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.

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PIC - Presidential Decisions

Leave to appeal an interlocutory decision under s 352(3A) WIMA, as part of an appeal against the final result – application of Gerlach v Clifton Bricks Pty Ltd [2002] HCA 22; 209 CLR 478; appeal on a matter of practice and procedure – application of Aon Risk Services Australia Ltd v Australian National University [2009] HCA 27; 239 CLR 175; Kelly v Mina [2014] NSWCA 9; determination of a deemed date of injury – application of Haddad v The GEO Group Australia Pty Ltd [2024] NSWCA 135

Secretary, Department of Education v Wells [2025] NSWPICPD 11 – Deputy President Snell – 18/02/2025

The worker was employed by the appellant from 2017. She worked at Queanbeyan High School, initially as a full-time classroom teacher, and then (from 2019) in a "*concurrent head teachers position*". She stated she "*was managing two head teacher positions in 2019*" and coped well. However, in March 2021, asbestos was found in 3 classrooms at the school and deep cleaning took 3 months. She and other staff were anxious about their physical health and one staff member was diagnosed with asbestosis and was fearful he would die. She was stressed and panicked and she was managing 10 staff, whose anxiety and anger were partially directed at her. There was also negative student behaviour due to difficulty in accessing practical rooms. These events caused her "*immense anxiety and fear*".

The worker said that before these events she had experienced "*a bit of depression and anxiety*" when she was about 20. She stated that prior to March 2021 she saw a psychologist "*monthly to bi-monthly to maintain the relationship and as a method of checking in*". She saw a psychiatrist in July 2021 and her medication was changed. She continued working full-time but "*relinquished one of [her] head teachers positions as [she] was stressed and could not cope*". She had time off which reduced her weekly earnings, she was unable "*to continue to work at the same capacity*". During the second lockdown due to the pandemic in September 2021 she was exhausted and became reclusive. She had exhausted her sick leave and resumed on full duties in term 4.

The worker "*applied for 12 months of leave without pay for 2022*". When school resumed after the summer holidays she had financial pressures and she taught casually. She was "*repeatedly at breaking point every single day*". She saw her general practitioner on 21 March 2022 and made a claim for workers compensation. She said the insurer accepted liability, but with "*an injury starting in 2022 not back in 2021 when my symptoms commenced*". Her payments were "*much less than my pre-symptom average weekly rate of pay*". Her "*loss of capacity occurred in Term 4 2021 when [she] applied for leave without pay for 2022 because [she] knew [she] wouldn't be able to continue working*".

The worker said that she tried, without success, to have the insurer "*correct this*". In her statement dated 29/11/2023, she said she had "*been able to resume work at a new school*".

At the worker's request, the insurer reviewed its decision on 22/04/2022, but confirmed date of injury as 18/01/2022 and determined that PIAWE was $1,050.03.

The worker claimed weekly compensation from 18/03/2022 @ $2,282.90 per week.

Member Drake conducted an arbitration, during which the appellant accepted that the worker had suffered psychological injury. The Member ordered the parties to file written submissions as to the date of injury and PISWE. On 26/03/2024, the Member issued a COD, which determined that the deemed date of injury was 19/07/2021, as it "*would be manifestly unfair to take the [worker's] absence on leave without pay into account when calculating her pre-injury average weekly earnings*". She made findings regarding PIAWE between 18/03/2022 and 23/11/2023 and awarded weekly payments under s 36 WCA.

The appellant sought leave to appeal on 3 grounds:

(1) The Member erred in the exercise of her discretion in not allowing it to place injury in dispute;

(2) The Member erred as to fact in finding that the respondent suffered injury on 19/07/2021; and

(3) The Member erred in law by not providing any or any adequate reasons for the finding of injury that she made.

The worker argued that leave to appeal should be refused.

Deputy President Snell determined the appeal. He granted leave to appeal, revoked the COD and remitted the matter to a different non-Presidential Member for redetermination. His reasons are summarised below.

