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UPDATES
INFORMATION
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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

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. Young v Vietnam Veterans Keith Payne VC Hostel Limited [2020] NSWWCCPD 66
2. Lachley Meats (Forbes) Pty Ltd and M C Meats (Lachley) Pty Ltd trading as Lachley Meats v Merritt (No 2) [2020] NSWWCCPD 67
3. Ooi v NEC Business Solutions Ltd (No 2) [2020] NSWWCCPD 68
4. Kohsar v BRI Security (Business Risks International) [2020] NSWWCCMA 169
5. Powell v Gotcha Pty Ltd [2020] NSWWCC 389
6. Purtell v Workers Compensation Nominal Insurer (iCare) & Others [2020] NSWWCC 393
7. Jago v Spotless P & F Pty Ltd [2020] NSWWCC 394

WCC – Presidential Decisions

Proposed surgery is not reasonably necessary - Factual determination – principles applicable on appeal

Young v Vietnam Veterans Keith Payne VC Hostel Limited [2020] NSWWCCPD 66 – Deputy President Wood – 19/11/2020

On 7/01/2016, the appellant injured her back at work. She claimed compensation and the respondent accepted the claim. Her symptoms worsened and she underwent numerous treatment regimes and procedures. Ultimately, on 21/06/2019, Dr Coughlan (treating neurosurgeon) recommended spinal fusion surgery at the L3/4 level. However, the respondent disputed that the treatment was reasonably necessary.

Arbitrator Wynyard issued a COD which determined that the proposed surgery was not reasonably necessary and he entered an award for the respondent. He considered Dr Coughlan's earlier opinion that surgery did not have a part to play in the appellant's treatment and his reasons for subsequently considering that spinal fusion was reasonably necessary. He also considered the opinion of Dr Bodel and those of Dr Teychenné and Dr Mitchell, who opined that the appellant's symptoms related to the central low back at the L4/5 and L5/S1 levels and that the radiology indicated a disc protrusion at the L4/5 level with an annular tear. He also noted that Dr P Bentivoglio diagnosed pre-existing degenerative changes at the L4/5 level and facet joint changes at the L3/4, L4/5 and L5/S1 levels, which were aggravated by the work injury. He also summarised Dr Casikar's opinion and the arguments made by both parties.

The Arbitrator referred to and quoted from the decision of *Diab v NRMA Ltd*, in which Roche DP set out the test for determining whether treatment was reasonably necessary. He noted that the appellant had argued that the surgery was reasonably necessary because all other treatment regimes had failed, which was Dr Coughlan's rationale. He noted that Dr Coughlan did not state that he expected the surgery to be effective or to alleviate the appellant's symptoms. While a potentially poor outcome from the surgery is not determinative of whether the surgery would be effective, the purpose of the treatment is to alleviate the appellant's suffering and neither Dr Coughlan nor Dr Bodel put forward a convincing case that the surgery would have the potential to alleviate her symptoms. At its highest, Dr Coughlan's evidence was that he had not come to the decision quickly or lightly, and that all other treatment had failed and the Arbitrator held that the failure of past treatment was not of itself sufficient to show that the treatment was appropriate.

The Arbitrator stated that it is not unusual for medical experts to have differing opinions and so in those circumstances, "*the medico-legal referee retained by the worker becomes of some relevance*." He held that there is no evidence that the proposed surgery would have actual, or even potential, effectiveness and that there is no unanimity between the medical professionals in the appellant's case that the proposed surgery was appropriate or likely to be effective.

The Arbitrator also noted that the evidence clearly indicated that the L4/5 disc was abnormal, and Dr Bodel had diagnosed a disc rupture at that level which was causative of the injury, which was supported by Dr Bentivoglio, Dr Teychenné and Dr Mitchell. He held that Dr Bodel clearly disagreed with Dr Coughlan's recommendation and that the appellant had not discharged her onus of proving that the proposed surgery was reasonably necessary.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) in fact in respect of the opinions expressed by Dr Coughlan and Dr Bodel in relation to the appropriateness of the treatment, thereby causing him to err in the application of the legal test under s 60 (1) *WCA*; (2) in fact in respect of the "*unanimity*" of the evidence; (3) in fact and law in respect of the availability of alternate treatment, by: (i) failing to provide sufficient reasons to understand the basis of the determination or the determination itself; and (ii) making a finding overwhelmingly at odds with the weight of the evidence, and (4) in law in misapplying the correct test under s 60 *WCA.*

Deputy President Wood determined the appeal on the papers. She confirmed that the principles summarised by Roche DP in *Raulston v Toll Pty Ltd* apply to an appeal against a factual determination and the matters that are relevant to whether treatment is reasonably necessary were set out by Bourke CCJ in *Rose* as follows:

> 3. Any necessity for relevant treatment results from the injury where its purpose and potential effect is to alleviate the consequences of injury.
>
> 4. It is reasonably necessary that such treatment be afforded a worker if this Court concludes, exercising prudence, sound judgment and good sense, that it is so. That involves the Court in deciding, on the facts as it finds them, that the particular treatment is essential to, should be afforded to, and should not be forborne by, the worker.
>
> 5. In so deciding, the Court will have regard to medical opinion as to the relevance and appropriateness of the particular treatment, any available alternative treatment, the cost factor, the actual or potential effectiveness of the treatment and its place in the usual medical armoury of treatments for the particular condition.

Roche DP applied Burke CCJ's criteria in *Diab*, but also observed (citations omitted):

> While the above matters are '*useful heads for consideration*,' the '*essential question remains whether the treatment was reasonably necessary*.' Thus, it is not simply a matter of asking, as was suggested in *Bartolo*, is it better that the worker have the treatment or not.

