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 Ltd t/as AAMI v Chan [2021] NSWCA 19
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Court of Appeal Decisions

MACA 1999 – Proper officer not to order further assessment unless there is additional relevant information capable of having a material effect on the outcome of the previous assessment – Primary judge erred in finding reviewable error

AAI Ltd t/as AAMI v Chan [2021] NSWCA 19 – Gleeson & Leeming JJA & Emmett AJA – 25/02/2021

In December 2014, the respondent injured in a MVA. In May 2019, a medical assessor certified that he injured his cervical spine in the accident and assessed 5% WPI, but that he did not injure his right shoulder, based on a lack of contemporaneous information. A MRP confirmed this.

The respondent obtained 2 further medicolegal reports that supported the allegation of right shoulder injury and applied for a further medical assessment under s 62 of the *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*". However, the proper officer declined to refer the for further assessment because s 62 (1A) was not satisfied.

The respondent applied to the Supreme Court of NSW for judicial review of that decision and alleged that there were "*jurisdictional errors and/or errors on the face of the record*".

Harrison J held that the proper officer's concern that further opinions did not appear to be based on any new findings or information different from what was before the MRP indicated that she posed the wrong question or improperly limited the scope of her inquiry. He stated, relevantly:

> 16 Section 62 (1A) clearly operates as a filter or gateway provision with the apparent purpose of restricting matters that are to be referred for further assessment to those that could have a material effect on the outcome of the previous assessment. Although the provision does not say so in terms, the notion of a material effect appears clearly to contemplate the prospect or possibility of a different result. Put another way, the legislation operates so that an application for further referral that is unlikely to produce a different result, in the sense that it is incapable of having a material effect on the outcome of the previous assessment, will not succeed.
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> 17 The word "*capable*" as used in s 62(1A) summons the concept of whether what is being considered as additional information has the potential to have a material effect on the outcome. While she uncontroversially accepted that the medical opinions in question were capable of amounting to additional information, the proper officer in my opinion improperly fettered her discretion by dismissing the prospect that the medical opinions of Associate

> Professor Haber and Dr Porteous were capable of materially effecting the outcome by reasoning that they were not underpinned or based upon a factual matrix that differed from that with which the original assessment was concerned. The fact that there has been no change of circumstances cannot in my opinion be a relevant disqualification of the reports in an assessment of their capability to have a material effect on the outcome. It may be accepted at one level that the likelihood that the reports would have the relevant effect in such circumstances may be low: but that is not what the proper officer was concerned to determine. The medical reports in question did not lose their capability of having such an effect. The proper officer's expressed concern, that the "opinions do not appear to be based on any new findings or information than that which was considered by the Panel" indicates either that she posed the wrong question or improperly limited the scope of her inquiry. Put slightly differently, it was an error for the proper officer to say that because the medical reports were not based on new findings or information that they were for that reason incapable of having a material effect on the outcome of the previous assessment. In either case, in my opinion, this constitutes an error on the face of the record.

His Honour set aside the proper officer's decision and remitted the matter to SIRA.

The insurer appealed to the Court of Appeal and the Court *(Gleeson JA, Leeming JA & Emmett AJA)* identified the issues as being: (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 allowed the appeal. The headnote reads as follows:

> As to issue (i), per curiam:
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> 1. The primary judge erred in granting Dr Chan 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].
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> 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].
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> As to issue (2), per curiam:
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> 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].
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> *Jubb v Insurance Australia Ltd* [2016] NSWCA 153; 76 MVR 228 applied.
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> As to issue (2), per Leeming JA (Gleeson JA agreeing):
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> 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 (2), 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.

MACA 1999 - Time limits - Leave to appeal against interlocutory decision

Rahman v Al-Maharmeh [2021] NSWCA 31 – Meagher JA, Leeming JA & Brereton JA – 15/03/2021

On 30/11/2014, the appellant was injured in a MVA. On 30/11/2017, the last day on which she could do so, she lodged an application with the Claims Assessment Review Service ('CARS'). On 14/12/2018, an assessment issued, after which she had 2 months to commence proceedings if she did not elect to accept it.