- He rejected ground (1) and stated that applying settled principles, it is open to the appellant to challenge the Member's refusal to grant leave, as part of its challenge to the final result. To the extent that it is necessary to grant leave pursuant to s 352(3A) WIMA, he did so.
- In *Kelly v Mina* [2014] NSWCA 9, the Court of Appeal (Barrett JA, Ward and Leeming JJA agreeing) dealt with an appeal regarding an application to amend a defence made on the opening day of a civil trial (notice had been given in the preceding week). His Honour said:

  > The judge's decision was obviously discretionary, so that appellate intervention will be warranted only upon the principles stated in House v The King. The fact that the decision was a decision on a matter of practice and procedure means that this Court should be slow to interfere and ought not to reverse the judge's decision unless convinced that it is plainly erroneous. (excluding references)

- He was not persuaded that the Member's decision on the application to amend the Reply was erroneous. It was a discretionary application relating to a matter of practice and procedure. He agreed with the Member's conclusion that the appellant had "*ample opportunity to contest injury at an earlier date and did not do so*." The appellant has not satisfactorily explained the delay in making the application to amend, which occurred on the hearing date, in the absence of prior notice. Error of the kind in *House v The King* was not identified.
- In relation to ground (2), he noted the provisions of ss 15 and 16 WCA. Regardless of whether the '*injury*' finding was to be made under ss 15 or s 16 WCA, the deemed date of injury was: (i) at the time of the worker's ... incapacity; or (ii) if ... incapacity has not resulted from the injury— at the time she made a claim for compensation with respect to the injury.
- He upheld ground (2). He noted that the worker's evidence was that the deemed date of injury was 19/07/2021. He stated, relevantly:

66. In *Haddad v The GEO Group Australia Pty Ltd* the Court of Appeal recently dealt with the identification of a deemed date of injury pursuant to the '*disease*' provisions. Griffiths AJA (Kirk and Stern JJA agreeing) observed that "*each case necessarily turns on its own particular facts and circumstances*". His Honour said:

> 80. As explained in Thoroughgood, the correct position is that where a disease injury causes an incapacity (in the sense of a reduction in earning capacity) and at the same time gives rise to an entitlement to compensation under the 1987 Act (whether for permanent impairment or treatment expenses or otherwise), s 15(1)(a)(i) operates to deem the date of injury relevant to any such claim to be the time when the worker suffered incapacity. This does not turn on the framing of the claim by the claimant but rather on the entitlement to claim, as illustrated most clearly in *Thoroughgood*, as to which see especially at [124] below. It means that since, in this case, on 20 January 2017, the appellant suffered a disease injury that caused both an incapacity giving rise to an entitlement to claim weekly compensation and also, at the same time, an entitlement to claim treatment expenses, that was the deemed date of injury relevant to both claims. That is not altered by the fact that he ultimately abandoned the claim for weekly compensation.
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> 81. It is only where neither aspect of s 15(1)(a)(i) operates that s 15(1)(a)(ii) is engaged. That would be so, for instance, where a disease causes a need for treatment without any reduction in earning capacity. And it would also be so where a disease first causes an incapacity and then, sometime later, causes a permanent impairment but no further incapacity.

- He accepted that the finding regarding the deemed date of injury involved error and concluded that it was not necessary to determine whether the Member's reasons were adequate.

Extension of time to appeal – s 352(4) WIMA and r 133A(5) of the PIC Rules 2021 – whether in exceptional circumstances, to lose the right to appeal would work a demonstrable and substantial injustice – Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290 applied – s 11A(1) WCA – reasonable action taken with respect to discipline – Department of Education and Training v Sinclair [2005] NSWCA 465; Van Vliet v Landscape Enterprises Pty Ltd [2022] NSWPICPD 49 applied

Fell v Willoughby City Council [2025] NSWPICPD 21 – Deputy President Wood – 19/03/2025

The appellant was employed by the respondent as a ranger, and his duties included parking inspections, processing of penalty notices and administration work.