Wood DP rejected ground (1). She held that the Arbitrator did not misrepresent Dr Coughlan's evidence, but he was not convinced by his opinion that the surgery had the potential to alleviate the appellant's symptoms. He concluded that the only *established* reasons for performing the proposed surgery were that Dr Coughlan had not come to his decision quickly or lightly and all other treatment had failed.

Wood DP rejected ground (2). She rejected the appellant's arguments and held that the Arbitrator's reference to there being no unanimity in her medical case was simply an observation that there was no agreement amongst the medical experts, particularly between Dr Coughlan and Dr Bodel, that the proposed surgery to the L3/4 level alone was the appropriate treatment to address her symptoms. That observation was undoubtedly correct and the Arbitrator was clearly looking for some corroborative evidence to support Dr Coughlan's opinion.

Wood DP rejected ground (3). She did not accept that the Arbitrator went so far as to conclude that there was alternate treatment available. The basis upon which the Arbitrator determined that the proposed surgery was not reasonably necessary was that he was not satisfied that the surgery would alleviate, or have the potential to alleviate, appellant's symptoms.

Wood DP also rejected ground (4). She held that the Arbitrator did not treat each of the criteria in *Diab* as "*pre-requisites*". He considered the criteria in the context of the evidence before him and was not satisfied that the failure of past treatment and that Dr Coughlan's opinion was not made hastily or without due consideration were sufficient reasons to say that the proposed surgery was reasonably necessary. That factual determination was open to the Arbitrator. She also stated:

> 153. The appellant asserts that the Arbitrator failed to take into account that the respondent's medico-legal expert, Dr Casikar, conceded that the type of surgery proposed was the standard form of treatment for a degenerative back condition. As the respondent submits, the Arbitrator acknowledged that spinal surgery was, in some cases, an accepted form of treatment. As Dr Casikar was the only expert to offer that opinion, it is clear that the Arbitrator took into account that evidence. In any event, Dr Casikar's opinion in that regard does not assist the appellant. A general view that spinal surgery is an accepted form of treatment does not address the reasonableness of performing surgery to one level of the spine over another, or without the other. The concern expressed by Dr Bodel was that consideration should be given to fusing both levels of the spine. In those circumstances, even if the Arbitrator had failed to consider that evidence from Dr Casikar, the error would not have affected the outcome of this case.

Accordingly, Wood DP confirmed the COD.

Construction of s 39 WCA - Reconsideration under s 350 (3) WIMA – Application of Court of Appeal's decisions in Hochbaum & Whitton

Lachley Meats (Forbes) Pty Ltd and M C Meats (Lachley) Pty Ltd trading as Lachley Meats v Merritt (No 2) [2020] NSWWCCPD 67 – Deputy President Snell – 25/11/2020

The decision of President Phillips DCJ dated 12/09/2019 (*Lachley Meats (Forbes) Pty Ltd and M C Meats (Lachley) Pty Ltd trading as Lachley Meats v Merritt [2019] NSWWCCPD 49*) was reported in Bulletin no. 43, but the following is provided by way of summary.

On 13/07/2017, the insurer's IME assessed 19% WPI and on 25/09/2017, it gave the worker notice that her weekly payments would cease on 25/12/2017, based upon that assessment.

In March 2018, the worker served a report of Dr Oates, which assessed 21% WPI, upon the insurer. However, on 23/02/2018, the insurer disputed the claim for weekly benefits under s 39 WCA. On 28/03/2018, the worker made a further claim under s 66 WCA and the insurer disputed that claim. The s 66 dispute was referred to an AMS and on 1/11/ 2018, Dr Anderson issued a MAC, which assessed 24% WPI.

On 21/11/2018, the worker claimed weekly benefits from 26/12/2017 to 31/10/2018 from the insurer. However, the insurer reinstated payments from 1/11/2018. On 5/12/2018, a COD was issued based upon the MAC.

On 16/01/2019, the worker filed a further ARD claiming weekly payments for the disputed period.

On 25/03/2019, ***Arbitrator Sweeney*** delivered an ex-tempore decision and stated, in effect, that he intended to follow his reasoning in *Kennewell* and the reasoning of Senior Arbitrator Bamber in *Hochbaum*.

The appellant appealed and asserted that the Arbitrator erred in his interpretation of s 39 WCA, as s 39 (2) WCA allows weekly payments to continue beyond an aggregate period of 260 weeks, but only on or from the date of such assessment. It relied upon President Phillips' decision in *Hochbaum* and argued that this matter is factually similar and should be decided accordingly.

SIRA intervened in the appeal and its submissions largely reflected those made in *Hochbaum* and *Whitton*. It outlined the four bases upon which the Arbitrator's decision was reached, namely: (1) the "*totally emphatic*" words "*does not apply*" in s 39 (2) mean that the limitation in s 39 (1) does not apply at all in cases where the worker has been certified as having a sufficient degree of permanent impairment; (2) it is not '*textually available*" to describe s 39 as operating *"in the present*", even if it may have merit "*if the language of the Act and the interrelationship of the various sections is only to be considered purposively*"; (3) a consideration of s 60AA reinforced his view as to the proper construction of s 39 (1) and (2); and (4) the interpretation urged by the respondent (reading words into s 39).

In relation to (1), SIRA argued that the Arbitrator's approach paid insufficient regard to other textual considerations and failed to give effect to s 39 (3) in construing s 39 (2).

In relation to (2), SIRA argued that the Arbitrator's finding was contrary to President Phillips' finding in *Hochbaum* and *Whitton* in respect of the clear language, text and context of the provision: namely that s 39 operates in the present, the trigger and time at which s 39 (2) operates to restore the entitlement to weekly payments is when the worker's WPI has been assessed in accordance with s 65 at more than 20%.