On/about 21/12/2018, she gave written instructions to her solicitors to reject the assessment and commence proceedings. The employed solicitor with carriage of the matter left the firm soon after, without commencing proceedings. Another employed solicitor was given carriage of the matter but did not commence proceedings within time. Proceedings were not commenced until 19/06/2019, approximately 4 months after expiry of the limitation period. She applied for leave to commence the proceedings out of time under s 109 (1) (a) of the *Motor Accidents Compensation Act 1999 (NSW) ('MAC Act')*.

In the District Court of New South Wales, Judge Wilson SC dismissed the application on the grounds that: (1) a full and satisfactory explanation for the delay' as required by s 109 (3) (a) of the MAC Act had not been provided, and (2) the total damages of all kinds likely to be awarded were not at least 25% of the maximum amount awardable for non-economic loss under s 134 as at the date of the relevant motor accident (namely $123,000), as required by s 109 (3) (b) of the MAC Act.

The appellant appealed to the Court of Appeal and the Court (Brereton JA; Meagher JA and Leeming JA agreeing) granted leave to appeal, allowed the appeal and set aside orders (2), (3), (4), (5), and (6) made by the District Court. In lieu thereof, the Court granted leave under s 109 (1) (a) if the MAC Act to commence the proceedings instituted in the District Court. The headnote provides, relevantly:

1. While the "full account of the conduct" referred to in the first sentence of s 66(2) MAC Act is not confined to that of the claimant personally but extends to the conduct of those who have acted or purported to act on behalf of the claimant, so far as it is relevant to the delay, this does not mean that the explanation is required to include "the actions, knowledge and belief" of the solicitors, as distinct from the claimant: it is the claimant who must provide the explanation for the claimant's delay in commencing proceedings: [39] (Brereton JA).

Walker v Howard (2009) 78 NSWLR 161; [2009] NSWCA 408, applied.

2. Evidence as to why the appellant's solicitors failed to implement her instructions was not required for a full and satisfactory explanation to have been given for the delay. Such information was beyond the appellant's control and would have made no difference to the adequacy of her explanation, which was only required to fully account for her own actions, knowledge, and belief. Her explanation was therefore 'full': [42] (Brereton JA).

3. It suffices for an explanation to be 'satisfactory' that some reasonable persons in the claimant's position would have experienced the same delay as the claimant: [43] (Brereton JA).

Hunter v Roberts (2019) 88 MVR 456; [2019] NSWCA 116; *Russo v Aiello* [2001] NSWCA 306, applied.

4. Many persons in the appellant's position would, having given instructions to commence proceedings, have assumed that their solicitors would have done so, and would not have followed up prior to the expiration of the limitation period. Accordingly, a reasonable person in the appellant's position would have experienced the same delay as she did. Her explanation was therefore 'satisfactory': [44] (Brereton JA).

5. Section 109(3)(b) MAC Act requires the Court to assume that the claim succeeds on liability, and to predict whether the total damages of all kinds likely to be awarded will exceed the threshold. This is a predictive exercise, based on a preliminary enquiry involving a cursory assessment of the available material, in which the question is whether there is a real and not a remote chance or possibility, regardless of whether it is less or more than 50 per cent, that the total damages will exceed the relevant threshold. This does not mean that the claimant's case on damages must always be taken at its highest. The reference to the claim being successful is a reference to the determination of liability. The test is not what may possibly be awarded, but whether the threshold is likely to be exceeded. Evidence which would not be probative or even admissible at trial might well be relevant, admissible and sufficient to establish what is likely to be awarded at trial: [47]-[50] (Brereton JA).

Dijakovic v Perez (2015) 71 MVR 334; [2015] NSWCA 174; *Eades v Gunestepe* (2012) 61 MVR 328; [2012] NSWCA 204; *Sinclair v Darwich* (2010) 77 NSWLR 166; [2010] NSWCA 195; *Harika v Tupaea* (2003) 58 NSWLR 675; [2003] NSWCA 332, considered.

6. A total of $63,000 of the $123,000 threshold was not in dispute. The essential question was whether more than $60,000 was likely to be awarded for future domestic assistance. While the primary judge was correct that future domestic assistance is only to be awarded if it is to be sourced on a commercial basis, and in some cases, where historically assistance has been provided on a gratuitous basis, evidence may be required to persuade a court at trial that commercial assistance will be engaged in future, in an appropriate case, it may be inferred that commercial services will be engaged. Admissible evidence probative of the relevant need is not essential to a conclusion that such need is "likely" to be established on a preliminary determination of this kind: [82]-[83] (Brereton JA).

