Bulletin

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Decisions reported in this issue

1. AAI t/as AAMI v Chan [2021] NSWCA 19
2. Workers Compensation Nominal Insurer v Dures [2021] NSWWCCPD 9
3. Craddock v GH Varley Pty Ltd [2021] NSWWCCPD 10
4. Hitchings v Secretary, Department of Planning, Industry and Environment [2021] NSWWCCPD 12
5. Lopez v Lionel Veliz t/as Top Lift Scaffolding [2021] NSWWCCMA 29

Court of Appeal Decisions

Judicial review – Application for further assessment under s 62 MACA 1999 - proper officer not to order further assessment unless additional relevant information capable of having a material effect on outcome of previous assessment - further medical opinions covering similar ground to opinions previously considered - further medical opinions accepted to be additional relevant information - primary judge erred in finding reviewable error - appeal allowed and decision of proper officer restored

AAI t/as AAMI v Chan [2021] NSWCA 19 – Gleeson JA, Leeming JA & Emmett JA – 25/02/2021

The respondent was injured in a MVA in December 2014. A medical assessor conducted an assessment pursuant to the *MACA* 1999, and in May 2019 certified that the respondent injured his cervical spine and assessed 5% WPI. However, the assessor concluded that he had not suffered any injury to his right shoulder caused by the MVA based upon a lack of contemporaneous information. A medical review panel confirmed the assessor's assessment.

The respondent obtained additional relevant information in the form of reports from two medical experts, which opined that the accident had caused injury to the right shoulder, and he applied for a further medical assessment under s 62 *MACA*. Section 62 (1A) provides that a matter may not be referred for further assessment unless the additional information "*is such as to be capable of having a material effect on the outcome of the previous assessment*". The proper officer who considered the application determined that the matter would not be referred for further assessment, on the basis that the requirement in s 62 (1A) was not satisfied.

The respondent applied for judicial review of the proper officer's determination, alleging "*jurisdictional errors and/or errors on the face of the record*". ***Harrison AsJ*** concluded that the proper officer's concern that the opinions in the new reports did not appear to be based on any new findings or information different from what was before the review panel indicated that she posed the wrong question or improperly limited the scope of her inquiry.

The insurer appealed to the Court of Appeal and the issues for determination were: (1) Whether the primary judge erred in granting the respondent relief; and (2) the correct construction of s 62 (1A) *MACA*, and what is required of a proper officer determining whether or not to refer a matter for further assessment.

The Court (Gleeson and Leeming JJA and Emmett AJA) allowed the appeal. The headnote reads:

As to issue (1), per curiam:

1. The primary judge erred in granting the respondent relief. At no stage did the primary judge identify error of law on the face of the record. The primary judge's reformulations of the statutory text, referring to "*prospect*", "*possibility*" and "*potential*", may have distracted from the task of identifying whether the proper officer held the opinion required by s 62 (1A) and, if so, whether that opinion was properly formed. The question for determination on the application for judicial review was not whether that opinion was right or wrong, but whether it had been properly formed, or else was vitiated by reviewable error: at [1], [68]-[69], [77], [106]-[107].

2. The proper officer asked herself the precise question posed by s 62 (1A), namely, whether the new reports were capable of having a material effect on the outcome of the previous assessment. On a fair reading of her reasons, the proper officer considered that the matters concerning causation advanced in the new reports had already been considered and rejected by the review panel, and on that basis concluded that they were not capable of changing the outcome of the previous assessment. The proper officer did not incorrectly circumscribe her approach: at [1], [72], [78], [105]-[106].

As to issue (2), per curiam:

3. Section 62 (1A) may be described as a filter or gateway provision. Whether the requirement in s 62 (1A) of *the Act* is satisfied turns on the proper officer's opinion, not on the fact, that the additional relevant information is capable of having a material effect on the outcome of the previous assessment: at [1], [13], [22]-[26], [102], [104].

Jubb v Insurance Australia Ltd [2016] NSWCA 153; 76 MVR 228 applied.

As to issue (ii), per Leeming JA (Gleeson JA agreeing):

4. Section 62(1A) does not involve a prediction that a further medical assessment will, more probably than not, lead to a materially different outcome. However, in order to form an opinion one way or the other, a proper officer must turn his or her mind to the original assessment and the reasons for it, and then evaluate the extent to which the new material impacts on what has already been determined: at [1], [24]-[25].