In relation to (3), SIRA noted that it was not clear why the Arbitrator regarded the language of s 60AA as reinforcing his opinion as to the proper construction of s 39 (1) and (2).

In relation to (4), SIRA referred to the Presidential decisions in *Hochbaum* and *Whitton* and argued that the President's construction of the provision in those decisions, which should equally be applied here, does not "*read words into*" s 39 (2), but simply provides that s 39 (1) either operates or does not, depending on whether the degree of permanent impairment has been assessed in accordance with s 65 as being greater than 20%. This construction has the advantage of enabling s 39 to be applied according to its terms to the facts as they exist at any given point in time, with the associated benefit of certainty as to the operation of the law at any particular time, depending on the existence or otherwise of the relevant favourable assessment in accordance with s 65.

President Phillips DCJ held that this matter involves issues of principle, construction of facts that are very similar, if not identical, to those discussed in his decisions in *Hochbaum* and *Whitton*, but the arguments raised in this matter "do have some slightly different emphasis being placed on particular issues than was the case in either *Hochbaum* or *Whitton*." He stated, relevantly:

> 85. Section 39 in its terms clearly reveals a similar cost saving intention as was discussed in Cram Fluid. For the first time, it brings to an end a worker's entitlement to compensation after 260 weeks. This provision is then subjected to an exception which is found in s 39 (2), which provision excepts from the bar the subset of those injured workers, namely, in the circumstances of this matter who are relevantly assessed as having a permanent impairment of greater than 20%. That s 39 reveals

> a cost saving intention could not be clearer. Once the 260 week period (in aggregate) is achieved, absent agreement with the insurer or a pre-existing MAC of greater than 20%, entitlement to compensation beyond the 260 week aggregate period depends upon the satisfaction of the criterion set out in s 39 (2), as assessed in accordance with s 39 (3). As I found in *Hochbaum* and *Whitton*, it is necessary to read s 39 (3) into s 39 (2) as subs 3 provides the definition of permanent impairment which is referred to in subs 2. Permanent impairment, as I found in *Whitton*, is not an everyday English phrase, rather it is a term of art with the particular meaning ascribed to it in s 39 (3).

His Honour held that the Arbitrator erred in finding that once the "*greater than 20% WPI*" threshold was satisfied, the 260 week limitation "*does not apply at all*". This incorrectly means that s 39 (1) never applied to the worker, which is contrary to the present tense of s 39. This construction also pays insufficient attention to the medical assessment scheme which Parliament enacted in s 39 (2) and s 39 (3), which operates to read s 39 (3) into s 39 (2). He concluded:

> 91.. This case, unlike *Hochbaum* and *Whitton*, did not assert that s 39 (2) was remedial or beneficial. I therefore do not need to deal with this particular submission, which I dealt with at length in both *Hochbaum* and *Whitton*. Indeed the learned Arbitrator, correctly in my view, properly characterised s 39 (2) as an "*exception*".

Accordingly, his Honour revoked orders 2 and 3 of the COD and entered an award for the appellant.

On 5/11/2020, the worker's solicitor wrote to the Registrar, seeking reconsideration of the Presidential decision under s 350 (3) *WIMA,* on the basis that this determination cannot stand in the light of the decision in *Hochbaum No. 2.* He sought reinstatement of the Arbitrator's decision. The employer's solicitors did not file submissions in response to this application.

Deputy President Snell revoked the Presidential decision and reinstated the decision made by Arbitrator Sweeney. In so doing, he stated (citations excluded):

> 15. I accept that the reasoning and conclusions of the Court of Appeal in *Hochbaum No. 2* are inconsistent with the Presidential decision in the current matter. I accept that it is appropriate to exercise the reconsideration power in the circumstances to do justice between the parties. The worker submits that the decision of the Arbitrator should be reinstated. I note that the employer, quite properly, does not make submissions contrary to that course.
>
> 16. I note that the employer's identity was described in the Certificate of Determination dated 2 April 2019, issued by the Arbitrator, in a fashion consistent with what appears in the Presidential decision dated 12 April 2019 (and in this decision). I note the employer was described in the Application to Appeal and the Notice of Opposition as the '*Workers Compensation Nominal Insurer'*. It was suggested by the employer's counsel at the hearing of the appeal that the correct identity may well be the '*Workers Compensation Nominal Insurer*'. There appears to have been some uncertainty. I note the Arbitrator gave the parties liberty to apply in respect of the calculations regarding the weekly entitlement from 26 December 2017 to 1 November 2018. It is, in my view, appropriate to grant liberty for the parties to apply to the Arbitrator in respect of both of these matters, should it prove necessary.

Reconsideration under s 350 (3) WIMA refused

Ooi v NEC Business Solutions Ltd (No 2) [2020] NSWWCCPD 68 – Deputy President Snell – 25/11/2020

The appellant alleged that she suffered repetitive strain injuries to her neck and right arm and ceased work in September 2003. In 2004, she claimed weekly payments, s 60 expenses and lump sum compensation.

On 10/05/2005, *Arbitrator Foggo* issued a COD, which stated that he was not satisfied that the appellant was injured in the course of her employment and he entered an award for the respondent.

The appellant appealed against that decision and on 26/06/2006, ***Acting Deputy President Snell*** (as he then was) determined the appeal on the papers. He confirmed the Arbitrator's decision.

The appellant then appealed to the Court of Appeal, but the appeal was dismissed with costs.

In 2010, the appellant commenced further proceedings against the respondent, but by consent, those proceedings were discontinued with no order as to costs.

In 2012, the appellant commenced further proceedings against the respondent.

