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

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Court of Appeal Decisions

Administrative law – Alleged constructive failure to exercise jurisdiction – Held: primary judge did not fail to address substantial, clearly articulated arguments – Appeal dismissed

Day v SAS Trustee Corporation [2021] NSWCA 71 – Meagher, Payne & White JJA – 28/04/2021

The appellant worked as a police prosecutor from 1984 to 1998. In August 1998, a general practitioner certified that he was "*disabled due to acute anxiety and depressive reaction*". In September 1998, whilst on sick leave attributable to that condition, he resigned from the police force. He commenced work as a criminal solicitor for the ALS in November 1998 and performed ably in that role. Many years later, in 2008, the appellant made an application to the respondent for a superannuation allowance under s 10 of the *Police Regulation (Superannuation) Act 1906 (NSW) (PRS Act)*, claiming to have been incapable by reason of an infirmity of mind of exercising the functions of a police officer at the time of his resignation. In 2009, a delegate of the respondent declined to grant the appellant a certificate to that effect under *PRS Act*, s 10B (2) (c). In 2019, after the respondent reissued a notice of that decision which correctly stated the appellant's rights to dispute it, he applied to have the District Court determine the issue.

The appellant's case was that at the time of his resignation, and thereafter while working for the ALS, he was incapable of working as a police prosecutor because of a chronic adjustment disorder characterised by depression and anxiety which worsened in response to contact with police officers. The primary judge rejected that claim, relying on inconsistencies between the appellant's account of his history of psychiatric symptoms given in 2002 and the account he commenced to give shortly before his application for a superannuation allowance, as well as on the fact the appellant had worked successfully for the ALS, which would have required regular interaction with police.

Neilson DCJ found that the appellant had been temporarily incapacitated between 21 August 1998 and the time he commenced work with the ALS in November 1998 by reason of a "*transient*" adjustment disorder. However, because that transient condition had not incapacitated the appellant for "*a period of time of an indefinite nature*", his Honour declined to certify that the appellant had been incapable from an infirmity of mind of exercising the functions of a police officer at the time of his resignation.

The appellant appealed on a question of law and relied primarily on two grounds, namely that the primary judge: (1) misconstrued *PRS Act*, s 10B (2) as requiring him to have been incapable for "*a period of time of an indefinite nature*", and accordingly erred in failing to certify him despite finding that he experienced a "*transient episode of ... an adjustment disorder*" for a few months

after his resignation; and (2) constructively failed to exercise jurisdiction by failing to consider and address "*three key issues*" relating to what his Honour relied on as "*implausibilities in the [appellant's] evidence*".

The Court (Meagher JA, Payne and White JJA agreeing) dismissed the appeal. The headnote reads as follows:

As to the first ground:

1. Even if the appellant were correct that a period of six months' incapacity would satisfy s 10B (2), the primary judge made no finding to that effect: at [22]-[23], [71], [72].

2. The primary judge's use of the phrase "*a period of time of an indefinite nature*" was to be understood as a reference to *SAS Trustee Corporation v Daykin* [2002] NSWIRComm 124; (2002) 115 IR 72, which held that an "*infirmity*" within s 10B (2) was a condition giving rise to an incapacity likely to continue "*for the foreseeable future*". Construing the *PRS Act* as a whole, and having regard to its history, his Honour did not err in following that decision: at [19]-[20], [24]-[32], [71], [72].

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28; *SAS Trustee Corp v Miles* (2018) 265 CLR 137; [2018] HCA 55, applied. *In re Buck; Bruty v Mackey* [1896] 2 Ch 727; *Re Boothroyd* [1986] 1 Qd R 167, referred to.

As to the second ground:

3. It was insufficient for the appellant to show that his "*three key issues*" were not stated and determined discretely. He needed to demonstrate that those issues raised substantial (in the sense of clearly material) arguments or questions which the primary judge failed in substance to address in disposing of the appellant's claim: at [37], [71], [72].

Dranichnikov v Minister for Immigration and Multicultural Affairs [2003] HCA 26; (2003) 77 ALJR 1088; *Goodwin v Commissioner of Police* [2012] NSWCA 379, considered.

4. The primary judge clearly had regard to the fact that the appellant's condition was said to be responsive to exposure to police officers (the second issue). His Honour's conclusion that the appellant's work as a criminal solicitor for the ALS was inconsistent with his having had the chronic adjustment disorder he described did not involve any failure to grasp the appellant's submission that the ALS and the police force were different working environments (the third issue): at [39]-[44], [71], [72].

5. The primary judge did not draw any inference adverse to the appellant from the fact he had not sought psychiatric treatment for several years after his resignation from the police force. Accordingly, the first issue – whether no such inference could be drawn because, on the evidence of the appellant and the first wife, he was a "*stoic*" – did not arise for separate determination: at [45]-[49], [71], [72].

