst it is no doubt correct that an AMS [Approved Medical Specialist] must exercise a degree of clinical judgment in assigning a class of seriousness to each area which he or she is required to address in completing a medical assessment, the characterisation of conduct as going to 'social and recreational activities' on the one hand, as opposed to any of the other five scales on the other hand, is not a matter of discretion.
>
> [94] Even if there may, as a matter of English language, be some overlap between some of the scales or categories of functional impairment, for the purposes of the WPI assessment exercise, particular conduct will fit within one or other of the scales. This calls for the correct characterisation of the conduct, i.e. whether it goes to '*self-care and personal hygiene*', '*social and recreational activities*', '*travel*', '*social functioning (relationships)*', '*concentration, persistence and pace*' or '*employability*'. This does not involve an exercise of discretion. If conduct is wrongly assigned to one scale, when it should have been assigned to another, this will result in the AMS taking into account an irrelevant consideration in the context of assigning a class to each of the distinct scales. This will inevitably bear upon the calculation of the WPI which is critical for an injured worker's entitlement to compensation.

- The MAP did not address the issue that the plaintiff raised in this regard in relation to the range of conduct that the MA relied upon in assessing social and recreational activities. Instead, the MAP adopted the same approach in relation to this scale as it had for self-care and personal hygiene, summarising the plaintiff's history and the medical assessor's reasons before concluding:

> [22] This history was interpreted by the Medical Assessor in the way that he summarised in his PIRS Table, extracted above. Essentially, he interpreted the history to mean that the worker 'socialises with family and a few close friends', occasionally goes out for social or recreational activities, participates in [sic] once a month in her Arts in Recovery program, attends a dialectical behaviour group therapy program (also monthly), even though she is '*less interested in social and recreational activities than she was prior to the injury*' and her social and recreational activities are mostly '*home based or structured around her immediate family*'.
>
> [23] In our view, that was a reasonably accurate summary of the history taken. It is consistent with the exemplars for a class 2 impairment. It was reasonably open to the Medical Assessor to find that the behavioural effects of injury best fit the exemplars for a class 2 impairment.
>
> [24] Whether or not those effects were also consistent with the exemplars for a class 3 impairment, and better fit those exemplars, is a matter of opinion on which reasonable minds might differ. In our view, they do not better fit the exemplars for a class 3 impairment, because the evidence does not satisfy us that the worker will not go out without a support person – even though she may take a support person from time to time – or that she is not actively involved in social and recreational activities, remaining quiet and withdrawn.
>
> [25] Our opinion, however, is beside the point. As it is a matter of opinion, the omission to assess a class 3 impairment is not one which discloses error of any kind. This ground also fails.

- The focus of the MAP was whether the matters on which the MA relied were "*consistent with the exemplars for a class 2 impairment*". That reasoning did not grapple with the point the plaintiff was seeking to make in her submissions, which was that a number of the activities on which the MA relied as social and recreational activities were not correctly characterised as such. Nowhere in the MAP's reasons did it address that argument.

- The respondent's submissions on this ground did not address the MAP's constructive failure to exercise jurisdiction. As Bell P and Payne JA recognised in *Ballas*, "*[m]isassignment of conduct to a particular area or 'scale', and assessment of that conduct for the purposes of assigning a rating or 'class' to that area, has the potential to distort the overall WPI of an injured worker*": at [84].

PIC - Presidential Decisions

Extension of time to appeal a decision of a Member – s 352(4)(b) WIMA & rule 133A of the PIC Rules 2021; Gallo v Dawson [1990] HCA 30 applied – whether the Principal Member erred by determining an issue not before her – Banque Commerciale SA, En Liquidation v Akhil Holdings Limited [1990] HCA 11 applied

Davoudi v Douglass Hanly Moir Pathology Pty Limited [2024] NSWPICPD 41 – Deputy President Wood – 24/0/2024

The appellant was employed by the respondent as a part-time blood collector. She alleged that she injured her neck, back and both shoulders at work on 6/05/2022, while trying to move a large chair so that a patient could be seated. She also alleged a secondary psychological injury.