On 27/04/2012, ***Arbitrator Wynyard*** conducted a teleconference, during which the appellant was self-represented. On 3/05/2012, he issued a COD and SOR, in which he described the allegations of injury as: "*Repetitive Strain and Stress Injuries with permanent impairment to right upper extremities (sic) and spine. Psychological Trauma Injury – severe anxiety, stress, depression. Post-Traumatic Stress Disorder; all work related.*" He held that he was bound by the Presidential decision and lacked power to consider the merits of Arbitrator Foggo's decision and that the appropriate forum for reconsideration was before a Presidential member. Accordingly, he struck out the application.

On 8/07/2020, the appellant wrote to the President, seeking reconsideration of "*my workers compensation claim of WCC 5574 of 2005*" (sic, 2004). She referred to the 2012 proceedings and stated that she was advised by Arbitrator Wynyard that she should "*seek legal representation to appeal to the President of WCC*". She asserted that there was a "*serious miscarriage of natural justice*" in the finding in favour of the respondent.

The respondent opposed the application for reconsideration.

Snell DP held that the reconsideration power under s 350 (3) *WIMA* is discretionary and the principles governing it are summarised by Roche ADP in *Samuel v Sebel Furniture Limited*, as follows:

> Having regard to the above authorities and the provisions and objectives of *the 1998 Act* I believe that the following principles are applicable to reconsideration applications under section 350 (3) of *the 1998 Act*:
>
> 1. The section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 2. Whilst the word '*decision*' is not defined in section 350, it is defined for the purposes of section 352 to include '*an award, order, determination, ruling and direction*'. In my view '*decision*' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
>
> 3. Whilst 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 application for reconsideration ('*Schipp*');

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 ('*Hilliger*');

5. Reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration 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 ('*Maksoudian*');

6. Given the broad power of '*review*' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 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 *Port of Melbourne Authority v Anshun Pty Ltd* [1981] HCA 45; (1981) 147 CLR 589 ('*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 ('*Anshun*');

8. A mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'), and

9. The Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354 (3) of *the 1998 Act*).

Snell DP stated that the presence of unexplained delay, and the principle that litigation should not proceed interminably, are important in the circumstances of this case. The Arbitral decision was issued on 10/05/2005, his previous appeal decision was issued on 26/06/2006 and the Court of Appeal's decision issued in early 2007, which is more than 13 years ago. He stated that during that period, the only steps that sought to positively advance the matter were the reconsideration applications in 2010 and 2012. The presence of very extensive delay, which is not adequately explained, militates heavily against exercise of the discretion in the appellant's favour and the course that is being followed amounts to effectively litigating the same matter "*again and again*" (see the passage of *Hardaker* (quoted at para [59] of the decision)).

Snell DP noted that the fundamental reason why the appellant failed before the Arbitrator was because he made an adverse credit finding against her. In the material that the appellant lodged in support of the reconsideration application, she asserted that the motor vehicle accident was "*minor*" and that it did not cause her condition. However, this does not solve the credit issue and in the Presidential decision, he concluded that the Arbitrator's decision was well open to him on the evidence and did not demonstrate appealable error.

Snell DP stated that while the appellant sought to rely upon fresh evidence, there was no good reason why this material could not with reasonable diligence have been put before the Arbitrator. He held:

> 73. Shortly after the commencement of the arbitration hearing, the Arbitrator asked the legal representatives whether they wished for Ms Ooi to give some evidence. No application was made by either party.[62] To permit such evidence to be relied on now, in the context of a reconsideration of the Presidential decision, approximately 15 years after the arbitration hearing before Arbitrator Foggo, would be contrary to the principles that govern reconsiderations. The material would not satisfy the requirements to be admissible as fresh evidence pursuant to s 352 (6) of *the 1998 Act*, applying the decision in *Strickland*. It could not be said that Ms Ooi moved "*with appropriate speed and diligence*" to rely on the further evidence.

74. Additionally, the evidence regarding Ms Ooi's activities looking after Mr Johnstone is not of such a nature that it would, "*if admitted, ... more likely than not have affected the outcome of the proceedings*" (see the passage of *Maksoudian* quoted at [60] above). The evidence may have lessened the impact of the apparent discrepancy regarding Ms Ooi's ability to perform domestic activities. The difficulty with the inconsistent statements, regarding the two potential causes of injury, remains, and would justify the view formed by the Arbitrator, and confirmed by me on the Presidential appeal, regarding credit. It follows that, applying the principles in Strickland, the evidence of Mr Kelso would not satisfy the criteria for admission as fresh evidence pursuant to s 352 (6) of *the 1998 Act*. If admitted, it would not constitute "*material that with reasonable diligence could not have been put before the Court at the time of the original proceedings*". It follows that the material from Mr Kelso, and material from Ms Ooi to similar effect, does not assist in Ms Ooi's application for reconsideration…

76. To pick up the language of O'Meally J in *Galea* (see [61] above) the further medical reports of Dr Champion constitute "*more evidence*" rather than "*fresh evidence*". It does not lead to the conclusion that reconsideration is appropriate.

77. I accept the respondent's submission that Ms Ooi's reliance on ss 329 (1A) and 378 is misconceived.

Accordingly, Snell APD refused the application for reconsideration.

WCC – Medical Appeal Panel Decisions

Psychological injury – assessment of deductible under s 323 WIMA as a result of a previous MVA upheld

Kohsar v BRI Security (Business Risks International) [2020] NSWWCCMA 169 – Arbitrator McDonald, Dr M Hong & Dr J Parmegiani -16/11/2020

On 10/09/2017, the appellant suffered a work-related psychological injury.

On 12/06/2020, Dr Parsonage issued MAC, which assessed 9% WPI, comprising 15% WPI less a deductible of 6% WPI under s 323 *WIMA*. The AMS reported that the appellant suffered depression following a MVA in 2014, in which he injured his neck. However, when asked about a report prepared by Dr Jungfer for the Medical Assessment Service on 3/04/2017, he denied suffering depressive symptoms in 2017 and asserted that the date in that Certificate was incorrect.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* The respondent opposed the appeal.