On 18/12/2022, the appellant was inspecting mobility parking scheme permits when he noticed that a permit was displayed on the driver's side of a particular vehicle rather than on the required passenger's side. As the couple who owned the car approached, he asked to be shown the permit, and a verbal altercation ensued. The female passenger subsequently lodged a complaint about him, which was communicated to him on 23/12/2022. The appellant provided a response to the complaint on 24/01/2023. On 16/02/2023, he was advised by letter that the complaint would be investigated. A meeting was scheduled for 21/02/2023, but was rescheduled to 2/03/2023 at his request to accommodate the attendance of the union representative as his support person.

In early March 2023, the appellant was advised that because the person investigating the complaint was going on leave for two weeks, the investigation would take longer. On 26/04/2023, he was called in from the field to attend the respondent's workplace. He arrived at about 5.05 pm and was handed a letter advising that there was to be a "*Request to Show Cause Meeting*" (the show cause letter) scheduled to occur at 10.30 am on 27/04/2023. He spoke with the union representative that afternoon, who advised him that the respondent was required to give 7 days' notice of such a meeting.

The appellant ceased work before the meeting on 27/04/2023. He sought medical treatment and claimed weekly payments and treatment expenses for an alleged psychological injury. The respondent disputed the claim, asserting that: (a) there was a factual dispute in relation to what was said by various representatives of the respondent; (b) the appellant did not suffer an injury in the course of employment; (c) the appellant's employment was not the main contributing factor to the injury, and (d) the appellant's psychological injury was not compensable because it was wholly and predominantly caused by reasonable action taken by the respondent in respect of discipline, performance appraisal and the provision of employment benefits in accordance with s 11A(3) WCA.

The appellant commenced proceedings in the PIC and the matter proceeded to Arbitration before ***Senior Member Haddock***. After receiving written submissions from both parties, the Senior Member determined that the appellant suffered a psychological injury was in the form of an aggravation, acceleration, exacerbation or deterioration of a disease pursuant to s 4(b)(ii) WCA and that the appellant's employment was the main contributing factor to the injury. However, she held that the injury was wholly or predominantly caused by the respondent's action in respect of discipline and, notwithstanding what she referred to as a "*blemish*" in respect of the short notice of the "*show cause*" meeting, the respondent's actions were reasonable.

The appellant appealed on the ground that the Senior Member erred in determining that the respondent's actions were reasonable, given that he appellant was given less than 24 hours' notice of the "*show cause*" meeting.

Deputy President Wood determined the appeal and dismissed it. Her reasons are summarised below.

- Section 352(4) WIMA provides that an appeal must be made within 28 days after the decision appealed against is made or a longer period determined or allowed in accordance with the PIC's Rules. As the COD was issued on 1/05/2024, the last day for filing the appeal was 29/05/2024. However, the appeal was filed at 6:27pm on 29/05/2024.
- On 30/05/2024, a Delegate of the President issued a Direction to the parties, indicating that under r 6 of the 2021 Rules, the PIC may dispense with a requirement of those Rules in relation to particular proceedings if satisfied it is appropriate to do so. The Delegate determined that he was satisfied that it was appropriate to dispense with r 26 and accordingly dispensed with that Rule and advised that the appeal application was taken to have been received on 29/05/2024.
- On 6/06/2024, the respondent lodged an Application for Reconsideration (Reconsideration) of the Delegate's Direction, asserting that r 6 does not confer upon the Delegate "*a statutory power capable of permitting dispensation with a requirement as to time or the dispensation of a 'deeming provision'.*"
- Rule 6 of the 2021 Rules relevantly provides:

  > "6 Dispensing with requirements of Rules
  >
  > (1) The Commission may, by order, dispense with a requirement of these Rules in relation to particular Commission proceedings if satisfied it is appropriate to do so.
  >
  > (2) The President may, by order, dispense with a requirement of these Rules in relation to particular applicable proceedings, or particular kinds of applicable proceedings, if satisfied it is appropriate to do so..."

