# 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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## Supreme Court of NSW – Judicial Review decisions

### *Judicial review – MAP's decision set aside – Inadequate reasons for declining the plaintiff's request for re-examination by a member of the MAP*

**Lancaster v Foxtel Management Pty Limited [2021] NSWSC 745 – Adamson J – 24/06/2021**

The plaintiff alleged that he suffered a psychological injury as a result of bullying & harassment at work (deemed date: 17/06/2017). The insurer accepted liability and paid compensation.

On 21/03/2019, the plaintiff claimed compensation under s 66 *WCA* for 19% WPI, but the insurer disputed the claim. On 12/06/2020, he attended an examination by an AMS and a MAC was issued that assessed 9% WPI.

The plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA*. He argued that the AMS' examination had not been undertaken correctly and that there were several factual errors in the reasons, which a supplementary statement sought to correct. He also argued that an AMS-member of the MAP should re-examine him. The appeal was referred to a MAP.

On 13/10/2020, the MAP determined that it was not necessary for the worker to undergo a further medical examination, but it accepted the supplementary statement as fresh evidence in the appeal.

The plaintiff applied for judicial review of that decision and alleged that the MAP: (1) erred in law when it failed to consider whether the AMS had considered the correct criteria when assessing the categories of "*social and recreational activities*", "*self-care and hygiene*" and "*social functioning*" and failed to properly consider the arguments made in support of the appeal, and in particular his statement dated 17/07/2020; and (2) its failure to consider his request for a re-examination and to provide its reasons for not doing so denied him procedural fairness and caused the MAP to fall into jurisdictional error.

***Adamson J*** noted that the respondent conceded that ground (2) was made out and that it was only necessary for her to be satisfied that the concession was properly made and that the proposed orders to which the parties agreed should be made.

Her Honour noted that the plaintiff argued that the MAP either failed to consider his request for re-examination or, if it considered it, it failed to give reasons other than "pro-forma" reasons for refusing it. This requirement was particularly necessary in this matter given that he had provided evidence as to the errors that he alleged that the AMS made in the original assessment. The defendant accepted that the MAP's reasons were "pro-forma" and that it did not indicate in its reasons that it had actually considered the plaintiff's request for a re-examination or the basis on which it concluded that no re-examination was warranted.

Her Honour stated:

> 20 I accept that the employer's concession was properly made. The Appeal Panel had the power to re-examine the claimant by reason of s 324 (1) (c) and s 324 (3). The claimant was entitled to request the Appeal Panel to exercise the power and, if he did so, to have the Appeal Panel consider his request and decide whether to grant it. The Appeal Panel has an implied statutory obligation to give reasons for its conclusions: *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372; [2006] NSWCA 284 (*Vegan*). Such reasons must "fulfil a minimum legal standard" (*Vegan* at [122] (Basten JA, McColl JA agreeing)) and "*where more than one conclusion is open, it will be necessary for the Panel to give some explanation for its preference for one conclusion over another*" (*Vegan* at [121]). The reasons need not be detailed. For example in *Starr v Pendergast Painting Pty Ltd* [2020] NSWSC 725, I held at [32] that the following reasons given by the Appeal Panel were sufficient in that case:
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> > The appellant requested a re-examination by a Panel AMS. However, the photographs relied upon by Mr Starr were clear, in focus and in colour. A re-examination would not have assisted the Panel any further.
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> 21 By contrast, all that the Appeal Panel did in the present case was to set out its conclusion that no re-examination was warranted. This is not enough to indicate to the claimant either that his application had received due consideration or why the Appeal Panel considered that no examination was warranted. In the circumstances, the cursory fashion with which the Appeal Panel dealt with the claimant's application that he be re-examined amounted to a denial of procedural fairness. This constitutes a jurisdictional error which has the effect that, as the parties agreed, the decision of the Appeal Panel ought be set aside.
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> 22 I note, for completeness, that it was common ground that the Appeal Panel had power to decide to re-examine a plaintiff if it chose to do so. Accordingly, it is not necessary for present purposes to address the decisions of this Court that the Panel only has power to re-examine a claimant under s 324 if it is satisfied that there is an error in a certificate issued by the AMS: *New South Wales Police Force v Registrar of the Workers Compensation Commission of New South Wales* [2013] NSWSC 1792 at [32]-[33] (Davies J) and *Midson v Workers Compensation Commission* [2016] NSWSC 1352 at [52] (N Adams J).