The MAP determined the appeal on the papers and decided that it was not necessary for the appellant to be re-examined.

The appellant argued that the AMS did not exercise his clinical judgment and treated Dr Jungfer's certificate as binding or conclusive and he made a demonstrable error by failing to have regard to the bulk of the medical evidence in the file. He argued that the AMS paid scant attention to the evidence and did so for the purpose of assessing the perceived inconsistencies identified from Dr Jungfer's certificate. The AMS failed to have regard to his own evidence about the effects of the 2014 MVA and he should have considered the evidence objectively and not assumed that the matters recorded in Dr Jungfer's certificate were correct. He also argued that the AMS failed to provide the path of reasoning by which he arrived at his conclusion. However, he did not argue that the primary assessment of WPI was incorrect.

The MAP held that the AMS' assessment was open to him in the exercise of his clinical judgment and he did not apply incorrect criteria or make a demonstrable error. The AMS determined that the deductible proportion under s 323 *WIMA* was 6/15, relying upon Dr Jungfer's assessment and his own clinical judgment, and because the history that the appellant provided to Dr Jungfer was inaccurate, he reconsidered that assessment on the basis of subsequent information. He concluded that a deduction on 1/10 was at odds with the available evidence. He considered all of the evidence in the file and came to his own conclusion.

The MAP stated, relevantly:

> 48. Any AMS is required to take a history when he or she examines the worker. The process of taking a history is a fundamental part of the assessment by a psychiatrist. He or she will have regard to the matters in the worker's statement but is not bound to accept them.
>
> 49. The MAC shows that the AMS took a detailed history. The conclusion reached by the AMS reflects his agreement that Mr Kohsar's condition was worse after the injury.
>
> 50. The AMS highlighted inconsistencies between the history Mr Kohsar gave him and the documents in the file. Mr Kohsar told the AMS that he had fully recovered from the depression he suffered after the motor accident. That is not consistent with his statement. When specifically asked about the symptoms recorded by Dr Jungfer, he said that he might have had some anxiety symptoms which had resolved by the time of the injury in 2017. Again that is inconsistent with his statement.
>
> 51. Dr Jungfer's report was important not so much for the assessment she made as for the history she took only five months before the injury. The AMS was correct to treat the matters set out as a picture of Mr Kohsar's pre-injury functioning.
>
> 52. The fact that he was assessed by the Medical Assessment Service means that he was pursuing a claim for damages at that time. The history of recovering damages recorded by Dr Benjamin suggests that the claim was finalised between April 2017 and November 2018, though Mr Khosar denied a history of psychiatric illness as a result of that accident.
>
> 53. Dr Jungfer's assessment relied on Mr Kohsar's statement that he was not working, which was not correct – he was already working for BRI.
>
> 54. The AMS did not rely on Dr Jungfer's assessment but used the history to form his own conclusion, using the method set out in paragraph 11.10 of the Guidelines:…
>
> 55. The AMS took that fact into account when he made his own assessment of pre-injury employability in Class 1 rather than Class 3. He explained his reasoning and compared his findings to those of Dr Malik.

Accordingly, the MAP confirmed the MAC.

WCC – Arbitrator Decisions

Claim under s 66 WCA – Worker returned to live in UK within a week of making her claim – Respondent's application to strike out application refused – Worker's application for Arbitrator to determine impairment declined – Matter remitted to Registrar for referral to an AMS

Powell v Gotcha Pty Ltd [2020] NSWWCC 389 – Arbitrator Sweeney – 13/11/2020

On 6/01/2020, the worker injured her right hand at work. the Nominal Insurer accepted liability and paid weekly compensation and s 60 expenses.

On 19/06/2020, the worker saw Dr Assem at the request of her solicitors and he assessed 12% WPI as a result of the work injury. On 15/07/2020, her solicitors made a claim under s 66 *WCA* upon the Nominal Insurer.

On 20/07/2020, iCare wrote to the worker advising that it was unable to determine the claim and would appoint an IME by way of Telehealth to assess the degree of permanent impairment. However, on 23/07/2020, the worker returned to the UK as a result of her visa expiring.

Arbitrator Sweeney noted that the respondent argued that the ARD should be struck out because it had not failed to determine the claim as and when required under the *WIMA.* However, the worker argued that iCare had not dealt with the claim in a practical or timely manner and it failed to determine the claim as required by the *WIMA* and as there is only one assessment of permanent impairment, there is no dispute to be referred to an AMS and she is entitled to compensation for 12% WPI.

The worker also stated that she has filed a Miscellaneous Application seeking a determination that her incapacity for work is permanent, which would entitle her to receive any weekly payments in the UK, but this had not yet been allocated to an Arbitrator.

The Arbitrator noted that under s 281 *WIMA,* the time within which the insurer must determine the claim would not expire until 2 months after the worker attended its medical examination or one month after the insurer received the medical report. However, iCare had not provided the worker with the necessary detail of any IME and s 282 (2) *WIMA* contemplates the worker being provided with the name and address of a doctor. He stated:

> 25. I appreciate that Icare was confronted with an unusual situation which arose from factors beyond its control. Nonetheless, the evidence does not suggest that it had made any progress in appointing a medical examination in Australia or in the United Kingdom, either audio visually or face-to-face, at the time the applicant commenced these proceedings. In my opinion it had not required the applicant "to submit herself to a medical examination", it had merely indicated in correspondence that it intended by future letter to appoint a medical examination.