As to the remaining grounds:

6. That the primary judge's findings were contrary to expert or lay evidence not specifically challenged in cross-examination did not necessarily involve error or raise any point of law: at [52]-[60], [71], [72].

Browne v Dunn (1893) 6 R 67 (HL); *R v Birks* (1990) 19 NSWLR 677; Vines v Australian Securities and Investments Commission (2007) 73 NSWLR 451; [2007] NSWCA 75; *Poricanin v Australian Consolidated Industries Ltd* [1979] 2 NSWLR 419; *State Rail Authority of New South Wales v Brown* (2006) 66 NSWLR 540; [2006] 220, referred to.

7. None of the remaining grounds raised any point of law which would provide a basis for allowing an appeal: at [61]-[68], [71], [72].

PIC - Presidential Decisions

Section 261 (4) WIMA – Failure to make a claim "occasioned by ignorance, mistake, absence from the State or other reasonable cause" – Alleged factual error

Burke v Suncorp Staff Pty Ltd [2021] NSWPICPD 6 – Deputy President Snell – 23/04/2021

On/about 28/07/2008, the appellant commenced work with the respondent as a claims support officer in its "*First Response Unit*". Her duties were mainly administrative and customer service – answering telephone calls, preparing and opening new claims and entering information into a database. She was also given an additional responsibility of training a new recruit and said that she had to work harder to accommodate the trainee's mistakes. She fell behind with her own work and sought treatment for anxiety and suffered panic attacks when commuting to work by train. On the night of Sunday, 6/09/2009, she collapsed at home and did not work thereafter. She received sick leave, annual leave and unpaid leave. She made a claim for income protection benefits which was accepted, and she was paid income support by that insurer.

On 22/10/2014, the appellant claimed workers compensation for the alleged psychological injury. However, the insurer reasonably excused the claim and it declined liability on 24/03/2015. On 21/12/2016, 4/08/2017, 21/02/2020 and 19/05/2020, the respondent confirmed its decision to dispute the claim under ss 4, 9A, 11A & 66 *WCA* and s 261 *WIMA.*

The appellant commenced WCC proceedings and alleged that her psychological injury was due to the nature and conditions of her employment from about July 2008 to September 2009.

Arbitrator Wynyard conducted an arbitration. He noted that the disputed issues were: (1) whether the application is statute barred due to s 261 WIMA? And (2) If not, was the appellant's employment a substantial contributing factor or the main contributing factor to her injury under ss 4 (b) or 9A *WCA*?

On 27/10/2020, the Arbitrator issued an amended COD, which determined that the appellant's failure to make a claim was not occasioned by ignorance and he entered an award for the respondent. He concluded the appellant had made out a prima facie case that experiences in her employment "*probably aggravated her pre-existing psychological condition*." With respect to s 261 *WIMA*, he accepted Dr Rastogi's opinion that the appellant had no capacity for work due to the chronicity of her condition, and that this was permanent. This was sufficient to bring the appellant within the "*exception to the three year rule*", because she had suffered serious and permanent disablement: *Jones v Qantas Airways Ltd*; *Gregson v L & M R Dimasi Pty Ltd*.

The Arbitrator noted that the appellant argued that she failed to make a claim at an appropriate time "*because she did not realise that a claim could be made in this jurisdiction for the consequences of a psychiatric injury*". However, he noted that the appellant had been employed by an insurance company in a department that processed claims and that she was "*successfully assessed under her income protection policy following her psychiatric injury in 2010*" and had previously successfully claimed workers compensation for a back injury. He found that the appellant's evidence was unreliable and her explanation was inadequate and stated, "*it may very well be that she did not consider her options at that time, not out of ignorance, but because she was receiving weekly payments under her income protection policy and, as she said, did not turn her mind to her rights at workers compensation*." This was "*a different proposition from being ignorant of the existence of those rights*" and he was not persuaded of her ignorance.

The appellant appealed and alleged that the Arbitrator erred: (1) in fact in finding that her failure was not occasioned by ignorance; (2) in law in considering that her receipt of income protection payments displaced the proposition that she was ignorant in material respects about her right to claim compensation; and (3) in the light of his assessment that income protection payments were relevant to the application of s 261 (4) *WIMA*, the Arbitrator erred in law in failing to consider whether the failure to claim was occasioned by "*other reasonable excuse*".

Deputy President Snell dismissed the appeal for reasons that are summarised below.