On 8/06/2022, the appellant was involved in a MVA. She asserted that this did not affect her physical, work-related injuries, but it caused PTSD..

The respondent disputed liability for the shoulder and neck injuries and asserted that the secondary psychological condition and injury to the lumbar spine had resolved. It also disputed liability for weekly payments on the basis that the appellant had current capacity for some employment.

At first instance, a Member identified the issues in dispute as: (1) whether the appellant's psychological condition had resolved, or had been overtaken by the motor vehicle accident; (2) whether the appellant's injury to the lumbar spine had resolved; (3) the extent of the appellant's capacity for work, together with the quantification of the appellant's entitlement to weekly compensation; and (4) whether the respondent was liable for payment of the treatment expenses. He ordered the parties to file and serve written submissions.

However, the Member passed away before issuing his decision and the matter was transferred to ***Principal Member Bamber***. On 22/12/2023, she noted that the respondent accepted that the appellant injured her lumbar spine, but denied injury to the cervical spine (neck) and shoulders and that she sustained a secondary psychological condition.

The Principal Member entered an award for the respondent with respect to the injuries to the cervical spine and both shoulders, and the secondary psychological condition.

The Principal Member held that the effects of the injury to the lumbar spine had not ceased and the claim for treatment expenses (which was limited to the cost of a consultation with Dr Darwish, neurosurgeon, in relation to the appellant's lumbar spine) was reasonably necessary as a result of the injury on 6/05/2022. She ordered the respondent to pay the weekly benefits from 8/11/2022 to date and continuing under s 37 WCA at the rate of $595.39 per week.

On 19/01/2024, the appealed against the Member's decision and alleged that the Principal Member erred in her finding that the appellant had no capacity for work.

On 29/02/2024, the appellant lodged her appeal. This was filed outside of the 28-day time limit prescribed by s 352(4) WIMA and she applied for an extension of time under s 352(4)(b) WIMA.

The appellant challenged the Principal Member's determination that she did not suffer from a secondary psychological injury due to the injury on 6/05/2022. However, before considering the appeal, it was necessary to consider whether leave should be granted. She also needed to satisfy monetary and percentage thresholds to appeal under s 352(3) WCA.

Deputy President Wood determined the appeal. She stated that the decision should be read with her decision in the respondent's appeal, which set out a detailed summary of the evidence and the Principal Member's reasons.

In *Gallo v Dawson* [1990] HCA 30, McHugh J considered the question of extending time to appeal. His Honour observed that, in order to determine whether a strict application of time limits would work an injustice, it was necessary to have regard to: (a) the history of the proceedings; (b) the conduct of the parties; (c) the nature of the litigation; (d) the consequences for the parties if the application to extend time was granted or refused; (e) the prospects of the applicant succeeding in the appeal, and (f) upon expiry of the time for appealing, the fact that the respondent has "*a vested right to retain the judgment*."

The appellant asserted that she was unaware that a cross claim could not be brought in the PIC. Ignorance of procedural requirements in the PIC is not a factor that lends support to an application for relief from the obligation to comply with the time limits imposed by the legislation.

It could be readily inferred that the respondent was aware of the appellant's intention to raise the issue now raised in this appeal when it was served with the appellant's Opposition on 26/02/2024 in the respondent's appeal. However, that time was outside of the time frame for filing an appeal.

A factor that tends to support the application for an extension of time is that the Principal Member's Certificate of Determination is also the subject of the respondent's appeal, so that any prejudice to the respondent is less likely to arise.

The only unusual circumstance in the history of the proceedings was the unfortunate passing of the Member who had the conduct of the matter through to (and including) the arbitration stage. That does not feature as an exceptional circumstance in terms of explaining the delay in lodging the appeal from the Principal Member's Certificate of Determination. There are no exceptional circumstances.

The Deputy President held that in order to determine whether to grant leave to extend the time to lodge the appeal, she needed to also consider whether a demonstrable or substantial injustice would occur if leave were not granted. This required an assessment of the merits of the appeal.