- Rule 5 of the 2021 Rules defines "*applicable proceedings*" as, inter alia, Commission proceedings and "*Commission proceedings*" as proceedings before the Commission under the 2020 Act.
- The function exercised by the Delegate was a function delegated to him by the President of the Commission in accordance with s 18(1)(b) of the 2020 Act, so that rule 6(2) of the 2021 Rules applies to the Delegate's powers.

- Upon receipt of the respondent's reconsideration application, the Delegate issued a further Direction dated 14/06/2024, in which he stayed the timetable set in his earlier direction. He provided the appellant with the opportunity to respond to the respondent's reconsideration application and also provided the respondent with the opportunity to respond to the submissions made by the appellant. The appellant, of its own motion, lodged submissions in which he sought an extension of time to lodge the appeal.
- Following receipt of those submissions, the Delegate issued a further Direction dated 10/07/2024 in which he revoked the suspension of the timetable and issued a new timetable.
- The appellant argued that there would be no prejudice to the respondent if the time for leave to appeal was extended, as the delay comprised only 1 hour and 27 minutes, and it relied on the High Court's decision in *Gallo v Dawson*.
- The respondent argued that the sole ground of appeal has no merit and thus an injustice would not occur if leave to extend the time was refused. Therefore, leave should not be granted.
- Under R 133A(5), time can only be extended if the PIC is satisfied '*in exceptional circumstances, that to lose the right to make the relevant application would work demonstrable and substantial injustice*.' It is therefore necessary to determine whether exceptional circumstances exist and whether a demonstrable or substantial injustice would occur if leave was not granted.
- In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290, Campbell JA explained what constitutes exceptional circumstances. His Honour concluded that:

  > (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered;
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  > (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors;
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  > (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional;
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  > (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision, and
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  > (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case.

- On balance, the combination of a number of unforeseen technical difficulties and the fact that the appeal was filed less than one and a half hours after the time to appeal had expired, together constitute exceptional circumstances. However, it was necessary to consider the merits of the appeal. The sole ground of appeal was that the Senior Member's finding that the respondent acted reasonably when he was given less than 24 hours' notice was erroneous. The fact that a "*show cause*" letter was issued was not challenged in terms of whether it constituted reasonable action taken by the respondent.
- The significance of the effect of that action on the appellant's psyche, the appellant's perception of events and the fact that the appellant decompensated and consulted his GP are all facts going to questions of causation and do not fall within the ambit of the pleaded ground of appeal. That is, providing less than 24 hours' notice of a show cause meeting was unreasonable and thus rendered the whole disciplinary action unreasonable.
- The appellant submits that despite the evidence that the short notice was procedurally unacceptable, the Senior Member was "*swayed*" to conclude that somehow the late notice was reasonable. However, the Senior Member did not conclude that the short notice was reasonable. She considered it was a "*blemish*" in the disciplinary procedure, which was otherwise reasonable.

- The approach taken by the Senior Member was consistent with Spigelman CJ's observations in *Sinclair* and those of Phillips P in *Van Vliet*. The appellant has failed to show that the Senior Member committed an error of law in the application of s 11A or any error of fact in reaching her conclusion that the respondent's actions were reasonable.
- The appeal has no prospects of success. I am therefore not satisfied that the appellant can show that a demonstrable or substantial injustice would occur if leave to extend the time to appeal was not granted.