Snell DP rejected ground (1). He found, contrary to the appellant's submissions, that the Arbitrator did not find that she was lying or being deliberately untruthful. The credibility finding was one of unreliability, for which he gave an explanation other than deliberate untruthfulness, and there is to be a distinction drawn between findings of deliberate untruthfulness and unreliability. He noted that in her challenge to the credibility finding, the appellant raised the fact that she was not cross-examined. He stated:

> 45. In *JB Metropolitan Distributors Pty Ltd v Kitanoski* Roche DP discussed the availability of credit findings in the context of the procedures applicable in the Workers Compensation Commission:
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> > Subject to the relevant issues having been fully and fairly ventilated in the documentary evidence, and the parties having had a reasonable opportunity to make appropriate submissions on those issues, it is open to an Arbitrator to form a view about the credit of a witness or a party even if that witness or party has not given oral evidence or been cross-examined (*New South Wales Police Force v Winter* [2011] NSWCA 330 [*Winter*] from [81]).
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> 46. The respondent submits that in the circumstances of the current matter, cross-examination was not required. Section 261 was raised in the s 287A dispute notice dated 21 December 2018 and all of the evidence to be relied on by the parties had been served.
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> 47. The respondent's submissions on this issue are consistent with the decisions in *Winter* and *Kitanoski*. The appellant did not, following lodgment of the respondent's submissions on this appeal, seek to put on any submissions in reply, identifying specific procedural unfairness in the circumstances. The appellant's challenge in Ground No. 1, to this aspect of the Member's reasoning, does not succeed…
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> 58. Ground No. 1 asserts error in finding that the appellant's failure was not occasioned by ignorance. Whilst this is perhaps understandable, given the way in which the findings were expressed at [161] of the reasons, it misstates the onus. The issue was not whether the respondent established that the appellant's failure was not occasioned by ignorance. It was whether the appellant established that the failure to make a claim within six months was occasioned by ignorance, so as to bring herself within s 261 (4) of *the 1998 Act*. Whilst the Member inverted where the onus lay, this would not have affected the result. He approached the matter on the basis that the respondent had discharged an onus that it did not bear. It follows that the appellant had not discharged her onus to prove the contrary proposition.
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> 59. The evidence about the consultation with Dr Lovric was a small part of the evidence on which the Member relied in reaching his conclusion. He relied also on his finding, made for reasons quite unconnected with Dr Lovric's report, that the appellant was an unreliable witness. This was in circumstances where a claim for workers compensation was first made on 22 October 2014, about five years after the appellant last worked for the respondent. The earliest of the appellant's statements was dated 7 September 2015, about one year after the claim form. The Member specifically referred to the effluxion of time as a difficulty in obtaining "*a clear chronology*", and also to the appellant's account of when she became overwhelmed at work as being "*vague*". Immediately prior to making a finding that the appellant's evidence was "unreliable", the Member said:
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> > … one of the further difficulties in recalling facts accurately that occurred many years ago is that there is always a danger that there will be an inadvertent reconstruction of events as remembered many years later.
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> 60. This was a valid consideration regarding acceptance of the appellant's evidence. It is generally consistent with what was said by McClelland CJ in Eq in *Watson v Foxman*:
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> > Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious

consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

61. I note also the following passage from *Onassis v Vergottis*:

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

62. A more extended section of the above passage was quoted with approval in *Withyman v State of New South Wales* where Allsop P (Meagher and Ward JJA agreeing) described it as a "*helpful discussion of credibility*".

63. The Member referred to multiple other matters that caused him to have reservations regarding the appellant's evidence regarding her ignorance of her rights. She was aware of the workers compensation scheme, having previously herself had a claim for a back injury. She had worked for over one year with the respondent, an insurance company, as a claims officer. Prior to her employment with the respondent the appellant worked in a responsible position as a manager with David Jones. The Member concluded it was likely the appellant "*would have been aware of the existence of workers compensation for psychological injuries*".

64. The respondent, of course, did not carry an onus to prove that the appellant was aware of her rights. It was up to the appellant to prove that she was ignorant of those rights at the relevant time.

Snell DP held that the Member's approach was available on the evidence and the appellant has not established appealable error.

Snell DP rejected ground (2). He held that the Arbitrator expressed multiple reasons that supported his conclusion that the appellant was not ignorant of her rights and there is no appealable error.

Snell DP also rejected ground (3). He stated:

74. The appellant's submission on this ground does not fairly or accurately state the Member's discussion at [159] of the reasons. I have concluded above that the passage at [159] does not give rise to appealable error. In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*, the High Court said:

> Procedural fairness does not require the Tribunal to give an applicant a running commentary upon what it thinks about the evidence that is given. On the contrary, to adopt such a course would be likely to run a serious risk of conveying an impression of prejudgment.

75. In *Brambles Industries Ltd v Bell*, McColl JA said:

> … a failure to address a matter which was not raised before the Deputy President as an identifiable issue is not a matter in respect of which an error in point of law can be identified in this Court. As was said in *Watson v Qantas Airways Limited* [2009] NSWCA 322 at [13], if a matter was not raised before the Deputy President, he could not commit an error of law in failing to deal with it. A similar observation was made recently by Heydon J in *Republic of Croatia v Sneddon* [2010] HCA 14 at [88].