In essence, the Principal Member determined that the appellant's statement evidence was unreliable, her accounts to the various medical experts were conflicting, and so she was required to treat the evidence with caution. She concluded that there was no objective evidence that the appellant suffered psychological symptoms prior to the motor vehicle accident, and in the absence of such evidence she was not satisfied that the appellant suffered a psychological condition secondary to the lumbar injury, which was the only physical injury she accepted.

In *Banque Commerciale SA, En Liquidation v Akhil Holdings Limited* [1990] HCA 11, Mason CJ and Gaudron J made the following observations (citation omitted):

> "... pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities.
>
> Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference."

In the recent decision of *Capitalink Pty Ltd v Withnall* [2024]NSWCA 172, Bell CJ made the following observations:

> "Mr Lawrance maintained that, although not pleaded, the type of reasoning he was seeking to deploy was sufficiently 'in play' during the proceedings at first instance and that this was a case where the parties could be said to have fought the case at first instance outside of the pleadings. In *Dare v Pulham* (1982) 148 CLR 658 at 664; [1982] HCA 70, reference was made to '*cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial*.'
>
> Much of the argument on appeal related to whether the argument Mr Lawrance sought to propound on appeal was '*in play*' at first instance…
>
> In light of the extracts from the Respondent's submissions at first instance and the terms of the primary judgment, it is evident that, while perhaps not presented with the same clarity of analysis and supporting reference to authority as this Court received from Mr Lawrance, the argument was sufficiently in play at first instance notwithstanding that it went beyond the pleadings. No question of prejudice to the Respondent arises in this circumstance."

The issues raised in the respondent's dispute notices and its Reply to the Application to Resolve a Dispute did not identify the issue it relied upon at arbitration - that the appellant did not suffer a secondary psychological condition and there is no record of that issue being raised prior to the commencement of the arbitration. In usual circumstances, the respondent should have sought leave to raise the issue. Where, however, both parties engaged in submissions on point, and the appellant did not object to the respondent's submissions, the appellant cannot assert any procedural unfairness in the Principal Member dealing with the submissions of both parties.

In failing to object to the issue and making submissions on that point, the appellant clearly acquiesced to the issue being raised. In the context of the significant failure of the appellant to disclose the MVA and its consequences, which rendered the medical evidence of little assistance, it was clearly in the interests of justice for the issue to be raised.

Therefore, the Principal Member was not in error in dealing with the submissions made, which is the only ground upon which the appellant relies in this appeal. There is thus no merit to the appeal and the application for an extension of time to appeal was refused.

PIC – Member Decisions

Workers Compensation

Claim for weekly payments for accepted psychological injury resulting from the implementation of the respondent's COVID-19 Policy which provided for the inoculation of all employees returning to work after lockdown - employer disputes entitlement to compensation on basis of dismissal and the provision of employment benefits under s 11A(1 WCA) - Held – the predominant cause of the injury was the respondent's actions in respect of dismissal and that those actions were reasonable - Award for the respondent.

Ryan v Alto Pennant Hills Pty Ltd [2024] NSWPIC 352 – Member Sweeney – 2/07/2024

The worker was previously employed by the respondent as a customer retention manager.

In July or August 2021, the respondent ceased its face-to-face business activities and its employees, including the worker, were required to work from home. The worker was paid the amount stipulated by the Federal Government's Job Keeper allowance in lieu of wages.

During this period, after consultation with staff, the respondent developed a COVID-19 vaccination policy which took effect from 15/11/2021. This was emailed to employees under cover of an email from the managing director on 17/11/2021. Subject to exemptions, the policy provided that all employees were to be fully vaccinated by 15/12/2021.

The worker did not wish to be vaccinated and on 2/12/2021, he attended his GP, Dr Mahalyana, and was diagnosed with anxiety. He was referred a psychologist and he was subsequently certified as unfit to work because of anxiety caused by "*work-related stress*."

The worker did not return to work with the respondent and he claimed compensation. The insurer disputed the claim under s 11A(1) WCA. His employment was terminated in May 2022.

Member Sweeney determined the dispute and he entered an award for the respondent. His reasons are summarised below.