Sampco Pty Ltd v Wurth [2015] NSWCA 117; *Gordon v Truong* (2014) 66 MVR 241; [2014] NSWCA 97; *Miller v Galderisi* [2009] NSWCA 353, considered.

7. There was evidence supporting an inference that gratuitous assistance would not continue to be available to the appellant in future, and a real chance that the appellant would establish at trial a need for in excess of two hours per week domestic assistance which, given the funds to do so, she would source it on a commercial basis at a cost of $90 per week, which would capitalise to $79,650. When added to the components of her claim which were not in issue, the total damages which the appellant was 'likely' to be awarded therefore amounted to $142,650, clear of the $123,000 threshold: [87]-[88] (Brereton JA).

8. Leave to appeal was required as the judgment below was an interlocutory one. However, the decision below effectively disposed of the appellant's claim, and error resulting injustice has been established, so leave to appeal should be granted: [90] (Brereton JA).

Hall v Nominal Defendant (1966) 117 CLR 423; [1966] HCA 36; *Dousi v Colgate Palmolive Pty Ltd* (1987) 9 NSWLR 374; *Christie v Baker* [1996] 2 VR 582; *Nominal Defendant v Manning* (2000) 50 NSWLR 139; [2000] NSWCA 80, considered.

9. A question arises as to whether prime responsibility for the litigation resided with the appellant's solicitors, such as to warrant a 'wasted costs order' under s 99 of the Civil Procedure Act 2005 (NSW) ('CPA'). Directions should be made for submissions as to costs, including whether orders should be made under s 99 CPA disallowing the whole or part of any costs as between the solicitors and the appellant, by any party and by the solicitors in their own right: [97] (Brereton JA).

Kelly v Jowett (2009) 76 NSWLR 405; [2009] NSWCA 278, considered.

WCC - Presidential Decisions

Principles applicable to the acceptance or rejection of expert evidence that is not rebutted by contrary medical opinion – Strinic v Sing [2009] NSWCA 15; Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174 considered and applied

Ly v Jitt Offset Pty Ltd [2021] NSWPICPD 2 – Deputy President Wood – 18/03/2021

On 20/10/1997, the appellant injured his lower back at work. He claimed compensation and the respondent accepted liability. On 10/06/1998, the appellant underwent a spinal decompression and discectomy.

On 16/05/2000, the Compensation Court entered a consent award under s 66 *WCA* for 22.5% permanent impairment of the back and 7.5% loss of efficient use of the left leg at or above the knee. An award for the respondent was entered "*in respect of any claim for permanent impairment of the neck*.

On 16/10/2007, the WCC entered further consent orders with respect to weekly payments.

In 2020, the appellant commenced WCC proceedings alleging that his neck symptoms were a consequence of his lower back injury and he claimed additional compensation under s 66 *WCA* for a further 7.5% permanent impairment of the back, a further 2.5% loss of efficient use of the left leg at or above the knee and 18% permanent impairment of the neck. The appellant concurrently commenced WCC proceedings seeking assessment of WPI for the purpose of establishing the required threshold to bring a claim for work injury damages. The respondent disputed liability for the alleged consequential condition in the neck.

On 1/10/2020, ***Arbitrator Isaksen*** issued a COD, which found against the appellant regarding the allegation of consequential injury.

The appellant appealed against that decision and asserted that the Arbitrator erred: (1) in applying "*common sense*" in his reasoning process in respect of matters that were beyond those for which lay inferences could be drawn and which required expert evidence in accordance with *Strinic v Singh*; and (2) in the reasoning process concerning the non-acceptance of Dr Giblin's views in that he failed to comply with the principles of *Wiki v Atlantis Relocations (NSW) Pty Ltd*.

Deputy President Wood determined the appeal on the papers. She noted that Court of Appeal's decisions in *Strinic* and *Wiki* are relevant in considering whether a member's reasoning process discloses error of the kind that warrants Presidential intervention.