As to issue (ii), per Emmett AJA:

5. While the proper officer asked herself the question posed by the statute, it was not entirely apparent that she undertook an evaluation of the new reports to determine whether they were capable of having a material effect on the outcome of the previous assessment. In the circumstances, that required her to consider such matters as the standing of the authors of the new reports and the cogency of their arguments: at [105].

Discussion by Leeming JA, Gleeson JA agreeing, of:

6. The need to pay close attention to the formulation of grounds of judicial review, to avoid conflation of jurisdictional error and error of law on the face of the record, and to distinguish between error of law and error of fact: at [40]-[47].

Kirk v Industrial Court (NSW) (2010) 239 CLR 531; [2010] HCA 1; and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen* [2016] NSWCA 229; 77 MVR 348 referred to.

7. The requirement for an appellant seeking to establish that s 101 (2) (r) of the *Supreme Court Act 1970 (NSW)* does not make a right of appeal subject to leave to do so by way of evidence: at [58]-[61].

Gaynor v Attorney General of New South Wales (2020) 102 NSWLR 123; [2020] NSWCA 48 referred to.

WCC – Presidential Decisions

Application to strike out Pre-Filing Statement dismissed because the worker commenced District Court proceedings after the application was filed – The worker and his legal representatives failed to comply with numerous directions issued by the Registrar's Delegates and failed to respond wo many enquiries (telephone and email) by the Commission – The Commission expects parties and their legal representatives to comply with directions and promptly respond to enquiries made by the Commission

Workers Compensation Nominal Insurer v Dures [2021] NSWWCCPD 9 – President Judge Phillips – 10/02/2021

The worker alleged that on 7/06/2002, he injured his back at work and later developed sleep apnoea. He recovered compensation under s 66 *WCA* for 14% WPI (lumbar spine).

The parties entered into a complying agreement on 3/04/2018, which evidenced 16% WPI for the lumbar spine and 6% WPI for sleep apnoea. On 14/05/2018, the worker gave notice of a claim for WIDs based upon the complying agreement and a report from Dr Young dated 28/11/2017.

On 25/09/2019, the worker served a Pre-Filing Statement upon the applicant and on 5/11/2019, the applicant served a Pre-Filing Defence. On 9/12/2019, the parties attended a Mediation. The matter failed to resolve and on 10/12/2019, Mediator Callaway issued a Certificate of Mediation Outcome.

On 3/09/2020, the applicant filed an application to strike out the Pre-Filing Statement and the Registrar issued a Direction setting out a timetable, which required the worker to lodge a Notice of Opposition by 15/10/2020.

However, the worker did not comply with the Direction and on 16/10/2020, the Commission emailed the worker's solicitor and law firm requesting urgent advice as to whether they continued to act for the worker. No response was received and on 20/10/2020, the Registrar directed the law firm to advise by 27/10/2020, whether it continued to represent the worker and whether he intended to file a Notice of Opposition.

No response was received and on 29/10/2020, the Commission called the law firm and spoke with the Solicitor's secretary, who advised that they still acted for the worker, that the Solicitor was on leave and that she would ask him to return the Commission's call on 6/11/2020. However, the Solicitor failed to return the call.

On 9/11/2020, the Commission again telephoned the law firm and was advised that the Solicitor was involved in a Commission hearing in another matter. A message was left requesting that he return the call. He returned the call on 10/11/2020 and advised that he had scheduled a teleconference with the worker on 16/11/2020 and he would be able to respond after that. On 19/11/2020, there having been no further response from the worker's Solicitor, the Registrar directed the worker to advise by 26/11/2020, whether he intended to lodge a Notice of Opposition.

On 24/11/2020, the worker's solicitor sent a letter to the Commission, advising, inter alia, that he filed a Statement of Claim in the District Court of NSW on 24/11/2020. The Registrar issued a further Direction to the worker's solicitors regarding the filing of a Notice of Opposition but no notice was filed until 9/12/2020.

The worker argued that he has acted to continue with his WIDs claim and that the applicant did not serve copies of all documents and submissions in support of its application upon him and he was at a disadvantage in responding. On 10/12/2020, the Registrar directed the worker to make any application for leave to lodge a Notice of Opposition out of time by 17/12/2020 and the applicant was granted leave to respond by 28/01/2021/ However, the worker did not respond to that direction.