The Arbitrator declined to strike out the ARD, but he also declined to determine the claim in accordance with Dr Assem's assessment, on the basis that it would not be fair to do so in the current circumstances. He also noted that while Dr Assem opined that the injury was complicated by the development of a chronic pain syndrome, he excluded a finding of CRPS. He stated, relevantly:

> 31. Chapter 17 of the SIRA NSW workers compensation guidelines for the evaluation of permanent impairment-fourth edition (the guidelines) specifically exclude Chapter 18 of the American Medical Association Guides to The Evaluation of Permanent Impairment (AMA 5) as chronic pain is a subjective experience which cannot be adequately measured or objectively assessed by a medical practitioner. It is at least arguable that Dr Assem has attempted to achieve indirectly what Chapter 17 of the guidelines precludes him from doing i.e. assessing permanent impairment as a result of chronic pain.
>
> 32. But even if I am wrong in that respect, I note that Dr Assem assessed the applicant some five months after her injury. There is other medical evidence before the Commission, which suggests that the applicant was improving up to that time including the opinions of two hand surgeons. In those circumstances, it seems to me to be a bold step to conclude that the applicant's chronic pain syndrome is permanent.
>
> 33. Of course, I do not conclude that Dr Assem is wrong in his assessment. It is simply the case that I am not persuaded by his report and the other evidence in this case that I should determine permanent impairment rather than referring the matter to an AMS.

34. The referral of the matter to an AMS may not solve the geographical problems that have confronted the parties. It is not obvious that the applicant's impairment can be assessed audio visually. Equally, it seems unlikely that the Commission will be able to have the applicant assessed in the United Kingdom in the near future. It is possible that the applicant and the respondent may be able to agree on a joint examination in London. But that approach is also problematical.

35. On the other hand, I see no other practical way of dealing with the dispute. I also note that there is a dispute between the parties as to permanency of the applicant's incapacity. That matter may also have to be referred to an AMS as I suspect that the question of permanency will be difficult for an arbitrator to decide on the current evidence. It may be preferable to have both matters assessed at the same time when that can be done

Section 9AA WCA – industrial deafness – the state in which the worker usually worked could not be identified – worker worked out of 2 bases (one in NSW & the other in Victoria) and neither could be said to be the place where he was usually based – employer's principal place of business was in Victoria – Held: employment not connected with NSW

Purtell v Workers Compensation Nominal Insurer (iCare) & Others [2020] NSWWCC 393 – Arbitrator Edwards – 16/11/2020

The worker was employed as a truck driver. He alleged that he suffered industrial deafness as a result of his employment (deemed date of injury: 12/09/2016) and claimed compensation for hearing aids under s 60 *WCA.*

The employer did not hold a policy of workers compensation insurance in NSW and its principal place of business was in Victoria. The Nominal Insurer disputed the claim under s 9AA *WCA* on the basis that the employment was not connected with NSW.

Arbitrator Edwards issued a COD dated 16/11/2020, which determined that the employment was not connected with NSW and he entered an award for the respondents. His reasons are summarised below.

- While the employer's principal place of business was in Victoria, it operated in Victoria, Southern NSW and Canberra and has a depot/warehouse in Albury. The Albury depot is usually operated by 2 employees – the "*night driver"* and "*the helper*", but sub-contract drivers are also engaged to do deliveries from the Albury depot to Wodonga and towns along the Victorian border to Cobram.
- When the truck from the Victorian depot arrives at Albury in the morning, it is unloaded by the night driver, the helper and the sub-contract drivers. After unloading, the night driver and helper (who reside locally) go home for several hour and then return to the depot to do any afternoon pick-ups and get the truck ready to be driven to Melbourne by the night driver, stopping at depots at Wangaratta and Benalla to load merchandise. On arrival in Melbourne, the night driver would have a meal break and then drive another truck to Albury, stopping at Benalla and Wangaratta, where he would unload merchandise.
- The worker argued that he satisfies the "*usually works*" test, because: he commenced and finished each shift at Albury; it is not a mathematical exercise to determine the proportion of time worked in NSW and Victoria; he reported to the Albury depot manager to fill our and report time sheets, receive orders and paperwork, to call in when sick and to arrange repair and maintenance on the truck. He collected materials in both states and the employer conducted its business in both states.
- However, he conceded that if the "*usually works*" test cannot be "*answered positively*" then, in accordance with the cascading test, he was "*usually based*" in NSW for the purposes of his employment. He argued that the Albury depot was the location where he was habitually or customarily based.

- iCare argued that the worker was not usually based in NSW for the purposes of his employment as he took instructions from the warehouse management in Melbourne and the warehouses in Benalla and Wangaratta, as well as the warehouse in Albury. Therefore, he was "*usually based*" in both Melbourne and Albury and, as found in *Fisher*, neither could be said to be the place where he was usually based for the purposes of his employment. Also, the worker's evidence was that any problems went through Melbourne does not support a conclusion that he was usually based in Albury.
- The employer adopted iCare's submissions.

The Arbitrator stated:

> 49. It is accepted that the relevant terms of s 9AA(3) provide cascading tests for determining the State with which a worker's employment is connected. First test (ss (3) (a)), a worker's employment is connected with the State "*in which the worker usually works in that employment*" (the "*usually works*" test). If that test provides an answer to the question, there is no need to proceed further. If not, one applies the second test (ss (3) (b)) and looks for the State "*in which the worker is usually based for the purposes of that employment*" (the "*usually based*" test). If that test provides the answer, there is no need to proceed further. If not, one applies the third test (ss 3 (c)) and looks for the State "*in which the employer's principal place of business in Australia is located*" (the "*principal place of business*" test).
>
> 50. Deputy President Roche in *Martin* said that in determining whether a worker usually works in a State under s 9AA (3) (a), regard must be had to the worker's "*work history*" with the employer and the intention of the worker and employer. However, regard must not be had to any "*temporary arrangement*" under which the worker works in a State for a period of not longer than six months (s 9AA(a)).
>
> 51. The Deputy President reviewed the authorities, applicable in the determination of the provisions of s 9AA of the 1987 Act, to distil the following principles set out at [60] as follows:
>
> > (a) regard should always be had to the terms of the contract of employment;
> >
> > (b) 'usually works' means the place where the worker habitually or customarily works, or where he or she works in a regular manner (*Hanns* at [26]). It does not mean the place where the worker works for the majority of time (*Knight* at [76]) and is not simply a mathematical exercise (*Falls* at [43]), though the time worked in a particular location will naturally be relevant. It will also be relevant to look at where the worker is contracted to work (*Falls*). Regard must be had to the worker's work history with the employer and the parties' intentions, but '*temporary arrangements*' for not longer than six months within a longer or indefinite period of employment are to be ignored. Whether an arrangement is a '*temporary arrangement*' will depend on the parties' intentions, which will be ascertained by looking at the worker's work history and terms of the contract. A short-term contract of less than six months that is not part of a longer or indefinite period of employment will not usually be a '*temporary arrangement*' (*Knight*);
> >
> > (c) '*usually based*' can include a camp site or accommodation provided by an employer (*Knight* at [83]). Where a worker is usually based may coincide with the place where the worker usually works, but that need not necessarily be so. In considering where a worker is '*usually based*', regard may be had to the following factors, though no one factor will be decisive: the work location in the contract of employment, the location the worker routinely attends during the term of employment to receive directions or collect materials or equipment, the location where the worker reports in relation to the work, the location from where the worker's wages are paid, and

(d) any employer's '*principal place of business*' is the most important or main place where it conducts the main part or majority of its business (*Knight* at [66]). It will not necessarily be the same as its principal place of business registered with ASIC.

52. In respect of the test where a worker is "*usually based*", Applegarth J in *Ferguson* agreed with the observations and statements of Deputy President Roche in *Martin*, adding:

> I add that the place in which the worker's employer is based may not be the same place in which the worker is based for the purposes of that employment. The place in which the employer chooses to base certain operations for the purpose of administering the contract of employment, for example, for administering payroll, may have little to do with the place at which the employee is based for the purposes of that employment. The location at which the worker routinely attends during the term of employment to receive directions or collect materials or equipment may be highly relevant.

53. His Honour at [39], [40] and [43] said:

> …, the place at which the applicant started and finished work each day has an obvious relevance. So too is the place to which he returned to collect products, and the place at which the vehicle he used for the purposes of his employment was based. The place at which he planned his daily runs and the place at which he received directions about the work he was to undertake by way of delivering products are also relevant in determining where he was '*usually based*'. The place at which he worked whilst awaiting delivery jobs is also relevant in determining where he was '*usually based*'. Whilst regard must be had to these and other facts, none may be decisive in determining where the applicant was '*usually based*'. Whilst regard must be had to these and other facts, none may be decisive in determining where the applicant was '*usually based*'.
>
> It may be inappropriate to place undue weight upon the place at which the worker starts and finishes each working day ….
>
> Depending on the facts of a particular case, a worker may have no '*base*' for the purpose of his or her employment, even a case in which he or she starts and finishes work each day in the same place. If, however, a base or bases are identified, then the question turns to whether a particular base is the place at which the worker ears [sic] is '*usually based*' for the purpose of that employment. The requirement that the worker is '*usually based*' involves consideration of whether the worker is customarily, commonly or habitually based in that place.

The Arbitrator held that the majority of the worker's shifts was spent in Victoria and the evidence does not satisfy the "*usually works*" test. The evidence also does not satisfy the "*usually works*" test and he found that the worker was not customarily, commonly or habitually based in Albury. As he found that the employer's principal place of business was in Victoria, he concluded that the employment was not connected with NSW within the meaning of s 9AA *WCA.*

Award of weekly payments made in March 2018 for closed period from 2001 to 2005, based in part on agreement as to probable earnings - Application to reconsider filed in August 2020, contesting that agreement and seeking to have probable earnings calculated –Principles of finality of litigation and delay were strong factors in refusing application - Application refused

Jago v Spotless P & F Pty Ltd [2020] NSWWCC 394 – Arbitrator Harris – 17/11/2020

On 20/11/2000, the worker was injured at work. He has previously recovered compensation under s 66 *WCA* and claimed weekly payments from 1/05/2001 to 25/04/2005 and from 1/07/2020 to date and continuing.

Arbitrator Harris conducted an arbitration on 2/03/2018. The worker claimed weekly payments from 1/05/2001, when he was retrenched, and that the parties agreed that comparable earnings were $847.69 per week. That agreement was incorporated into oral reasons, which also indicated that a second closed period claimed was from 18/09/2009 to 30/09/2012. The worker was awarded weekly payments from 1/05/2001 to 25/04/2005 and s 60 expenses, subject to the operation of s 59A *WCA,* with an award for the respondent for the second closed period.

On 26/08/2020, the worker filed an application for reconsideration of the COD under s 350 (3) *WIMA* and sought its rescission on the basis that his solicitors wrongly consented to an incorrect pre-injury wage rate, which formed the basis of the weekly payments award. He alleges that comparable earnings as at 1/05/2001 were $1,211.54 per week, but the respondent maintained that comparable earnings are as agreed at the hearing.

In his letter to the Commission dated 3/04/2018, the worker asserted that his earnings were $750 per week plus overtime which amount to a total remuneration of "*$1,045.95 per week at a minimum*." In an email to his counsel dated 15/05/2018, he stated: "*The main point I have raised is that the weekly earnings where not correct, this schedule given to the commission by the respondent was based on my pre and post injury earnings and was calculated on a twelve month period not on the 9 month period that I earnt it in*."