PIC – Medical Appeal Panel Decisions

Appeal against MAC failed – Held: 6 grounds of appeal rejected as being without merit; challenge to AMS' qualifications are specious; AMS gave reasons

Young v Woolworths Group Limited [2021] NSWPICMP 52 – Member Wynyard, Dr G McGroder & Dr J Bodel – 19/04/2021

On 28/07/2020, a delegate of the Registrar referred the matter to an AMS for assessment of WPI with respect to the cervical spine and left upper extremity (shoulder) due to an injury on 23/06/2018. On 19/10/2020, Dr Anderson issued a MAC, which assessed combined 14% WPI.

On 3/11/2020, the appellant appealed against the MAC under s 327 (3) (d) *WIMA.* He argued that the AMS made 6 demonstrable errors, namely: (1) (a) wrongly asserting that no part of the claim was outside his field of expertise; (2) failing to explain why he was "*unable to unequivocally demonstrate radiculopathy*"; (3) failing to give any explanation or reason for giving him 5% WPI at paragraph 8(b); (4) failing to explain why he was "*unable to convincingly demonstrate radiculopathy*" in paragraph 10(c); (5) failing to explain that whilst his findings were not all that dissimilar to another expert's opinion in respect of the left shoulder, the AMS assessed an 8% whilst the other expert assessed 11% WPI in respect of the left shoulder and the AMS has calculated 8%; and (6) he "incorrectly determined and has failed to consider" hand dominance.

The Appeal Panel rejected all grounds and dismissed the appeal. It confirmed the MAC for reasons that are summarised below:

- Ground (1) – it described the appellant's submission as "*specious*" as it was not suggested that the AMS was not listed as a trained assessor for orthopaedic injuries.
- Grounds (2) and (4) – it found that the AMS explained in his summary that his finding was based upon his examination and the reasons given for his finding were adequate and conformed to the standard required: *Vegan.*
- Ground (3) – it found that the AMS' assessment was in keeping with the manner in which assessments have been made in accordance with the AMA 5 Guidelines for over 10 years. Accordingly, this ground was totally without merit.
- Ground (5) – it noted that the appellant made no submissions in support of this ground.
- Ground (6) – it found that while the AMS wrongly found that the appellant is right-hand dominant, nothing turns on that error. The Panel stated:

  > 44. We were unable to comprehend the meaning of the appellant's submission. We could not find any relevance in the error that was relevant to the assessment the AMS was required to make. The referral sought an assessment of WPI to the cervical spine and the left upper extremity (shoulder). Whether the worker was right or left handed was not a relevant consideration. The AMS noted, as we have indicated, that the right upper arm was 5 cm less in circumference but that did not infer with the measurement of range of motion by which shoulder impairments are assessed.

PIC – Member Decisions

Deceased fell and was injured whilst assisting in the installation of replacement equipment at premises owned by a company of which he was a director – Held: Deceased was a volunteer and not a working director under a contract of service & he was neither a worker nor deemed worker of the company that ran the business

Kallis v Workers Compensation Nominal Insurer (iCare) [2021] NSWPIC 70 – Member McDonald – 9/04/4021

The deceased died on 16/06/2017, after he fell from a height while upgrading an auger at premises owned by the first respondent and occupied by the third respondent. The deceased was the sole director and shareholder of the first respondent.

In about 2010, John Bouletos and Adam Waters set up the third respondent and took over the manufacturing business. Either the first respondent or Mr Bouletos continued to own the premises and much of the plant and equipment and the third respondent paid rent of $3,000 per week to the first respondent.

The applicant and fourth respondents were 2 of the deceased's children and claimed death benefits under s 25 *WCA* on the basis that he was a worker employed by either the first or third respondents at the date of his death and that he was performing maintenance work on machinery at the premises. However, John Bouletos disputed this.

The first respondent did not hold a policy of workers compensation insurance at the date of the death. The third respondent was insured, but both it and iCare disputed that the deceased was a worker.

Member McDonald conducted an arbitration hearing. On 9/04/2021, she issued a COD and entered an award for the first, second and third respondents. Her reasons are summarised as follows.

The applicant and fourth respondent sought to characterise the deceased's work at the premises as "*the big project*". However, this evidence is inconsistent with the evidence of John Bouletos and Mr Waters and their reasonably contemporaneous statements to SafeWork NSW. Member McDonald stated, relevantly:

> 84. To accept Koula and Maria's version – which also forms the basis for Mr Formica's report – I would need to find that a new system to operate the business was being installed, all at once, over a period of one to two months before Mr Bouletos' death. I do not accept that was the case for the reasons set out below. The evidence shows that the installation of new equipment and replacement of old was an ongoing process rather than a project and that Mr Bouletos often attended the premises, assisting in work being undertaken or finding jobs to do…
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> 92. There is no evidence as to who installed the robotic equipment though Mr Waters referred to the installers and manufacturers in his second statement to SafeWork NSW. I am satisfied that it was not installed by Mr Bouletos.