President Judge Phillips dismissed the application and stated, relevantly:

> 55. It is apparent from this that Mr Dures, since the lodgment of the Application to Strike Out a Pre-Filing Statement, has taken further steps to advance his claim, notably the commencement of work injury damages proceedings in the District Court. In view of the steps taken by Mr Dures and the lodgment of a Statement of Claim in the District Court, I am not persuaded to exercise my discretion to Strike Out the Pre-Filing Statement. I do not think it is appropriate to do so in view of the Statement of Claim having been filed in the District Court.
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> **ANOTHER MATTER**
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> 56.Whilst not part of my reasons in coming to this decision, there is one observation that I wish to make in relation to the history of these proceedings. The chronology listed above demonstrates the respondent claimant, and particularly his solicitors, have failed to comply with numerous directions issued by the Registrar's delegate throughout the course of these proceedings. Further, the respondent claimant's solicitors have failed to respond to many enquiries from the Commission in this matter, made both by telephone and email. The Commission expects parties and their legal representatives to comply with Directions issued, and to promptly respond to enquiries made by the Commission.

Factual error – application of weight of expert evidence in the Commission – admission of fresh evidence on appeal

Craddock v GH Varley Pty Ltd [2021] NSWWCCPD 10 – Deputy President Snell – 11/02/2021

The appellant) was employed as a production worker from 27/02/2017 to 24/05/2017. On 29/03/2017, he was using an air rivet gun that was connected to compressed air, when the air hose blew off the machine and struck him in the vicinity of his abdomen. There was an issue regarding precisely where the appellant was struck and the nature of any injury sustained. He resumed normal duties after 2 days off work, but his employment was terminated on 24/05/2017, whilst he still on probation, due to concern about his attendance and health issues.

The appellant obtained sedentary work with another employer from 22/10/2017 to 18/08/2019. He lodged a claim form dated 11/12/2017, but the insurer denied liability and issued a dispute notice dated 19/03/2018, arguing that the incident did not cause any incapacity for work, that any treatment was not reasonably necessary, and that the effects of the injury had resolved. That decision was confirmed in a s 287A notice dated 31/07/2019.

The worker commenced proceedings claiming weekly payments from 24/05/2017 to 22/10/2017 and continuing from 19/08/2019, and s 60 expenses.

On 17/09/2020, Arbitrator Toohey issued an amended COD, which entered an award for the respondent. She referred to the decision in *Paric v John Holland Constructions Pty Ltd* and associated authorities regarding the need for a fair climate upon which a doctor can base an opinion. She accepted the respondent's argument that there was not a fair climate for the appellant's specialists' reports and held that the appellant had not discharged his onus of establishing ''injury'' on 29/03/2017. To the extent that there was any incapacity after that date, she was not satisfied that it resulted from the appellant's employment.

The appellant appealed and alleged that the Arbitrator erred in fact finding: (1) in that she effectively concluded the air hose struck the appellant above the umbilicus rather than on the left side of the abdomen because there was '*no reason*' to think that Dr Chin's record was not accurate; (2) in that she concluded Dr Chin's record was '*the only contemporaneous record*'; and (3) in that she concluded the opinions of the three specialists were not given in a '*fair climate*'. He also argued that (4) Fresh evidence (on which he appellant sought leave to rely) assists in concluding that the other probabilities so outweigh that chosen by the Arbitrator as to conclude the Arbitrator was wrong.

Deputy President Snell noted that the appellant sought to rely upon 2 photographs of his abdomen and shirt and a statement dated 1/10/2020, in which he asserted that the photos were taken on the date that the incident occurred, as fresh evidence. The respondent opposed that application.

Snell DP referred to the decision in *CHEP Australia Ltd v Strickland* in which Barrett JA (Macfarlan JA agreeing) dealt with the application of s 352 (6) *WIMA.* His Honour stated:

> 27. In the s 352 (6) context, there are two threshold questions. They arise as alternatives and are set out in the second sentence of the provision. The first goes to the issue of availability in advance of the proceedings. The second entails an assessment of whether continued unavailability of the evidence '*would cause substantial injustice in the case*'. The discretion to admit becomes available to be exercised only if the Commission is satisfied as to one of the threshold matters…
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> 30. Counsel for the appellant submitted that the Commission misdirected itself in law in construing the 'substantial injustice' criterion in s 352 (6). It was submitted that that criterion may be satisfied in circumstances where it is not possible to say that availability of new evidence would have produced a different result; and that the criterion will be satisfied if the evidence is compelling and might have influenced the outcome even though it cannot be said that it would certainly have done so…
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> 31... The part of s 352 (6) concerning '*substantial injustice*' does not direct attention to possibilities or potential outcomes. The task is to decide whether absence of the evidence '*would cause*' substantial injustice in the case. There must therefore be a decision as to the result that '*would*' emerge if the evidence were taken into account and the result that '*would*' emerge if it were not. If the result would be the same on each hypothesis, the ends of justice cannot be said to have been defeated by exclusion.

The appellant asserted that he had not shown the photographs to his solicitors as he did not realise that they would be relevant and he did not mention them during the arbitration as he "*felt uncomfortable and intimidated by the whole process*". However, Snell DP held that it was common ground that the photographs were available and could have been used at the hearing. Therefore, the photographs did not satisfy the first of the threshold questions identified in *Strickland.* As to whether the second threshold test was satisfied, Snell DP stated that it is necessary to deal with the various grounds of appeal to consider whether the result that emerges is different depending on whether the fresh evidence is taken into account.

Snell DP upheld grounds (1), (2) and (3).In doing so, he noted the principles in *Paric*, in which the High Court stated:

> It is trite law that for an expert medical opinion to be of any value the facts upon which it is based must be proved by admissible evidence (*Ramsay v. Watson* [1961] HCA 65; (1961) 108 CLR 642). But that does not mean that the facts so proved must correspond with complete precision to the proposition on which the opinion is based. The passages from Wigmore on Evidence cited by Samuels J.A. in the Court of Appeal (Wigmore on Evidence, (1940) 3rd ed., vol.II, 680, p.800; 2 Wigmore, Evidence 680 (Chadbourn rev. 1979), p.942) to the effect that it is a question of fact whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value are in accordance with both principle and common sense.

Snell DP also stated:

> 52. References to *Paric*, in the Arbitrator's reasons and in the parties' submissions, are to whether a '*fair climate*' existed for the expression of an expert opinion by a doctor. This phrase is taken from the decision in the case of *Paric* in the Court of Appeal, in which Samuels JA said:

> It is a question of whether the hypothetical material put to the expert witnesses represents a fair climate for the opinions they expressed. I do not think there is any requirement that the matter put is precisely consonant with the material provided; and certainly it cannot be contended that there was no evidence upon which the opinions could be based.
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> Discrepancies may be fatal; in some cases even slight discrepancies may be fatal; in other cases even broad departures are not likely to affect the force of the expert opinion. Moreover, it is for the tribunal of fact to assess this factual basis.

53. The above is to some extent modified in the context of the statutory scheme in the Commission, in which the rules of evidence do not apply: s 354 (2) of *the 1998 Act*. In *Onesteel Reinforcing Pty Ltd v Sutton*, Allsop P said:

> 3. Rule 15.2 of the *Workers Compensation Commission Rules 2010*, provides that evidence should be logical and probative, be relevant to the facts in issue and the issues in dispute, not be based on speculation or unsubstantiated assumptions, nor should it be in the form of unqualified opinions. The relationship between these requirements and lawful discharge of power at general law based on relevant material need not be explored. It suffices to say that Rule 15.2 represents a sound approach for the reliable disposition of important cases for individuals. It is not a reintroduction of the rules of evidence. Were the rule to be such a reintroduction, it would confront the inconsistency of the statute (in s 354). Thus, when one is considering the probative value of an expert report, for instance, the question is not whether it is admissible, but whether it provides material upon which the Commission was entitled to act.
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> 4. The recognition of the difference will be important in a jurisdiction where the Commission will often conduct an appeal without an oral hearing in a statutory regime, the aims of which include expedition and low cost. Thus, if a person has given a history to a doctor which is incorporated as an assumption for the doctor's opinion, that recorded history may be hearsay for the *Evidence Act 1995*, but it may be material able to be acted on by the Commission in accepting the doctor's opinion. Much will depend on the context and the issues tendered for consideration as to how the Commission evaluates material before it. In most cases, as here, that evaluation will be a factual question, although the question whether material could or can support a factual conclusion is ultimately a question of law. (excluding references)

54. In the context of the Commission it is also necessary to have regard to the following in *Hancock v East Coast Timber Products Pty Limited*:

> In the case of a non-evidence-based jurisdiction such as here, the question of the acceptability of expert evidence will not be one of admissibility but of weight. This was made apparent in *Brambles Industries Limited v Bell* [2010] NSWCA 162 at [19] per Hodgson JA.