- The worker said that he asked his GP for a medical exemption certificate, but she refused to provide it. He said that he was "*very concerned that the vaccination will be dangerous to my health*." On 26/11/2021, he received an email from the General Manager stating that if he was not vaccinated by 15/12/2021 he would be in breach of his contract. He complained that management had "*made me out to be an anti-vaxxer,*" but he has had other required vaccines.
- The worker argued that the respondent's request denied his "*fundamental right to work*" and restricted his "*basic liberties*."
- The Member noted that while the parties addressed on the issue of reasonableness, little was said about the provision of employment benefits and nothing was said about dismissal. Rather the parties' submissions concentrated on the issue of reasonableness.
- The Member only found one previous decision of the WCC dealing with "*employment benefits*." In *Reedy v IBM Australia Ltd,* Arbitrator Beilby held that working from home "*on flexible hours*" laws fell within the phrase. On that basis, he doubted whether it could now be denied that remote working opportunities might be characterised as "*an employment benefit*".
- The Member asked whether the development of psychiatric injury was predominantly caused by actions taken by the respondent with respect to "*dismissal*" or the provision of "*employment benefits*." He noted that employment was not finally terminated until 3/05/2022, but the threat of dismissal if he did not have a COVID injection existed from mid mid-September 2021. By the time the worker saw his GP it was a near certainty that he would lose his job if he did not have the injection.
- The Member inferred that the worker was willing to continue working for the respondent in his usual job or in some suitable employment consistent with his non-vaccinated status. However, the respondent determined that the likely option, if he did not have the vaccination, was dismissal. In the words of the worker, his "*only choice is, to be vaccinated or say goodbye to my career*."
- Therefore, the Member held that the threat of dismissal was the predominant cause of the injury. Without it the respondent's COVID response and the policy dated 15/11/2015 (sic) was unlikely to have engendered a psychological injury.
- However, he was not persuaded that the respondent's actions with respect to the provision of employment benefits were a cause of the injury. He held that the facts in this matter are distinguishable from those in *Lancaster*, as the worker was content to return to his usual work, or any alternative work, for the respondent, provided he was not vaccinated. It is difficult to see how refusing to so employ him constitutes action by the respondent with respect to employment benefits. On the contrary, it has a distinct detrimental flavour.
- In relation "*reasonableness*", the Member found that events that occurred in 2022, including the delay in finally terminating the employment, were not relevant to the determination of the issue of reasonableness and they did not materially contribute to the injury.
- The worker primarily relied upon the respondent's failure to grant an exemption from vaccination in circumstances where it accepted that he had a genuine belief that it had harmed members of his immediate family and may be harmful to him. He argued that policy clearly permitted an exemption to be granted and these facts necessitated that it be granted to him.
- The Member found that those arguments were not persuasive. The worker's GP, who was presumably familiar with his medical history, not only refused to provide him with an exemption, but advised him to have the vaccination. While the worker believed that members of his family were adversely affected by COVID vaccinations, there was no medical evidence to support a causal connection between their illness and the vaccination.

- At the meeting on 14/12/2024, Mr Fitzgerald asked the worker whether he had discussed the matter of his family history with his doctor. The worker responded that "*doctors were untrustworthy and had been directed by the Australian Medical Association (AMA) not to certify exemptions from the vaccination.*" The respondent decided that these were medical issues that it should not address.
- The Member held that this evidence does not detract from a finding that the respondent was acting reasonably in dealing with the worker's application for an exemption. Whether the worker's physical health made vaccination inappropriate was a matter for a medical practitioner.
- The Member found that the respondent had developed its COVID-19 policy after surveying its staff and consulting with various state and federal health agencies. The policy itself was not impugned. While the manner of its implementation was said to be unreasonable, it is necessary to consider the process as a whole: *Sinclair*.
- While the respondent's actions had serious consequences for the worker they must be weighed against its obligation to its workforce and customers and its undoubted desire to return to profitability after the COVID lockdown. Adopting this approach, the respondent's proposed actions with respect to dismissal were reasonable.