Factual error within the meaning of s 352(5) WIMA: Whiteley Muir & Zwanenberg Ltd v Kerr (1966) 39 ALJR 505; Workers Compensation Nominal Insurer v Hill [2020] NSWCA 54; weight of medical opinion: application of Paric v John Holland (Constructions) Pty Ltd [1985] HCA 58; 59 ALJR 844; [1984] 2 NSWLR 505; credibility: Onassis v Vergottis [1968] 2 Lloyd's Rep 403; inferences – Luxton v Vines [1952] HCA 19; 85 CLR 352

Romeo v Vanguarde Pty Ltd [2025] NSWPICPD 25 – Deputy President Snell – 25/03/2025

The appellant worked for the respondent as a senior property manager from about 17/06/2017 to 1/12/2017. He then worked with the second respondent from March 2018, performing similar duties, which are alleged to have had a similar aggravating effect on pre-existing degenerative disease. The deemed date of injury with the second respondent is alleged as 20/11/2018.

In these PIC proceedings, the appellant alleged that he injured his cervical spine (with radiating symptoms to his upper extremities) due to aggravation of degenerative disease, occasioned by "*long hours sitting at a desk using a mouse and keyboard with ergonomically poor work stations*".

The appellant had earlier proceedings against the respondent (WCC 4934/19), relating to psychological injury alleged to result from the same period of employment. Those proceedings resolved on 22/11/2019, when a WCC Arbitrator entered a consent award in the amount of $20,000 inclusive of medical expenses and the appellant gave admissions that he had received all his entitlements to weekly compensation and medical expenses and was fully recovered from the effects of employment injury with the respondent.

However, within two days of this resolution, the worker sought a reconsideration of these orders. On 31/08/2020, a WCC Arbitrator refused to reconsider the consent orders.

The appellant then lodged a Presidential appeal against the decision refusing the reconsideration. This was dealt with by Deputy President Wood, who issued a decision dated 9/12/2020, which confirmed the arbitral decision dated 31/08/2020.

On 4/03/2020, the appellant made the claim for injury to his wrists and hands, based on a report from Dr New, his qualified orthopaedic surgeon, which 2021, diagnosed "*radicular pain bilaterally in the C7 nerve root distribution*".

On 20/02/2023, the appellant made his claim against the second respondent for injury to his neck, shoulders, wrists, right elbow, low back and bilateral leg pain.

In the current PIC proceedings, the appellant claimed weekly benefits and medical treatment, including the cost of surgical discectomy and fusion at C5/6/7 recommended by Dr Khong.

Member Rimmer heard the dispute on 4/04/2024. Due to the operation of cl 44 of the Workers Compensation Regulation 2016, the appellant's counsel was required to elect between reliance on the expert opinion of either Dr Singh or Dr New and he elected to rely on Dr Singh's report. This meant that Dr New's report was to be considered only on the issue of delay. There was agreement that PIAWE were as alleged in the application and that the cervical spine surgery proposed by Dr Khong was reasonably necessary. The injury relied on was presented as one involving "*aggravation of degenerative cervical spine disc disease*" with radiation to the upper extremities. The allegation of injury to the back was withdrawn.

The respondents were granted leave to cross-examine the appellant with respect to the issue of delay

On 29/04/2024, the Member issued a COD, which entered an award in favour of both respondents.

The appellant appealed on 5 grounds:

(1) Factual error by the Member in paragraph [199] of the reasons: "*The [appellant], in his various statements and his oral evidence, did not actually state that paraesthesia, pins and needles or numbness were occurring when he worked for the first respondent*";

(2) The Member erred in dismissing his submission that the psychological issues and other conditions of fibromyalgia and seronegative arthritis masked the symptoms of aggravation of the degenerative condition in his cervical spine (reasons, [196]–[197]);

(3) The Member erred in requiring him to point to evidence corroborating his evidence of experiencing pain in his neck and hands when working for the first respondent (reasons, [196]);

(4) The Member erred in finding that the right hand paraesthesia developed '*spontaneously*' with no contribution from work some 21 months after the worker ceased work for the first respondent (reasons, [210]–[212]) (emphasis in original); and

(5) The Member erred in finding that the histories relied upon by Dr Khong, Dr Singh and Dr Lee were inaccurate and so should be given no real weight on causation issues (reasons, [202]–[208]).