Wood DP upheld ground (1) and stated relevantly:

> 81. In submissions in support of Ground One, the appellant relies on the observations made by Beazley JA (as her Honour then was) in *Strinic* and argues that the Member could not determine the matter on the basis of common sense alone. After reviewing the evidence provided by Dr Giblin in his numerous reports, the Member made the following observations:

> However, I am not satisfied that the opinion that an altered balance of the spine, primarily in the sagittal plane, due to chronic tension in the lumbar muscles which then causes a symptomatic aggravation of underlying age related changes, meets 'the common sense evaluation of the causal chain' referred to in *Kooragang* and *Moon*, when that opinion is placed against all other evidence in this dispute.
>
> And:
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> As a common sense proposition I cannot accept that the balance of the spine can be altered without use or movement of the lower back. Nor can I accept as a common sense proposition that the tension of lumbar muscles on their own can cause symptomatic aggravation of age related changes in the neck. I therefore cannot accept from the explanation which is ultimately provided by Dr Giblin that the [appellant's] neck condition results from his lower back injury.

82. As Beazley JA remarked in *Strinic*:

> It cannot be denied that judges gain enormous experience in determining such matters. However, that experience is in assessing the credit of witnesses; in determining what evidence to accept or reject; making findings of fact based on the evidence and in applying the law to those facts. Familiarity gained from experience with medical terminology and medical conditions is of undoubted assistance in helping a judge understand the evidence in a particular case. However, such familiarity never makes the judge the expert in the case.

83. I agree with the submission put by the appellant that the reference to a common sense evaluation, as referred to in *Kooragang*, is about the lay inferences that can be drawn from the facts, not the inferences that can be drawn which require expertise.

84. The Member's task in this case was to determine whether, because of chronic tension in the lumbar muscles, the spinal balance was altered and caused an aggravation of underlying degenerative changes in the cervical spine. There was no challenge to the fact relied upon by Dr Giblin that there was chronic muscle tension. Whether such tension could cause spinal imbalance is a question of causation that, in the circumstances of this case, is a medical question which required expert medical opinion. Dr Giblin provided that opinion in his 2018 report.

Wood DP held that in the absence of any competing expert evidence, the conclusion that the Arbitrator relied upon his own lay assessment of the causal connection is compelling. In doing so, in the manner discussed in *Strinic*, he has stepped beyond the scope of his familiarity with medical matters to understand the medical evidence. This approach was clearly in error, but it was not the only basis upon which the Arbitrator rejected Dr Giblin's opinion.

Wood DP also upheld ground (2). She held that *Wiki* establishes that in order to reject a coherent and reasoned opinion expressed by a suitably qualified expert, it should be the subject of a coherent and reasoned rebuttal, unless it can be discounted for other cogent reasons. However, the Arbitrator did not reject Dr Giblin's opinion because of the evidence of Dr Breit. Adopting the ratio in *Wiki*, there was no suggestion that Dr Giblin was attempting to mislead. In those circumstances, and in the absence of an accepted rebuttal by a medical expert, the Member was required to give cogent reasons as to why he rejected Dr Giblin's opinion expressed in his 2018 report.

Wood DP held that the absence of contemporaneous evidence from Dr Giblin or the appellant's treatment providers of the onset of symptoms and the context in which those symptoms arose is relevant to the weight to be afforded to the opinion ultimately expressed by Dr Giblin. The extent to which the Arbitrator took other matters into account has led to error on his part and that error has affected the outcome. Having rejected the opinion of Dr Giblin in circumstances where there was no expert rebuttal of that opinion, the Arbitrator was required to provide cogent reasons as to why he did not accept the proposition put forward by Dr Giblin. The Arbitrator's reasons fell short of that standard.

Accordingly, Wood DP revoked determination 1 and order 2 of the COD and re-determined the disputed issues, which she identified as "*…whether the appellant suffers from a consequential condition in his neck that results from the lower back injury and whether the appellant is entitled to treatment expenses pursuant to s 60 of the 1987 Act in respect of the neck condition, further entitlements pursuant to s 66 of the 1987 Act and a further amount pursuant to the former s 67 of the 1987 Act for the associated pain and suffering*".

Wood DP held that Dr Breit did not traverse the proposition put by Dr Giblin and that as Dr Giblin's opinion is not rebutted by any other expert opinion, it must be accepted unless there is good reason to disturb it. She found that the appellant suffered a consequential condition in his neck as a result of the back injury in 1997. She ordered the respondent to pay the appellant's s 60 expenses for the neck condition and remitted the matter to a non-Presidential member to determine the terms upon which the claim(s) under s 66 *WCA* are to be referred to an AMS.