Member McDonald found that the deceased was a director of the first respondent, but this does not necessarily mean that he was a working director. There is no evidence that he was paid a salary and there is evidence that he was not. She noted that in *Riverwood Legion & Community Club Ltd v Morse* [2007] NSWWCCPD 88, Roche DP said (at [41]:

> … there was no evidence that Ms Morse was contractually bound to perform any work for the Club. Mutuality of obligation is an essential requirement for a contract of service. In *Dare*, Gibbs, Mason and Wilson JJ held at 409:
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> > It seems to us that the arrangement lacked the element of mutuality of obligation that is essential to the formation of such a contract. A contract of service is of its nature a bilateral contract. It may be conceded that merely to say that the parties had agreed upon a trial does not necessarily rule out its formation. The answer in that respect will

depend upon the detail of the arrangement. In particular, the answer will be affected, among other things, by the discovery in the arrangement of the assumption by the '*worker*' of an obligation to perform some work, it being the purpose of the trial to determine whether the work is performed in a satisfactory manner. But in the present case we cannot discover an obligation on the appellant to perform any work at all.

Member McDonald held that there was no obligation on the deceased to perform any work for the first respondent. Mr Waters stated that the deceased went to the premises almost every day and created jobs for himself to do. There is no evidence that he was required to maintain the equipment – merely that he chose to do so. On some occasions contractors were retained. His attendance at the premises was voluntary. John Bouletos' evidence was similar.

Accordingly, Member McDonald held that the work that the deceased did to maintain the company's equipment was voluntary and he was not a worker employed by the first respondent and the evidence leads to the conclusion that he was not employed by the third respondent.

Member McDonald rejected the applicant's argument that the deceased was a deemed worker of the third respondent. She did not accept that there was an agreement between the third respondent and the deceased to perform work or complete a particular project and found that he attended the premises when he liked and assisted with any work being undertaken or created work for himself to do. There was no payment and no contract and he was not a deemed worker.

Calculation of PIAWE – Monetary allowance covering the expense of ingredients is specifically excluded from the calculation of PIAWE under the former s 44G (1) WCA

Green v Seven Network (Operations) Limited [2021] NSWPIC 75 – Member Rimmer – 13/04/2021

The applicant was employed by the respondent as a contestant on a reality television program – "*My Kitchen Rules*". She alleged that she suffered a psychological injury as a result of vilification and bullying from producers and the network, which involved "*over 40 hour work weeks, control over her phone, distortions of her actions and words after editing, victimisation, bullying and harassment and unfair treatment and adverse interactions with other workers, producers and staff*". She claimed continuing weekly payments from 24/12/2018 at the rate of $1,000 per week.

The respondent disputed issues including: whether the applicant was a worker or deemed worker; whether she received an injury as alleged; whether employment was a substantial contributing factor to the injury; whether she was incapacitated at all or as alleged; whether any incapacity was related to an injury at work; the rate of weekly compensation claimed; that notice of injury was not given as required by the legislation; that the claim for compensation was not made within the time limits prescribed by the *WIMA;* that the events that she alleged were not real events or did not actually occur; and that she did not suffer a psychological injury or that she had misperceived events.

Member Rimmer conducted a teleconference, during which the respondent agreed to make voluntary weekly payments to the applicant. However, the parties were then unable to agree on the calculation of PIAWE and Member Rimmer directed them to file written submissions. She determined that dispute on the papers.

Member Rimmer noted that the respondent employed the applicant pursuant to a "*Contestant Agreement*" (*the Agreement*) executed by the parties on 23/06/2018 and another connected agreement headed "*Contractor Agreement*". The Agreement provided for payment to the applicant of a "*fee*" in the sum of $500 per week, as recorded in clause 3.1 and 3.2, and an "*allowance*" in the sum of $500 per week as recorded in clauses 5.2 and 5.3. Clause 3.1 of *the Agreement* stated the following: "*In consideration of the rights granted in this Agreement, I acknowledge that should I be confirmed as a contestant on the Program the Produced will pay me a fee of $500.*" Clause 3.5 stated the following: "*Seven will provide an allowance for all ingredients for the meals that I cook as part of the Program as determine by Seven and for the décor for the dinner/s*." Clause 5.2 stated the following:

> I agree to co-host with my Partner at least one dinner event at a nominated premises approved by Seven in my state of origin and attend other premises in other States to participate in a dinner event for contestants which will be filmed as part of the Program. I acknowledge that Seven will provide return economy air travel to the other State capital ci ties, accommodation (if required by Seven to stay overnight) and a meal allowance of $500 per week whilst I am required in the other cities.