Deputy President Snell determined the appeal and dismissed it. His reasons are summarised below.

- He rejected ground (1) and held that it is necessary for a Member's reasons to be read as a whole.
- He found that the Member engaged in a careful analysis of the appellant's complaints from time to time. There was a credit issue in the case and the Member held that there were exaggerations and inconsistencies in his evidence and his memory was poor which affected his reliability. The Member's impression was that he would say he was unable to remember if he did not wish to answer a question. The Member made a number of specific findings going to the reliability of his evidence.
    (a) She found that he exaggerated the hours he worked with the respondent, the number of staff who were terminated or left after he commenced there, the volume of phone calls into the office, the condition of the office and the problems with the computer setup.
    (b) She did not accept that he complained to Dr Ozser about paraesthesia in the right hand before 16 August 2019.
    (c) She did not accept that he complained about his neck to Dr Ozser until 2021, save for "*neck swelling*" on 12 September 2019, which was of no real significance.
    (d) She did not accept that he had the pain he described when working for The respondent, which he did not mention to his general practitioner Dr Ozser during his period of employment with the respondent or during the period of 20 months after he was terminated.
- The Member specifically found that if the appellant had a medical problem regarding the neck or cervical spine, he would raise it with Dr Ozser, but there was no evidence to corroborate his evidence that he experienced neck and hand pain when working for the respondent.
- The Member held that it was a feature of the case that "*many medical providers have recorded a history that is inconsistent with the [worker's] evidence*". Her broad findings in her reasons at [194] to [197], regarding the acceptability of the appellant's evidence, are inconsistent with acceptance of the complaints described, in the absence of corroboration, particularly from the contemporaneous material of Dr Ozser.
- The appellant's statement postdated the end of his employment with the respondent by nearly four years. The Member's fact-finding essentially relied on contemporaneous complaints recorded by treating doctors, as opposed to his statement. This was consistent with the following well-known passage from *Onassis v Vergottis*:

> '*Credibility*' involves wider problems than mere '*demeanour*' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be ... Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.

- The Member was clearly aware of the appellant's statement dated 8/11/2021, as she specifically referred to it in her reasons at [26]. Acceptance of these complaints is inconsistent with the Member's findings regarding the acceptability of his evidence.
- He rejected ground (2) and held that the Member dealt with the '*masking*' submission at [197] of the reasons and she gave reasons for not accepting it, as it was not supported by a "*close reading of [the] clinical notes*". She noted Dr Ozser treated the worker for "*a range of conditions*". She said that the worker's "*psychological issues and the other conditions of fibromyalgia and seronegative arthritis certainly did not preclude [the worker] from raising other conditions with Dr Ozser after his employment with the first respondent was terminated*". By way of example, she referred to 5/02/2018 when matters raised at a consultation included the worker's toenail, a lost script, depression and anxiety and the worker's dismissal from work.
- Acceptance or rejection of this submission was a factual matter. The appeal is one pursuant to s 352(5) WIMA and is subject to the principles discussed above, in decisions such as *Whiteley Muir* and *Raulston*. The view which the Member took was open to her. The way in which the Member dealt with this issue did not involve appealable error.
- He rejected ground (3) and held that the Member's reference to corroboration did not involve her applying an inappropriate test. Its relevance was readily apparent, given the factual findings going to the absence of relevant complaint by the worker during the period of the worker's employment with The respondent, and thereafter. It formed part of her discussion of the evidence as a whole dealing with whether the worker had succeeded in establishing the occurrence of the pleaded injury.
- He rejected ground (4) and noted that the appellant framed this ground on the basis there was no medical evidence to support a finding that right hand paraesthesia developed spontaneously, with no work contribution, some 21 months after he ceased employment with the respondent.
- The appellant carried the onus of establishing the pleaded injury. The Member found that his qualified medical case was deprived of probative force, in circumstances where she found the worker did not suffer relevant symptoms during (or in an acceptable period after) his employment with The respondent. The effect of this was that the worker's case failed. The result did not turn on the Member's reference, in the reasons at [212], to a "*spontaneous*" development of symptoms.
- He rejected ground (5) and held that this was misconceived. The Member's discussion set out multiple bases on which she did not accept the appellant's evidence regarding when he experienced neck and related complaints. She found that he did not make relevant complaints about his neck and upper limbs while he was employed by the respondent or for a lengthy period thereafter.