Section 352 (3A) WIMA – interlocutory decision – acceptance or rejection of evidence – the exercise of discretion as to whether a matter should be referred for reconsideration of a MAC in accordance with s 329 WIMA

CSR Limited v Ewins [2021] NSWPICPD 1 – Deputy President Wood – 4/03/2021

This matter has a lengthy history and has previously been reported in Bulletins numbered 27, 39 and 42, respectively. However, by way of summary the worker claimed compensation under s 66 *WCA* for 17% WPI. The self-insurer disputed the claim and the dispute was referred to an AMS. On 24/04/2019, Dr Mason issued a MAC, which assessed 17% WPI, but he did not apply a deductible under s 323 *WIMA* and stated that "*there was no requirement to do so*". On 16/05/2019, the appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. The worker opposed the appeal.

On 7/06/2019, the appellant sought to amend the grounds of appeal to include reliance on s 327 (3) (b) *WIMA* and, on 20/06/2019, it sought to adduce fresh evidence in the form of a surveillance report dated 30/05/2019. It also lodged submissions in support of the proposed amended ground of appeal and in reply to the worker's submissions. However, the MAP confirmed the MAC.

The appellant lodged a summons in the Supreme Court of NSW seeking judicial review of the MAP's decision. However, Adamson J dismissed the summons.

The appellant then applied for reconsideration of the MAC by the AMS under s 329 *WIMA.* However, on 6/10/2020, ***Arbitrator Young*** issued a COD which refused that application.

The appellant appealed against that decision and alleged that the Arbitrator erred: (1) in law in determining the dispute without first satisfying the requirements of s 355 (1) *WIMA*; (2)in law in denying it procedural fairness by determining the matter on a basis not put to or by the parties; (3)in fact in considering that the surveillance material might have been obtained before the AMS assessment; (4) in discretion in consideration of the public interest, and (5) in law by failing to consider and apply the appropriate test.

Deputy President Wood determined the appeal on the papers.

The appellant argued that the Arbitrator's decision was not interlocutory in nature. However, Wood DP held that it was an interlocutory decision because the proceedings remain on foot and there are still issues to be determined. As Snell DP pointed out in *Adriaansen,* it is theoretically possible that steps could be taken which could lead to a different result than that recorded in the MAC and if there were some appropriate other factual and legal basis, a further application under s 329 *WIMA* could be made. Accordingly, the appellant required a grant of leave to appeal.

Wood DP held that in accordance with s 352 (3A) *WIMA*, leave can only be granted if she is satisfied that determining the appeal is necessary or desirable for the proper and effective determination of the dispute. She held that the following factors, when considered together, weigh heavily in favour of the granting of leave: (a) the protracted history of the respondent's s 66 claim, which, after almost 2 years from the issuing of the MAC, is yet to be determined; (b) the proceedings before Arbitrator Young have concluded; (c) a consideration of the appeal would not

unduly delay the matter, because the respondent's claim for weekly payments and treatment expenses are proceeding to be determined by Arbitrator Harris regardless of this appeal; (d)it is appropriate that a consideration as to whether the Arbitrator erred in refusing the application is determined at this time, rather than after all claims brought by the respondent are finalised, and (e) as the issue will need to be determined in any event, it is more efficient to deal with the appeal brought now, rather than an appeal brought at some future time.

Accordingly, Wood DP granted the appellant leave to appeal against Arbitrator Young's decision.

Wood DP rejected ground (1). She noted that the appellant argued that because the worker did not personally participate in the teleconference with the Arbitrator, the Arbitrator could not proceed to determine the matter. However, the Arbitrator did not find that the worker's non-participation was an impediment to his ability to discharge his obligation of using his best endeavours to encourage resolution and the appellant did not object to the matter proceeding to arbitration.