Accordingly, her Honour set aside the decision of the MAP and remitted the matter to the PIC for referral to a MAP for determination according to law.

## PIC - Presidential Decisions

### *Section 11A (1) WCA – reasonable action with respect to performance appraisal, transfer and discipline*

**Younan v Inner West Council [2021] NSWPICPD 16 – Acting Deputy President King SC – 7/06/2021**

The appellant commenced employment with Ashfield Council in January 2005, as a temporary Planning and Building Officer, and became a permanent officer in October 2005. Following the Council's merger into the respondent in May 2016, she became a Development Assessment Officer (Assessment Planner) on a permanent basis. However, she ceased work in the latter part of June 2018.

The appellant lodged a claim form dated 24/08/2018, in which she alleged that she suffered depression and loss of confidence and was incapacitated for work due to years of abuse, discrimination, humiliation & harassment by previous and current superiors. However, the respondent disputed the claim under s 11A *WCA*.

***Arbitrator Batchelor*** conducted an arbitration hearing and on 29/09/2020, he issued a COD and Statement of Reasons. He determined that the respondent discharged its onus of proving that the appellant's injury was caused by reasonable action with respect to performance appraisal, transfer and discipline and he entered an award for the respondent.

On appeal, the appellant argued that the Arbitrator erred: (1) in finding that s 11A *WCA* applied; and (2) in finding that the appellant's injury was wholly or predominantly caused by reasonable actions of the respondent.

***Acting Deputy President King SC*** determined the appeal on the papers. He referred to the evidence and the Arbitrator's reasons and stated, relevantly:

> 37. The Arbitrator articulated his reasons under the heading "*Findings and Reasons*" in paras [65] – [134] of his written reasons, a passage thereof occupying 13 pages.
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> 38. It is not necessary to say more in respect of the first section of this passage, sub headed "*Injury*", in which the Arbitrator found in the appellant's favour, than that he correctly noted, by reference to authority, that a misperception of actual events can provide a basis for a finding of injury i.e. can sustain finding a fact to that effect which is sound in law.
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> 39. However the Arbitrator went on under the sub heading "*Section 11A Defence*", from paras [95] and following, referencing Sackville AJA in Heggie to correctly deal with the respondent's defence, upon the basis that whatever may have been the appellant's perception, in determining whether the respondent had discharged its onus, it was necessary to find what the reality of events in the workplace was.
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> 40. I should say immediately that in my opinion the Arbitrator's discharge of that task is both thorough and betrays no error. He painstakingly, chronologically, and fairly, summarises the evidence as to what happened. In my opinion he correctly characterises the events involving the appellant in her workplace as satisfying the requirements of s 11A. Even if I am wrong in that view, that is to say if there were another interpretation of some or all of the events available which differs from that arrived at by the Arbitrator, I would be firmly of the view that the evidence makes it clear that his findings were at least open to him. In these circumstances, when it is kept in mind that in order to succeed upon this appeal the appellant must show error of, relevantly, law or fact (there being no question of the exercise of a discretion), in my view error is not demonstrated. I will return to this in discussing the submissions of the parties upon this appeal.

With respect to the appellant's allegation of religious discrimination, which concerned a comment about a Coptic cross tattoo on her right wrist, King ADP held that it could not be suggested that this incident was remotely relevant to s 11A, whilst it may have been understandable and inoffensive for Mr Bas to make an enquiry about the tattoo on her right wrist which was confirmed to it and her alone, to go further and enquire about her husband and her sons was entirely inappropriate and capable of causing offence and upset. However, only one of the psychiatrists in the case had a history of this incident and on a fair reading of the reports of all four psychiatrists, this incident could not be regarded as a material causal factor. He stated, relevantly:

> 72. … But on my view of the appellant's case it was not supportable as the real cause of her psychological injury, either in itself or in combination with other events which would not without it have caused the injury. On the contrary, I think the thrust of her case, perhaps prudently influenced by the lack of importance of this incident in the eyes of the psychiatrists whose reports were relied upon, depended upon other conduct, in the main of Messrs Bas and Betts.
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> 73. In my opinion the findings of fact made by the Arbitrator as to the characterisation of that conduct and of the associated documents for the purposes of s 11A was correct. For the sake of clarity, by "*the associated documents*" I mean the warning notices and letters issued to the appellant, and in relation to the appellant's written grievance and her complaints about her treatment, the conduct of the respondent viewed as a corporation extends to the investigation and findings that there was no substance in the appellant's complaints. (As to the handwritten contemporaneous material from Mr Betts, it is to be seen as in a different category from the evidence just referred to, in that there is no indication that at any relevant time the appellant had access to or was affected by his contemporaneous notes. Nonetheless they in my opinion had the considerable importance the Arbitrator assigned to them: they were entirely consistent with the respondent's case and supportive of it.)

Accordingly, King ADP dismissed the appeal and confirmed the COD.

## *Section 294 WIMA – Adequacy of reasons – Ex-tempore reasons – addendum to oral reasons added at the end of their delivery*

**Sydney Catholic Schools Limited v Bridgefoot [2021] NSWPICPD 17 – President Phillips DCJ – 8/06/2021**

The worker alleged that she was injured as follows: (1) on 30/01/2008 – she injured her right knee when bending down to the floor while teaching year 1 students; (2) On 30/11/2018, she injured her right shoulder, neck, back and body, fractured ribs and left shoulder in a bus accident at work; and (3) On 6/12/2019, she truck her right knee while travelling on a bus at work. On 1/06/2020, she underwent right total knee replacement surgery and claimed the cost of the surgery on the basis that it was reasonably necessary treatment as a result of incident (3).

***Arbitrator Young*** conducted an arbitration hearing. He found that he was comfortably satisfied that on the balance of probabilities, the incident on 6/12/2019 caused a pathological change in the right knee. As to whether the surgery was reasonably necessary, he stated:

> Medical reports, in particular, Dr Broe's opinion and reported initially at least by Dr Wallace confirms that after 6 December 2019 things got much worse for the applicant to the extent that, as I have already said, the need for physiotherapy increased and the need for opioids increased and in those circumstances I am of the view that the applicant should have had that surgery. I express that position aware of the decision of Burke J in *Rose* being should the applicant have (had) the surgery?. I have considered the alternatives which have been pursued by the applicant, the general view in the medical profession and the other matters outlined in *Diab* that on the balance of probabilities this Commission takes the view that the surgery was reasonably necessary. The applicant trialled other measures to no avail and it is pleasing to see that the applicant has experienced a successful result from the surgery, although I would hasten to add that this latter matter is not significant to my decision in the matter.

The Arbitrator gave ex-tempore reasons and determined that the surgery was reasonably necessary and he ordered the appellant to pay for it.

The appellant appealed against that determination and asserted that the Arbitrator erred in fact and law: (1) in failing to properly engage with its submissions and the evidence before him and failing to provide proper reasons; and (2) in failing to properly consider the report of Dr McGee-Collett and failing to find that the worker suffered significant right knee symptoms before 6/12/2019.

***President Phillips DCJ*** determined the appeal on the papers. He allowed the appeal, revoked the COD and remitted the matter to a different Member for re-determination. His reasons are summarised below:

- Section 294 (2) *WIMA* mandates that a brief statement of reasons is to be attached to the COD. However, an Arbitrator is required to engage with the issues canvassed by the parties and the issue is whether or not the Arbitrator met this standard in his decision. The fact that the decision was made ex tempore does not detract from or modify that obligation.
- During the hearing, counsel for the appellant argued that the need for surgery could have multiple causes and that the worker did not have expert medical evidence that established that the 2019 injury materially contributed to the requirement for the surgery. It was incumbent upon the Arbitrator to deal with this argument.
- The Arbitrator did not grapple with or deal with this argument in terms. Rather, his approach was to record salient point from the medical reports and to examine the history recorded by Dr Edwards, before making the contested finding. This did not engage with the appellant's argument. It is not a question that engages with the commonsense evaluation of the causal chain as set out in *Kooragang*. The question for consideration is whether the argument that was fairly and squarely advanced by the appellant was dealt with.