Section 60 WCA - claim for cost of physiotherapy treatment; gym membership; personal training, and exercise physiology – the Member made orders for payment of treatment for a particular time period – appeal by worker seeking orders for those treatment expenses to be paid "for the duration of his lifetime" – consideration of treating doctor's reports – s 59A WCA

Hallmann v Southern Cross University [2025] NSWPICPD 26 – Acting Deputy President Parker SC – 27/03/2025

On 26/004/2024, Member Whiffen issued a COD which determined that physiotherapy treatment is reasonably necessary medical treatment as a result of accepted injuries dated 1/07/2020 and 15/10/2022, and he approved 8 weeks of physiotherapy treatment (3 times per week in accordance with the physiotherapist's request dated 6/04/2022).

The Member also determined that gym membership is reasonably necessary medical treatment and he approved gym membership for 3 months in accordance with the tax invoice from Byron Gym dated 11/04/2022.

The Member also determined that personal training is reasonably necessary medical treatment and he approved 13 weeks of personal training (2 times per week) in accordance with the trainer's request dated 30/08/2023.

The Member also determined that exercise physiology is reasonably necessary medical treatment and he approved 8 weeks of exercise physiology (once per week) in accordance with the physiologist's request dated 9/03/2023.

The Member stated that he only had evidence to order these treatment modalities for the relevant periods, and if the appellant required treatment for a longer period, he would need to make an appropriate claim upon the respondent.

The appellant appealed on eight grounds:

(1) The Member erred in fact in finding that he '*received no submission pointing me to … a reference within Dr Bird's reports stating that the [appellant] will specifically require lifelong physiotherapy treatment, gym membership, personal training, and exercise physiology*'.

(2) The Member erred in fact in finding that he was not able to find a reference within Dr Bird's reports stating that the appellant will specifically require lifelong physiotherapy treatment, gym membership, personal training and exercise physiology.

(3) The Member erred in fact in finding that the SMART plan specifically refers to how often each treatment modality requires review.

(4) The Member erred in law and fact in concluding that he could not infer from Dr Bird's reports that the treatment that is required to be lifelong, would be the specific treatment modalities of physiotherapy, gym membership, personal training and exercise physiology.

(5) The Member erred in law in finding that an award of lifelong treatment would be '*incongruous with s 59A of the 1987 Act*'.

(6) The Member erred in his discretion to award eight weeks of treatment for physiotherapy, exercise physiology and personal training, and three months for access to a gym membership.

(7) The Member erred in law and/or discretion in not making considering (sic) and/or making a finding and/or make orders with respect to the appellant's submissions on the invalidity of the s 78 notices.

(8) The Member erred in law and/or discretion in not making considering (sic) and/or making a finding and/or making orders with respect to the appellant's submissions on the respondent's breaches of their model litigant obligations.

Acting Deputy President Parker SC determined the appeal. He dismissed all grounds of appeal and confirmed the COD. His reasons are summarised below.