Snell DP noted that all of the specialist medical opinions that dealt with causation supported the appellant's case, but the Arbitrator concluded that none of these had any probative weight on the basis of the principles in *Paric.* It is therefore necessary to examine the assumptions upon which the opinions were based and the extent to which the assumptions were borne out by the evidence. He found that the lay evidence is generally consistent with the appellant's history to the medical specialists and he doubted the relevance of the appellant's prior abdominal complaints because they were essentially of a gastric nature and the diagnosed injury was "*abdominal wall neuralgia*". He stated that there is no reason to conclude that the capacity of the incident to cause injury to the soft tissues of the appellant's abdomen, in the region of his stomach, was limited to the location of the mark observed by Dr Chin and there is no medical opinion to that effect.

Snell DP found that the Arbitrator erred in fact finding by proceeding on the basis that any injury was confined to a location at or close to the red mark identified by Dr Chin, but the evidence was not confined in that way and referred to general .trauma to the abdomen or stomach. stated, relevantly:

85. It was also necessary that that the Arbitrator deal with the evidence in Dr Chin's note having regard to the principles in *Davis* and associated authorities. The Arbitrator referred appropriately to that line of authority. She did not, in my view, exercise the caution that those authorities require. In *Davis* it was said:

> Experience teaches that busy doctors sometimes misunderstand or misrecord histories of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury. It is possible, and not merely speculatively so, that Dr Middleton misunderstood the precise mechanics of the immediate antecedent of the fall.

Snell DP also found that the Arbitrator erred in applying the principles in *Paric* and associated authorities. The passage of *Hancock* (see para 54 of his decision) makes it clear that, even if there are deficiencies between the facts as proved and the assumed facts relied upon by the experts, it is necessary to assess what weight should be afforded to the expert opinion in the circumstances of the particular case.

Snell DP stated that as the Court of Appeal said in *Paric*, "*in some cases even slight discrepancies may be fatal; in other cases even broad departures are not likely to affect the force of the expert opinion*". He concluded that to the extent that there was any deficiency in the history regarding prior intra-abdominal symptoms, its impact on the weight of the medical opinions was not self-evident.

Snell DP found that as the appeal succeeded without the fresh evidence, it cannot be said that its exclusion would cause a substantial injustice and, in the absence of the fresh evidence, ground (4) does not arise.

Accordingly, Snell DP revoked the COD and remitted the matter to a different Arbitrator for re-determination.

Section 4 WCA – Whether the worker was in the course of employment – Hatzimanolis v ANI Corporation Ltd [1992] HCA 21 – considered and applied

Hitchings v Secretary, Department of Planning, Industry and Environment [2021] NSWWCCPD 12 – Deputy President Wood – 19 February 2021

The appellant was employed by the respondent as a procurement officer from February 2019. He resided in Port Macquarie, but he was initially required to work from the Queanbeyan office. Ultimately, the work arrangements were changed, and he was required to attend the Queanbeyan office on Mondays and Tuesdays, work in the Sydney Office on Wednesdays and to work from home on Thursdays and Fridays. He was required to visit clients in various parts of New South Wales.

On 8/10/2019, while driving from home to the Queanbeyan office in the very early morning, the appellant suffered severe low back pain and left sided sciatica. He was unable to continue the journey and returned home and sought medical treatment. He was then certified as having no current work capacity.

The appellant claimed compensation, but the respondent disputed the claim under s 10 (3A) *WCA* and asserted that there was no real and substantial connection between the employment and the incident. Alternatively, it disputed the claim on the basis that the injury did not arise out of or in the course of appellant's employment and that employment was a substantial contributing factor to the injury.

Arbitrator Isaksen issued a COD on 25/09/2020, which determined that the appellant did not suffer an injury in the course of his employment, the injury did not arise out of his employment and there was no real or substantial connection between his employment and the incident out of which the injury arose, while he was on a journey between his place of abode and his place of employment.