- In *Wang c State of New South Wales* [2019] NSWCA 263, the Court of Appeal set out the following principles:

  > It was submitted that the judge failed to respond to substantial, clearly articulated arguments relying on established facts on behalf of Mr Wang …
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  > The submission invoked the decision of the High Court in *Dranichnikov v Minister for Immigration & Multicultural Affairs* [2003] HCA 26; (2003) 77 ALJR 1088 in which it was stated that a failure to respond to a substantial, clearly articulated argument relying on established facts was a constructive failure to exercise jurisdiction: at [24] to [25] per Gummow and Callinan JJ. The decision is not authority for the proposition that any failure to refer to any argument put to a trial judge amounts to error. It is necessary to engage with the nature and materiality of the argument in the context of the issues in the proceedings. (emphasis added)

- While the Arbitrator's result for all intents and purposes dismissed the appellant's argument, a close consideration of his reasons does not reveal how the argument was rejected. At the very least, the Arbitrator was required to attempt to resolve or grapple with that issue in terms of the doctors' opinions. It is not possible to discern exactly how the medical evidence was construed to reach the result. This is a constructive failure to exercise jurisdiction in the sense referred to in *Dracnichikov* and is an error of law.
- While it was not necessary to deal with ground (2), his Honour considered it and rejected it. He stated that the appellant asserted that having completed his ex tempore reasons, the Arbitrator could not add to them. He stated that this is not technically correct as the decision is not formally entered into the Commission's records until the COD is issued. While the Commission's decisions are final and binding, a decision is not vitiated because of any informality or want of form. The Arbitrator's approach in terms of the discussion had with counsel at the conclusion of the delivery of the oral reasons is consistent with the statutory provisions under which the former WCC operated. The approach urged by the appellant would introduce a level of formality and rigidity in the PIC's operations which are contrary to the objectives and conduct of the tribunal generally. Whilst it is true that decisions are final, s 350 (3) *WIMA* enables the Commission to undertake a reconsideration of any matter that it has previously dealt with and alter or amend that decision.

## *Assessment of permanent impairment – whether a Member can decline to refer a body part for assessment by a medical assessor*

**Shankar v Ceva Logistics (Australia) Pty Limited [2021] NSWPICPD 18 – Acting Deputy President Parker SC – 16/06/2021**

The appellant claimed lump sum compensation under s 66 *WCA* for the following alleged injuries: (1) 22/10/2010 – 11% WPI with respect to the cervical spine & right upper extremity; (2) 7/01/2015 – disease injury; and (3) 7/07/2015 – 17% WPI with respect to the cervical spine and both upper extremities.

On 9/07/2020, the insurer disputed that the appellant was entitled to lump sum compensation for injury resulting from the nature and conditions of his employment.

***Arbitrator Harris*** conducted a teleconference on 4/12/2020 and, after hearing submissions from the parties, he made the following findings:

> (a) The respondent asserts in the Reply that it disputes that the claim for nature and conditions should progress at all or be referred to an AMS. I reject that submission. The material before me establishes that the applicant has made a claim based on the nature and conditions deemed to have occurred on a specific date.
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> (b) The alternative submission made by the respondent is that there is no assessment of the left shoulder by reason of the nature and conditions/deemed date of injury.

To resolve the "*alternative submission*", the Arbitrator identified the issue as being "… whether Dr Wong has provided an assessment of permanent impairment in respect of the left upper extremity by reason of the nature and conditions of employment. He inferred in favour of the appellant that 7% WPI was a reference to the left upper extremity, but Dr Wong clearly stated that the nature and conditions of employment, whilst causing injury, was not substantial enough to cause symptoms or range of motion restrictions. He did not accept that Dr Wong has expressed the view that the nature and conditions of employment caused any whole person impairment of the left upper extremity and he declined to refer that body part, which has no assessable impairment, for assessment by an AMS.

The Arbitrator issued a COD in which he determined, inter alia, that the appellant had not made a claim for permanent impairment compensation to the left upper extremity in respect of injury deemed to have occurred on 7/01/2015.

The appellant sought leave to appeal against that determination and argued that the Arbitrator erred in law: (1) when he failed to include the left upper extremity in his orders for remitting the matter to the Registrar for referral to an AMS; and (2) when he failed to give proper reasons for his decision that he would not refer a body part that has no assessable impairment for assessment by an AMS.