- He considered grounds (1) to (4) together and rejected all of them
    - He noted that the Member contemplated that the appellant may require future treatment in the future, but he did not regard Dr Bird as indicating that the specific treatment modalities or the particular frequencies at which the treatments were afforded to the appellant should continue for the balance of the appellant's life.
    - He held that Dr Bird's report establishes is that the conditions from which the appellant suffers are lifelong and will require doubtless lifelong medical treatment. But that is not the same as saying that he should receive precisely the same treatments for the same frequency for the rest of his life. The Member declined to make an order that the specific treatment modalities should be provided to the appellant at the same frequency identified in the requests for treatment for "life".
    - Rather the Member made an award in favour of the appellant in accordance with the specific requests for treatment for which the respondent had refused liability. These were discrete claims for benefits which the Member determined should be provided. The Member determined the claims denied in the s 78 notice and the exercise physiologist. He acted upon the specific requests made by the treatment providers in accordance with the directions given by Dr Bird to them. There is no error on the part of the Member in making an order in accordance with the specific requests which were disputed by the respondent.
    - Contrary to the appellant's submission, the inference from the SMART plan is that the treatment modality will be reviewed as to whether it should be continued and, if so, for what further period. The respondent was correct in arguing that "*review*" is used in the SMART plan to connote an assessment of something with an intention of instigating change if necessary. There is nothing in the SMART plan limiting the word "*review*". The inference from the SMART plan is that on review by the treating doctors the plan in all aspects would be subject to further consideration as to its efficacy and continued appropriateness. A particular treatment modality under consideration might be confirmed, varied or discontinued.
- He rejected ground (5) and noted that the Member found that at some point, s 59A WCA was likely to apply to the appellant and the clear intention of s 59A is to terminate compensation payments with respect to s 60 expenses. The Member did not conclude that an award for lifetime treatment cannot be awarded due to the operation of s 59A. The Member concluded that without an assessment as to whether the appellant was a worker with high needs, to make an award for the treatment identified by Dr Bird for the balance of the appellant's lifetime would be "*speculative*". That conclusion was plainly open and in accordance with the context of s 60. He stated, relevantly:

> 131. In *Zanardo & Rodriguez Sales & Services Pty Ltd v Tolevski* [2013] NSWCA 449, Leeming JA in a decision agreed to by Beazley P and Tobias AJA provided insight as to the operation of the payment provision s 60. His Honour said:
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> > *Section 60(1) is an indemnity provision, imposing an obligation on the employer to pay the costs of the treatment or service or related travel expenses: New South Wales Sugar Milling Co-operative v Manning [1998] NSWCC 33; (1998) 44 NSWLR 442. Subsections (2), (2A), (2B), (2C), (3) and (4) qualify and amplify the statutory indemnity in subsection (1). Subsection (5) is of a different character. The reason for its first sentence, which expands the authority of the Commission to decide disputes about prospective treatment, was that it had been held in Widdup v Hamilton [2006] NSWWCCPD 258; (2006) 5 DDCR 85 that there was no power to determine a dispute about paying for treatment which had not been undertaken.*

132. The point is that while subsection (5) authorises the Commission to decide disputes about prospective treatment, this is in the context of an indemnity provision in which costs are to be incurred for prospective treatment.

- He rejected ground (6) for the reasons provided in relation to grounds (1) to (5).
- He rejected ground (7). He noted that the appellant complained that the s 78 notice was defective and that the Member found in favour of the appellant and found it unnecessary to determine whether the notice was defective or not. There was no issue of inadequacy of the s 78 notice before the Member and he was not required to determine whether the notice was defective.
- He also rejected ground (8) and held that the appellant's assertion that the Member did not consider his complaint that the respondent was in breach of the model litigant obligations was "*simply not correct*". The Member did not consider it to be his role to investigate the dealings further or prompt further investigation, but that "*the respondent has acted courteously and in accordance with the guiding principle of the Commission (pursuant to s 42 of the Personal Injury Commission Act 2000 [sic, 2020] in assisting [him] to facilitate the just, quick and cost-effective resolution of the real issues in the proceedings – the respondent did not delay the resolution of the proceedings, making its submissions in a timely manner*." The Member's function and jurisdiction was limited to the material before him and the resolution of the parties' dispute as defined by the issues. The issues did not extend to a general excursus into the respondent's conduct at large.