The appellant appealed and alleged that the Arbitrator erred as follows: (1) error of fact, law or discretion in finding that the medical evidence did not support the assertion that there was a connection between the back injury and the need to drive long distances as part of his work duties; (2) error of fact and law in finding that there was not a real and substantial connection between his back injury and the need for him to drive long distances in order to carry out his duties, and (3) error of fact and law in finding that his back injury did not arise out of or in the course of his employment when the Arbitrator had found that he had injured his lower back as a result of driving to work.

Deputy President Wood determined the appeal. She upheld ground (3) and stated that it was not necessary to determine grounds (1) and (2) and stated, relevantly:

> 87. This challenge is in part premised on the assertion that the Arbitrator made a finding that the appellant had injured his lower back as a result of driving to work. In the process of determining whether the appellant suffered a personal injury on 8 October 2019, the Arbitrator reviewed the medical evidence and the relevant authorities as to what constitutes a "*personal Injury*" for the purpose of s 4 of *the 1987 Act*. The Arbitrator concluded as follows:
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> > I accept from the applicant's evidence of a sudden onset of lower back pain, and the records made by the doctors at Port Macquarie Medical and Dental Centre on and from 8 October 2019, that there was a sudden pathological change in the applicant's lower back, even though it might not have been positively identified in any subsequent radiology. I accept from this evidence that the applicant did sustain a personal injury to his lower back on the morning of 8 October 2019.
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> 88. The Arbitrator did not make a finding that the personal injury was caused by the appellant driving to work. The Arbitrator simply accepted, on the basis of the evidence before him, that the onset of symptoms was sufficient to identify a sudden pathological change, which satisfied the requirements of s 4 of *the 1987 Act*.
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> 89. Whether the injury occurred in the course of the appellant's employment involves a temporal element. Of course, if the appellant had been successful in establishing the temporal element, he would have then had to satisfy the Arbitrator that his employment was a substantial contributing factor to the injury in accordance with s 9A of *the 1987 Act*. However, having found against the appellant, the Arbitrator did not proceed to determine the issue in relation to s 9A.
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> 90. The appellant contends that it is not relevant whether the respondent required, encouraged or authorised the appellant to drive to Queanbeyan. The appellant describes the Arbitrator's conclusion that the journey was one which would ordinarily be expected of an employee as "*untenable*." This was said to be so because the journey was lengthy, had commenced at 2 am, and was a journey which could not have been taken by other means of transport. It also required the appellant to take with him his electronic devices and other items he would need over the working week.
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> 91. The appellant refers to *Hatzimanolis* and *PVYW*. Those cases each involved an injury sustained between two intervals of employment where the worker was at a particular place where he or she was required to be for the purpose of undertaking his or her employment duties. It is important that this case does not involve an injury occurring during an interval in, or interruption to, the appellant's employment duties. That is not to say that the observations of the High Court in *Hatzimanolis* provide no assistance in the determination of whether the injury in this case occurred in the course of the appellant's employment. While the Court in *Hatzimanolis* was considering factual circumstances which can be distinguished from the present case, the Court expressly considered the phrase "*in the course of employment*." The reasons expressed in that decision provide useful guidance in a consideration of the proper application of s 4. In a joint judgment delivered by Mason CJ, Deane, Dawson and McHugh JJ, the Court made the following useful observations (citations omitted):

> For the purposes of section 4, the course of employment is not identical with the period of employment of a worker or with the work which that person performs. From a very early stage in the history of the law of workers' compensation, it was recognised that the course of employment covered not only the actual work which a person was employed to do but also 'the natural incidents connected with the class of work'. In 1931 in *Whittingham v. Commissioner of Railways (WA)* Dixon J said that there can '*no longer be any doubt that the accident must happen while the employee is doing something which is part of or is incidental to his service*'. But his Honour went on to say that it was '*another matter to be sure what is included within this conception'*. He thought that, in considering what was incidental to service, the sufficiency of the connection between the worker's employment and what he was doing at the time that he was injured could only be a matter of degree in which time, place, practice and circumstances as well as the conditions of employment had to be considered.

And:

> … In determining whether the injury occurred in the course of employment, regard must always be had to the general nature, terms and circumstances of the employment '*and not merely to the circumstances of the particular occasion out of which the injury to the employee has arisen'*.