Clause 5.3 of the Agreement stated:

> During the second phase of the production I will be required to stay in Sydney. I acknowledge that Seven will provide return economy air travel to Sydney (if I reside outside Sydney), accommodation in Sydney (Sydney based contestants will also be accommodated by Seven) and a meal allowance of $500 per week whilst I am required in Sydney.

The *Contractor Agreement* between the applicant and the respondent, under "*Contractors Obligations*" provided at paragraph 3.2: "*During this agreement, you must: (a) provide all materials necessary to supply the services…*". The services were defined in Item 3 of Schedule 1 as "*You will be engaged to provide services on a show-by-show basis. Unless otherwise agreed in writing, the services are set out in the attached 'Services Description' which may be amended or replaced from time to time*".

The applicant argued that she was paid $500 per week for being on the show and was given an additional $500 a week for food for herself to eat and to aid in the purchase of food that would need to be bought and to practice cooking for the show. Her bank statements indicated that $1,000 was regularly deposited into her bank account by "*SWM FINANCE PTY SEVENNET*" and she argued that the respondent's decision to apportion her remuneration into a fee and a "*meal allowance*" was arbitrary and did not alter the substantive reality that she was remunerated in the sum of $1,000 per week for each week that she worked for the respondent. The proportion of the remuneration or earnings that constituted the payment for meals was a sum which the applicant was not bound to spend exclusively on meals. It was a component of her earnings that she could spend as she saw fit.

The applicant referred to ss 44C and 44E *WCA* as in force at the time of her employment and injury and argued that as her earnings were not calculated on the basis of hours worked, her ordinary earnings were, as provided by s 44E (1) (b), "*the actual earnings paid or payable to the worker in respect of that week*", which were $1,000 per week.

However, the respondent argued that the $500 '*fee*' paid to the applicant for her participation in the television show represented her earnings in '*employment*' for the purpose of calculating PIAWE and the additional $500 provided to her was a monetary allowance for the purpose of covering the expense of ingredients. As this was a monetary allowance covering the expense of ingredients, it was specifically excluded from the calculation of PIAWE under the former s 44G (1) *WCA*. Therefore, PIAWE is $500 (subject to indexation), and the appropriate weekly payments to be made were: (1) Section 36 *WCA* - from 24/12/2018 to 25/03/2019 @ $475 per week; and (2) Section 37 *WCA* – continuing from 25/03/2019 @ $425 per week.

The respondent noted that during the teleconference on 17/02/2021, the parties agreed that the date of injury is 13/08/2018, but even if the date of injury was determined as being a different date, this would not alter the outcome. Even if the former s 44C (2) *WCA* did not apply and the applicant's employment extended beyond 4 weeks, the evidence does not support the assertion that PIAWE is $1,000 per week.

Member Rimmer noted that the applicant sought workers compensation on the basis of alternative claims that she was either a worker under a contract of employment or a deemed worker under Schedule 1, Clause 15 of *the 1998 Act.* She stated the PIAWE issues must be resolved by reference to the correct legal characterisation under *the 1987 Act* of the payments actually made under the two agreements between the parties, and not by reference to what an industrial authority or tribunal under the *Fair Work Act* might think ought instead to have been paid if she was employed under a contract of service. Therefore, the applicant's arguments must be rejected.

Member Rimmer held that the parties agreed that the date of injury was 13/08/2018 and the parties did not seek leave to withdraw that admission. She also stated:

> 50. The applicant's arguments as to the applicable statutory provisions relevant to PIAWE in the present case overlook the fact that although the *Workers Compensation Legislation Amendment Act 2018 No 62* (*the 2018 Amendment Act*) was assented to on 26 October 2018 and various schedules of that amending Act commenced by proclamation on 12 December 2018, Schedule 3 of that amending Act which contains the relevant amendments relating to PIAWE did not commence to operate until a much later date than January 2019, such date being 21 October 2019.
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> 51. Adopting the approach taken by Arbitrator Harris in *Bosko Alavanja v PT Labour Services Pty Ltd (in liquidation*) [2020] NSWWCC 348, I have concluded that although the various sections affecting the calculation of a worker's entitlement to weekly compensation based on the calculation of PIAWE were substantially amended by *the 2018 Amendment Act*, the provisions concerning PIAWE in Schedule 3 of *the 2018 Amendment Act* were postponed in their commencement and do not apply to injuries received before 21 October 2019 (*1987 Act*, Sch 6, Pt 21, c l7).
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> 52. *The 2018 Amendment Act*, section 2(1) provides: "*This Act commences on a day or days to be appointed by proclamation, except as provided by subsections (2) and (3)*". Subsections 2(2) and 2(3) listed various Schedules (4,6,7 and 8) which commenced on the date of assent (26 October 2018) and Schedule 5 which commenced on 1 December 2018. Therefore the commencement date of Schedule 3 (which contained all the relevant amendments as to PIAWE) did not take place until the commencement date of Schedule 3 was appointed by proclamation.
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> 53. By Commencement Proclamation under *the 2018 Amendment Act* signed and sealed on 11 September 2019, the Governor of New South Wales, with the advice of the Executive Council, and in pursuance of section 2(1) of *the 2018 Amendment Act*, appointed "*21 October 2019 as the day on which Schedule 3 of that Act commences*". This proclamation included the following "*Explanatory Note*":
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> > The object of this Proclamation is to commence provisions of the *Workers Compensation Legislative Amendment Act 2018* relating to the calculation of pre-injury average weekly earnings of a worker for the purposes of determining the worker's entitlement to weekly compensation.