Wood DP rejected ground (2). She stated, relevantly:

> 117. It is well settled that the acceptance or rejection of evidence and the weight to be afforded to particular evidence is generally a matter that falls within the province of the primary decision maker. Findings of fact will not normally be disturbed on appeal if they have rational support in the evidence. Whether the evidence was sufficient to warrant a referral for reconsideration was dependent upon the Arbitrator's assessment of that evidence.
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> 118. The Arbitrator's conclusion that the fact that the respondent attended church on two occasions some seven weeks after the assessment by the medical assessor did not compel him to conclude that the respondent was not telling the truth was logical and open to him. It was supported by the medical evidence from the MAP that in their view, it was likely that the attendance at church was an exercise in self-contemplation. The appellant makes no compelling submissions that indicate that the Arbitrator was wrong in coming to the conclusion that he did. I do not see any reasons as to why the Arbitrator's conclusion was wrong and here is no basis upon which to interfere with that conclusion.
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> 119. The appellant not only had the opportunity to submit on the nature of the evidence and its effect, but also made submissions relevant to that point. The Arbitrator considered those submissions and made his determination. There was no procedural unfairness in the Arbitrator's approach.
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> 120. Similarly, the appellant was not denied procedural fairness by the Arbitrator taking into account the absence of medical evidence to support the appellant's assertion that the respondent's condition had improved, or the view expressed by the MAP. The submission that the surveillance material established that the respondent's condition had improved was made forcefully by the appellant at the arbitration. The respondent took the Arbitrator to the view taken by the MAP and the appellant did not seek to respond to those submissions. What the evidence established was in issue between the parties and at issue before the Arbitrator. On the basis of the submissions made, the Arbitrator was required to assess that evidence and look to other evidence on point.
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> 121. The Arbitrator did comment on the value of the evidence of surveillance undertaken after the conclusion of the medical assessment. His observation was that:
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> > Finally, in addition to the above considerations is the view that the results of continued investigation and scrutiny beyond the conclusion of the AMS process, whilst not prohibited, is a matter that should only be allowed where potentially persuasive evidence supports the need for reconsideration. Put simply, it may well be that there is a perfectly plausible explanation for the applicant to be able to attend church seven weeks after the examination by the AMS.

122. The Arbitrator's comment was simply that if surveillance evidence that came into being after the conclusion of the assessment was to be admitted for the purpose of a reconsideration, it needed to be of sufficient probative value. There is nothing in that observation that is surprising or that indicates the appellant was denied procedural fairness. It is consistent with a long line of reasoning, summarised by Roche DP in *Samuel v Sebel Furniture Limited* as:

> (a) 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, and
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> (b) the new evidence sought to be relied upon, had it been before the decision-maker, would likely to have led to a different result.

Wood DP rejected ground (3) and she stated, relevantly:

> 124. The appellant submits that if the respondent was being truthful about not attending church, then the surveillance material could not have been obtained prior to the medical assessment. The appellant says that, on the other hand, if the material could have been available at that time, then the compelling conclusion must be that the respondent was being untruthful.
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> 125. I agree with the respondent's submission that the Arbitrator's remark was simply that the evidence would have been more persuasive if it had established that the respondent had attended church within a close time of the medical assessment. The remark is self-evident and is not demonstrative of error on the part of the Arbitrator. Under this ground of appeal the appellant also asserts that the Arbitrator erred in determining that the nature of the activity was one of "self-contemplation." The Arbitrator did not make such a finding. The Arbitrator merely reported that this was an observation made by the MAP. If the Arbitrator took that observation into account, he did not fall into error, as it was evidence pointing to the evaluation of the probative value of the surveillance material.

Wood DP rejected ground (4). She noted that in *Micallef*, Heydon JA (Sheller JA agreeing) observed as follows:

> It is necessary to bear in mind some submissions of the defendants to the effect that a discretionary judgment can only be overturned in limited circumstances. These submissions were trite, but they are true, and they are vitally important…
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> Any attack on decisions of that character must fail unless it can be demonstrated that the decision-maker:
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> (a) made an error of legal principle,
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> (b) made a material error of fact,
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> (c) took into account some irrelevant matter,
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> (d) failed to take into account, or gave insufficient weight to, some relevant matter, or
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> (e) arrived at a result so unreasonable or unjust as to suggest that one of the foregoing categories of error had occurred, even though the error in question did not explicitly appear on the face of the reasoning.

Wood DP also rejected ground (5). She stated that even if the proper test was that the referral to the AMS was warranted because the dictates of justice required it, the lack of probative value of the surveillance report would count against the granting of the application. As Roche DP said in *Milosavlevic*:

> Whether the dictates of justice require a further referral requires a careful consideration of the facts in each case, but whether such a referral can be made is always subject to the Commission's jurisdictional limits.

Accordingly, Wood DP dismissed the appeal and confirmed the COD.