92. The Arbitrator acknowledged that the passages above lent support to the appellant's argument that he was in a unique role that involved significant travelling, and that during the entire period from when the appellant left home until he returned, the appellant was in the course of his employment. The Arbitrator concluded that the journey undertaken on 8 October 2019 could not be found to be part of the appellant's whole course of employment and that at the time of the injury, the appellant was on a journey from his home to his place of employment.

93. The respondent argues that the appellant's contract did not require him to travel by car, the decision was that of the appellant and the appellant was not reimbursed for the travel from his abode to Queanbeyan and return. Further, the journey was a requisite part of the job which was based in Queanbeyan.

94. I do not regard that the fact that the appellant travelled by car, which was not at the direction of the respondent, is determinative of whether the appellant was or was not in the course of his employment. The contractual arrangement between the appellant and the respondent that the respondent would not pay an allowance for the trip between the appellant's abode and the respondent's Queanbeyan office is also not determinative. The fact that the appellant travelled by car was clearly a practicality and the appellant's acceptance that he was not to be reimbursed for that expense does not of itself indicate that the journey undertaken was a journey within the meaning of s 10 of *the 1987 Act*.

95. The determinative question is whether the journey undertaken by the appellant was a journey between the appellant's place of abode and his place of employment, or whether the appellant was in the course of his employment once he left his abode on the morning of 8 October 2019. This requires a consideration of what was the appellant's "*place of employment*."

96. It is clear that the Arbitrator's observation that the appellant's course of employment would ordinarily be perceived as when he commenced work in Queanbeyan and ending when he completed his work that day in Queanbeyan indicates that the Arbitrator did not give proper consideration to the special circumstances in which the appellant worked. The nature of his duties were such that he would not have ceased to be in the course of his employment when he finished work in Queanbeyan on that day. He was then required to continue on to Sydney. In addition, the Arbitrator considered that the activity of driving to work on 8 October 2019 was no different from the activity of thousands of workers each day. That observation also indicates that the Arbitrator did not fully appreciate the circumstances in which the appellant attended to his weekly duties.

Wood DP applied the principles enunciated in *Hatzimanolis* and found that the appellant was not simply embarking on a journey from his place of abode to his place of employment, as Queanbeyan was just one destination on the overall route that he embarked upon, having taken with him all the things (both business and personal) that he would require at each destination during the working week. The character of the journey was therefore not a journey within the meaning of s 10 *WCA* and once he embarked on that journey, the appellant was in the course of his employment.

Accordingly, Wood DP revoked the COD and remitted the matter to a different Arbitrator for re-determination.

WCC – Medical Appeal Panel Decisions

Table 4.2 of the Guidelines requires the presence of radiculopathy at the time of the AMS' examination – AMS did not err in applying a 1/10 deduction under s 323 WIMA – AMS erred by giving insufficient reasons for describing the surgical scarring as "well-healed" – MAC revoked & fresh MAC issued

Lopez v Lionel Veliz t/as Top Lift Scaffolding [2021] NSWWCCMA 29 – Arbitrator Harris, Dr D Dixon & Dr B Noll – 11/02/2021

On 4/09/2016, the appellant injured his lumbar spine at work. He claimed compensation under s 66 *WCA* for 18% WPI based upon an assessment from Dr Habib, comprising 17% (lumbar spine) and 1% (scarring). However, the respondent qualified Dr Breit, who assessed 14% WPI, comprising 14% (lumbar spine) and 1% (scarring) less a 1/10 deduction under s 323 *WIMA.*

On 28/09/2020, Dr Crane issued a MAC, which assessed 14% WPI, comprising 16% (lumbar spine) and 0% (scarring) less a 1/10/deduction under s 323 *WIMA.* The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.*

Following a preliminary review, the MAP determined that a ground of appeal had been established and it requested a colour photograph of the appellant's car so that the matter could be reassessed without conducting a further medical examination.

The MAP also perceived a calculation error in the MAC and directed the parties to file and serve further submissions as to whether there was a double counting of a 2% allowance for ADLs.

The appellant argued that he had ongoing radiculopathy following the first surgery, but the AMS noted that there was no evidence of continuing radiculopathy. He argued that para 4.27 of the Guidelines does not require the radiculopathy to be continuing in order to qualify for the additional 3% allowance and it simply requires that symptoms and radiculopathy be present after surgery. The respondent did not address this argument.