The worker attempted to appeal against the COD, but the Commission rejected the appeal as it did not comply with the procedural requirements in s 352 *WIMA.*

By a letter dated 20/12/2019 to the worker's previous solicitors, his current solicitors asked why the figure of $847.69 was agreed and suggested that the figure should have been $1,025.12 if the retrenchment date was 1/05/2001 and greater if the retrenchment date was "*significantly earlier*". On 26/02/2020,the previous solicitors replied that they asked the worker to provide evidence of his earnings prior to termination and the only documentary evidence he provided was a single PAYG statement ending 30 June 2001. The PIAWE was calculated based on this statement. After the Arbitration Hearing, the worker obtained documentation from the Australian Taxation Office regarding his profit and loss statement which showed ·the wages that he received from Asset Services were for a period of nine months, not a full year. If the worker now has evidence, that was not available at the Arbitration Hearing, to show what his actual earnings were for the period 1/05/2000 to 1/05/2001, he may be able to prove that the correct figure for the PIAWE is greater than the figure that was used. However, the worker instructed them that he was retrenched in approximately May 2001 and, on his instructions, they adopted the date of 1/05/2001.

In a statement dated 30/07/2020, the worker asserted that he was awarded weekly payments at various rates based on agreed earnings of $847.69 per week as at the time of injury. During the hearing, the respondent's barrister presented him with a document showing the figures they had used for his wages and his barrister did not object to it and he did not have any information to dispute it at that point. He disputed that he was ever asked to provide further information regarding wages and he assumed that his solicitor and barrister assumed that his 2001 tax return reflected income for a full year, while he was only employed for 9 months.

The Arbitrator accepted the respondent's submission that the principle of finality of litigation is a strong reason for rejecting the application and that the worker is seeking to reopen litigation that finalised when the appeal was rejected. He stated (citations excluded):

> 78. The delay in making this application only reinforces this principle. Whilst I accept that there is a partial explanation for the delay because the initial solicitors focused on appealing the decision, there is no proper explanation why there has been extensive further delay since the applicant consulted his present solicitors.

79. The applicant stated that he contacted his present solicitors on 13 December 2018 and had an initial conference on 19 December 2018. It then took one year until a letter was written to the former solicitors. The present application was not filed until August 2020.

80. Whilst it is contended that the applicant has maintained from the outset and conveyed to the insurer that he obtained an unfair result, the Reconsideration Application was filed almost two and one half years after the award was issued. I do not accept, as was submitted, that the "*context of the case*" justifies the extraordinary delay.

81. Whilst I accept that the matter is complicated, it does not justify the extraordinary delay that had occurred in this matter.

82. The applicant relied on his rejection of the award monies as a matter in his favour. I do not accept that this is a relevant consideration. The applicant was entitled to accept the award and pursue any additional rights. Those rights were not affected because any award was not paid to the applicant. There is no logic in the proposition that because he advised EML not to pay the award, his right to reconsider the matter is somehow elevated. There is also no logic in the submission that the respondent has had the benefit of the award monies when the respondent offered to pay the award and the applicant expressly rejected it.

83. The applicant is seeking to set aside the award because it is essentially based on the agreement reached by the parties that the probable weekly earnings but for injury were $847.69.

84. The unverified transcript included in the Reconsideration Application refers to the applicant's counsel needing "*a short adjournment at the completion with my submissions*" in relation to discussing the quantum of the comparable earnings. The applicant's counsel subsequently announced that "*we don't have a problem with $847.69 as the earnings that were at the time of the injury*". I noted in the oral reasons that the "*applicant accepted the respondent's wages schedule concerning the allegation of comparable, probable earnings under section 40 of the 1987 Act*".

85. Following the hearing the former solicitors wrote to the applicant on 29 March 2016 "*that it was agreed that your pre-injury average weekly earnings (PIAWE), as at the date of injury on 20 November 2000, were $847.69*". The letter sent to the Commission by the applicant does not deny that he provided instructions for that agreement.

86. The letter sent by the current solicitors on 20 December 2019 was in the context of asking why the PIAWE [sic] was agreed at $847.69. It does not suggest that there was no agreement…

89. The parties referred to *Tedeschi* in their written submissions. In *Tedeschi* Roche DP referred to *Sorcevski v Steggles Pty Ltd* and *Preston v Randwick City Council* where the Compensation Court and the Commission have respectively held that an order setting aside a consent order would only be made in exceptional circumstances. The Deputy President endorsed that approach in *Tedeschi*.

90. Whilst this was not a consent order, it was a consent agreement between the parties of one issue in dispute. It is that agreement that is now challenged in this application to justify setting aside the order for weekly compensation. This is a further and independent reason why the application is rejected.

The Arbitrator held that given the passing of time, the terms of the redundancy are unclear, although it would be usual for payment of some employment benefits or alternatively a payout of the contract terms. There is no indication of what entitlements the worker was paid at the time of his redundancy/retrenchment, but the worker argued that the gross earnings shown in the 2001 tax return do not include any termination payment. There is no reference to this in the evidence.

The Arbitrator noted that the worker's submissions asserted that he was on a 12-month contract, but the contract was not in evidence. This raised questions of whether the worker was paid out the balance, if any, of the contractual period, but none of this was properly addressed in his evidence in circumstances where he bears the onus. Any payments made on termination would have affected the monies paid by the respondent in 2000/2001. He concluded:

> 108. Whilst there are arguments, certainly based on the present material, that the probable earnings but for injury may have been higher than what was agreed, there is also no doubt that the matter was disputed by the respondent at the substantive hearing. The determination of the probable earnings but for injury remains unclear. I do not accept, even on the current evidence, the applicant's submission of the "*strength of the claim*".
>
> 109. I otherwise do not accept that there are exceptional circumstances in revisiting the prior agreement on the probable earnings.