Member Rimmer held that the former s 44G (1) WCA apply and this provides for a number of exclusions from the calculation of the base rate of pay and ordinary earnings. Specifically, ss 44G (1) (c) and (f) provide for the exclusion of any monetary allowance or separately identifiable amount not otherwise referred to. She also held that the allowance of $500 per week was an allowance for ingredients for the meals that the applicant cooked as part of the program and for the décor for the dinner and it was not a meal allowance. In any event, this allowance fell within s 44G (1) (c) *WCA* and should not be included in the base rate of pay and it does not form part of ordinary earnings. Accordingly, PIAWE was $500.

Member rejected the respondent's application to admit late documents comprising video surveillance film and a report into evidence and refer them to the AMS – Held: exceptional circumstances were not made out and it was not in the interests of justice that the late documents be admitted into evidence and referred to the AMS

<u>Evangelista v Coles Supermarkets Australia Pty Ltd</u> [2021] NSWPIC 87 – Member Batchelor – 21/04/2021

The worker claimed weekly payments and compensation under s 66 *WCA* for a psychological injury (PTSD) that she suffered on 4/07/2017, as a result of an armed hold-up at work. She has not worked since then.

On 23/10/2020, Arbitrator Moore entered Consent Orders, which remitted the dispute under s 66 *WCA* to the Registrar for referral to an AMS for an assessment of permanent impairment.

On 1/12/2020, the WCC referred the dispute to Dr D Andrews for a video assessment via Zoom and he examined the worker on 8/02/2021. However, on 1/02/2021, the respondent lodged an application to admit late documents with the WCC, comprising a surveillance DVD and a report, which depicted the worker's activities between 23/10/2020 and 6/11/2021. These documents were served on the worker on 5/02/2021.

Member Batchelor conducted a teleconference on 23/02/201, during which the respondent sought a direction that the late evidence be referred to the AMS for consideration before the issue of the MAC. The worker objected to this.

The Member noted that para 2.26 of *the Guidelines* provide that the Commission file may contain video surveillance material obtained as part of investigators' reports and this shall not be disclosed to the AMS unless ordered by the Commission in exceptional circumstances.

As to the meaning of exceptional circumstances, the Member referred to the decision of Campbell JA in *Yacoub* at [66] (authorities omitted):

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

Member Batchelor stated that in *Moston*, Arbitrator Burge held that "*video surveillance material*" did not extend to reports arising from the surveillance. However, Member Batchelor held, having viewed the surveillance video and read the report, that "*video surveillance material*" extends to that report, as it contains a number if photographs that have obviously been taken from the film. In *Moston*, the Arbitrator held on the facts that the video surveillance material did not disclose exceptional circumstances. He stated:

> 48. Each case "*depends upon a careful consideration of the facts*" as Campbell JA stated in *Yacoub*. The respondent relies on what Senior Arbitrator Capel said at [112] in *Duran* with reference to the facts of that case. To put that paragraph of the decision in context, both [111] and [112] should be referred to, namely:
>
> > 111. The respondent submits that the DVD should also be admitted into evidence and referred to the AMS because there is a clear continuous inconsistency in the applicant's presentation in unguarded moments when compared to her presentation and the history given to the AMS.
> >
> > 112. Whilst I do not necessarily agree with this submission, given the potential inconsistencies identified in the surveillance report, I consider that, in fairness to all parties, the AMS should have access to the DVD, so he can draw his own conclusions rather than rely on an investigator's perception and description of what the applicant was doing.

49. I therefore do not accept the respondent's submission, based on the partial quotation from [112] of *Duran*, that it is inherent in that finding that inconsistencies gave rise to '*exceptional circumstances*' such that the video surveillance ought to be disclosed to the AMS in accordance with the Guidelines.