The MAP held that in order to satisfy the definition of radiculopathy in para 4.27 of the Guidelines, the appellant must satisfy at least 2 criteria, one of which must be "*a major criteria*". The MAP stated:

> 34. The word "residual" must be read in context with "*symptoms and radiculopathy*". The plain meaning of the word "residual" is that the symptoms are ongoing following the spinal surgery.
>
> 35. That interpretation is contextually consistent with other parts of paragraph 4.37. The opening part of the paragraph provides that disorders are assessed under DRE category III "*where radiculopathy has resolved*" following surgery. That portion of the paragraph is consistent with previous radiculopathy which has resolved following surgery. It does not provide when it has resolved, merely that it is no longer present. That sentence is inconsistent with the appellant's submission.
>
> 36. Furthermore, the following sentence in paragraph 4.37 is inconsistent with the appellant's submissions. The sentence provides:
>
> > Radiculopathy persisting after surgery is not accounted for by AMA5 Table 15-3 and incompletely by tables 15-4 and 15-5, which only refer to radiculopathy that has improved after surgery.

37. The concept that the radiculopathy is "*persisting*" and is not accounted for in AMA5 Table 15-3 suggests that it must be "persisting" at the time of the examination to obtain the additional 3%. That sentence is consistent with the requirement in the specific line that there be "*residual symptoms and radiculopathy*". The other reference to radiculopathy "*that has improved*" following surgery also supports that interpretation.

38. In our view, the plain meaning of paragraph 4.37 and the specific allowance for an additional 3% for radiculopathy in Table 4.2 requires that the radiculopathy is present at the time of the examination. That interpretation is otherwise consistent with paragraph 1.6 of the fourth edition guidelines which provides that clinical assessment is made of the worker "*as they present on the day of the assessment*".

The MAP rejected the appellant's argument and stated (citations excluded):

40. We note that the appellant's submission is otherwise inconsistent with the decision of the Appeal Panel in *Vella-Kuitkowski v Nepean Blue Mountains Health District* (*Vella-Kuitkowski*).

41. In *Vella-Kuitkowski* the Appeal Panel stated:

> The purpose of the Table is otherwise clear, that is, it provides a slightly higher assessment in particular circumstances. One of the main reasons why further surgery to the lumbar spine is undertaken is to cure ongoing radiculopathy when it is not cured in the first operation.

42. We agree with those observations.

Accordingly, the MAP held that the appellant was not entitled to the allowance of 3% WPI for residual symptoms of radiculopathy.

With respect to the scarring, the MAP held that the AMS' description of the scar as "*well-healed*" does not directly address the criteria provided by Table 14.1 and he has a statutory obligation to provide reasons under s 325 *WIMA.* The principles were discussed in *El Masri v Woolworths Ltd,* in which Campbell J stated:

> As I have said, and at the risk of repeating myself unduly, the process is one of expert evaluation. Often when judgment of any type is called for, there will be a gap between expression of reasons and articulation of decision which cannot itself be fully articulated. That gap constitutes what might be called judgment. Although, as Ms Allars reminded me, *Wingfoot* does not necessarily apply to this case because it was a case where there was a statutory obligation to give reasons, and in this case the obligation to give reasons is implied by the general law as explained in *Campbelltown City Council v Vegan* [2006] NSWCA 284; (2006) 67 NSWLR 372, what their Honours said at [55] of *Wingfoot* must be applicable. Basically, the statement of reasons must explain that actual path of reasoning in sufficient detail to enable a court to see whether the opinion does or does not involve any error of law. Applying that standard, it is clear what was decided and why, as is the reasoning process that led to the decision, especially if one has regard to what was said by the Panel at paragraph 18 which I will not further set out.

The MAP was unable to discern from the reasons what scar characteristics are present. This uncertainty is amplified by the opinions of the respective qualified doctors who both assessed 1% WPI for the scar based on the presence of suture marks and discolouration. Indeed, the description that the scar is well-healed is not inconsistent with a number of characteristics which could mean that the scar was otherwise assessable under Table 14.1. It held that this was a demonstrable error.

The MAP held that it was not necessary to determine whether the AMS' assessment was based upon incorrect criteria.

The MAP agreed with the AMS' views regarding the deduction of 1/10 under s 323 *WIMA.*

Accordingly, the MAP revoked the MAC and issued a fresh MAC that assessed 14% WPI, comprising 13% (lumbar spine) and 1% (scarring).