WCC – Arbitrator Decisions

Respondent is not required to make weekly payments between the expiration of the second entitlement period and the issue of a MAC certifying that the degree of permanent impairment is not yet ascertainable – there is a temporal element in cl 28C of the Regulation that must be satisfied before the operation od a 39 WCA is vitiated

Jansen v Colin Smith t/as Col's Clip Joint [2021] NSWPIC 24 – Member Burge – 15/03/2021

On 13/12/2002, the worker was injured in a MVA while on a journey from her place of work to her home. Injury was not disputed and the insurer made weekly payments. The worker was an "*existing recipient*" for the purposes of establishing an entitlement to weekly payments under the 2012 amendments.

On 25/12/2017, weekly payments ceased by operation of s 39 *WCA.*

On 16/06/2020, an AMS certified that the degree of permanent impairment arising from the injury was not yet fully ascertainable following anterior spinal fusion at the C4 to C7 levels.

The respondent resumed weekly payments from the date of the MAC, but the worker claimed arrears from 26/12/2017 to 16/06/2017. The sole issue for determination was the insurer's liability to make weekly payments during that closed period.

Member Burge entered an award for the respondent. The parties' arguments and the Member's reasons are summarised below.

The worker relied upon the Court of Appeal's decision in *Hochbaum v RSM Building Services Pty Ltd* [2020] NSWCA 113 (*Hochbaum*) and argued that the circumstances of her matter were analogous to those in *Hochbaum* and that her weekly benefits should be backdated to 26/12/2017.

The worker also argued that the decision of Deputy President Snell in *Strooisma v Coastwide Fabrication and Erections Pty Ltd* [2020] NSW WCCPD 65 (*Strooisma*) is inconsistent with the judgement of Brereton JA in *Hochbaum* and that the decision in *Strooisma* has given rise to a situation where s 39 *WCA* may not apply, but the relevant clause of the Regulation can be used to disentitle compensation for an intervening period between cessation of benefits and a MAC being issued. She argued that it is immaterial whether cl 28C has a temporal element, as it does not apply until one of the criteria in the clause is met and the important point is that once cl 28C does apply, its effect is that s 39 *WCA* does not.

The Member stated:

> 14. In my view, the operation of clause 28C must be consistent with that found by Deputy President Snell in *Strooisma*. Contrary to the applicant's submission, the Deputy President summarised the difference between *Hochbaum* and *Strooisma* by reference to the decision of Brereton JA in the former matter and at [54] and following, set out the basis for the difference between section 39 and clause 28C. At [58], the Deputy President said:
>
> > I accept the respondent's submission that, unlike section 39(2), there is a temporal element in the satisfaction of the criteria for the application of clause 28C (a). Satisfaction of clause 28C(a) requires the occurrence of certain events. It is necessary that an assessment of the degree of permanent impairment "*is pending*". An AMS must have declined to make an assessment of permanent impairment '*on the basis that maximum medical improvement has not been reached and the degree of permanent impairment is not fully ascertainable*'.
>
> 15. At [59], Snell DP noted the requirements of clause 28C (a) are met when an AMS has declined to make an assessment for the reason set out in the subclause. As such, a worker in the position of the applicant in this matter cannot satisfy the requirements of the subclause until the assessment of their permanent impairment "*is pending*". That is a different criterion to those set out in section 39 (2), which simply require a degree of permanent impairment resulting from injury of more than 20%. As such, in my view the requirements of the relevant

subclause of the regulation were not met until the MAC was issued and, it is from that date on which the respondent was required to recommence payments of weekly compensation.

16. Put simply, the difference between the two provisions is that the requirements of section 39 (2) are satisfied at all relevant times from the date of injury, as liability for permanent impairment arises from that date. Clause 28C (a) by contrast, contains a temporal element in that an assessment of the degree of whole person impairment must be "*pending*". In my view, that is consistent with the relevant clause containing a temporal element and as such, the applicant's claim for weekly payments for the period in dispute must fail.

17. Given the degree of whole person impairment is not yet fully ascertainable, it is impossible to know whether the degree of whole person impairment will be 20% or greater, or indeed whether there will ultimately be any whole person impairment at all. As such, it is not possible to state that the relevant threshold is satisfied under section 39 (2) from the date of injury. Ultimately, it may be that the applicant does satisfy the requirements of section 39 (2) as set out by the Court of Appeal in *Hochbaum*, however, at this point in time she has not.