50. The circumstances of *Duran* are also quite different to the circumstances of the current matter in so far as the way in which it was sought in that case to have the video evidence reviewed by the AMS. It involved an application by the respondent employer for referral of the matter back to the AMS, who had previously examined the applicant worker, for reconsideration pursuant to s 329 (1) of the *Workplace Injury Management and Workers Compensation Act 1998 (the 1998 Act).* After the initial examination of the applicant by the AMS, the solicitor for the respondent wrote to the Registrar of the Commission requesting that the matter be referred back to the AMS pursuant to s 329 because surveillance evidence had been obtained of the applicant before and after the medical examination carried out by the AMS which was allegedly inconsistent with the applicant's clinical presentation to the AMS. At issue before the Senior Arbitrator was whether the dispute in respect of the applicant's claim should be referred back to the AMS pursuant to s 329. As part of that referral, the respondent sought a direction that the surveillance reports and DVD obtained by the respondent be referred to the AMS. The applicant opposed the respondent's application for referral of the matter back to the AMS and the admission of this fresh evidence.

51. After a comprehensive review of the facts of the case, the Senior Arbitrator granted the respondent employer's application pursuant to s 329 (1) of *the 1998 Act* for the referral of the matter to the AMS for reconsideration of the MAC previously issued. The AMS was ordered to conduct a further examination of the applicant, who was granted leave to file and serve a further statement and medical evidence. The surveillance reports and DVD evidence which the respondent sought to have considered by the AMS were included in the material to be reviewed by him.

52. At [107] of *Duran*, Senior Arbitrator Capel noted:

> There has been minimal delay in bringing the application and the surveillance evidence was provided to the applicant and the Commission within one week or so of the MAC. Any referral back to the AMS will not be against the public interest as the litigation will not conclude with a fresh MAC, given that there is a claim for weekly compensation and medical expenses still to be dealt with by me.

Member Batchelor held that in this matter, the surveillance video and report were available to the respondent by or shortly after 12/11/2020 but they were not served on the worker until 5/02/2021. The surveillance video was lodged with the Commission on 1/02/2021 and the AMS' examination took place, as scheduled, on 8/02/2021. He noted that, as was the case in *Duran*, the litigation in this matter will not conclude with the issue of the MAC, given that there is a claim for weekly benefits still to be dealt with by Member Moore, if necessary. However, finalisation of the proceedings will be delayed as the respondent concedes that if the late evidence is to be referred to the AMS, the worker should have the opportunity of providing a further statement and undergo a further examination, if required. That delay is prejudicial to the worker and must be considered along with the dictates of justice in allowing the AMS to see the surveillance video and report thereon. That involves a consideration of the evidence itself, but it is of concern that the respondent apparently had the evidence on or shortly after 12/11/2020 and chose not to serve it on the worker until 3 days before the scheduled AMS examination.

Member Batchelor found that the respondent had not complied with r 10.3 (a) of *the Rules* as there was no explanation as to why the video and report were not served on the worker as soon as practicable after becoming aware of the document or obtaining possession of the documents. If the respondent had done this, there would have been ample time for the worker to raise an objection to the additional evidence and if she had done this, the respondent could have requested a teleconference to ventilate the issue.

Member Batchelor stated, relevantly:

> 65. In my view, having regard to the evidence that I have summarised there are no exceptional circumstances that would justify the admission of the surveillance video and 2nd Surveillance Report of Procare dated 12 November 2020 into evidence to enable their referral to the AMS, Dr Andrews, before he issues the MAC in respect of his examination of the applicant on 8 February 2021. The applicant has been the subject of surveillance on four occasions previously, in February, March and September 2018 and in March 2020. Reports on the surveillance of the applicant in February, March and September 2018 and March 2020 are in evidence. The activities shown in those earlier reports of the surveillance in February, March and September 2018 and March 2020 are similar to those depicted in the video surveillance of October and November 2020 which the respondent now seeks to have placed before the AMS, together with the 2nd Surveillance Report of Procare dated 12 November 2020. The three expert witnesses who have examined the applicant, in particular Professor Mattick and Dr Roberts, are of the view that the applicant is exaggerating her symptoms and presenting inconsistently. Dr Bertucen acknowledges Professor's Mattick's assessment, his views regarding exaggeration of the applicant's symptoms and possible histrionic overlay. The AMS will have before him all of these reports and the earlier surveillance reports attached to the Reply referred to above.
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> 66. It is a matter for the AMS to make his own assessment of the applicant having regard to his examination of her, the history of the incident on 4 July 2017, the history of treatment past and present, her current condition and the documentation he has before him.

Member Batchelor held that it is not in the interests of justice to admit the late evidence as the respondent breached rule 10.3 (a) of *the Rules* in failing to serve a copy of the material on the worker as soon as practicable after becoming aware of it. The worker would suffer prejudice through further delay in having her case finalised and having to put on further evidence, and possibly be examined again by the AMS, if the disputed material is allowed into evidence. This prejudice outweighs any prejudice that the respondent will suffer in not having the disputed material placed before the AMS. As noted above, the AMS has already before him significant evidence that may cause him to find exaggeration on the part of the worker or inconsistency in her presentation.

Accordingly, the Member directed the Medical Assessor to issue the MAC based upon his examination of the worker.