***Acting Deputy President Parker SC*** determined the appeal on the papers. With respect to the monetary threshold, he held that s 352 (3A) may provide an alternative route by which an appellant can satisfy s 352 *WIMA* in cases where the application is for leave to appeal from an interlocutory decision.in those cases in which the Commission grants leave to appeal the interlocutory decision it may be that the grant of leave overcomes the threshold requirement applicable to an appeal which does not require leave. However, he had not received submissions regarding the effect of s 352 (3A) *WIMA* and he was satisfied that *Hart* provides appropriate guidance. As the amount claimed was $25,300 and quantum was "*at issue*", he held that the threshold of $5,000 is satisfied.

Parker ADP granted leave to appeal from the interlocutory decision for the following reasons:

> (a) The point is of general importance to the administration of the system. There have been cases analogous to this matter determined at the Presidential level and I have found the decision of Deputy President Snell in *Guzman v Trade West Pty Limited* to be of assistance, but so far as I can ascertain, there has been no determination of this precise point at a Presidential level or by the Court of Appeal.
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> (b) The decision is of importance to the parties to the present dispute. On the appellant's case a sum substantially in excess of $5,000 is in issue.
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> (c) In my view the appeal should be allowed. It follows that if leave is not granted the appellant may suffer a substantial injustice in that there will not have been included for assessment a body part, arguably, affected by the injury being assessed.

Parker ADP upheld ground (1). He held that s 65 (1) *WCA* provides that the degree of permanent impairment that results from an injury is to be assessed as provided for in s 65 and Part 7 of Chapter 7 *WIMA*. The amendment to s 65 does not authorise the Commission to make an assessment of the degree of permanent impairment and this remains the province of an AMS. It follows that notwithstanding the absence of ss (3), the assessment of the left upper extremity could only be performed by the AMS. The respondent argued that because the qualified specialists each assessed 0% impairment of the left upper extremity, there is no medical dispute within s 319 *WIMA* and there is no jurisdiction to refer the matter to the Registrar for referral to an AMS. However, he rejected that argument and stated:

> 65. In this matter, by the s 78 Notice, the respondent disputed that the appellant is "*entitled to permanent impairment compensation for injury resulting from the nature and conditions of [Mr Shankar's] employment*." The Arbitrator resolved the issue concerning whether the appellant has sustained injury resulting from the nature and conditions of employment, but he had no jurisdiction to assess the degree of "*permanent impairment*." That issue could only be resolved by referral to an AMS.

66. There was and remains a "*dispute*" within the meaning of s 319 which is required to be referred to an AMS for assessment: s 65 (1).

67. That conclusion is supported by reasoning of the Deputy President in *Guzman*. *Guzman* was decided on the unamended version of s 65 which included s 65 (3) but the repeal of subsection 3 does not detract from the reasoning which remains apposite.

68. In that matter, Mr Guzman wished to have referred to an Approved Medical Specialist a claim for further lump sum compensation. The Senior Arbitrator dismissed his application pursuant to s 354 (7A) (b) of *the 1998 Act* on the basis that the claim was misconceived and lacked substance.

69. In *Guzman* the WPI resulting from the injury to the cervical spine and right upper extremity was assessed for the purpose of the application before the Senior Arbitrator to be 8%. However, in the original claim Dr Bodel had assessed the WPI at 11% and the AMS, Dr Berry, assessed it at 9%. The AMS's assessment had formed the basis of the original award. In other words, the claim being dealt with by the Senior Arbitrator was nominally at least, for a lesser WPI than that for which the worker had previously claimed. The Senior Arbitrator struck the claim out.

70. The Deputy President in setting aside the decision of the Senior Arbitrator said this:

> 59. It was not open to the Senior Arbitrator in the circumstances, to dismiss the proceedings pursuant to s 354 (7A) (b), effectively on the basis of a consideration of the persuasiveness of the medical evidence relied on by the appellant, to make the claim for lump sum compensation which gave rise to the '*medical dispute*'. The Workers Compensation Acts reserve assessment of a 'medical dispute' to an AMS. (emphasis added)

71. The High Court in *Wingfoot Australia Partners Pty Limited v Kocak* said:

> The function of a Medical Panel is to form and to give its own opinion on the medical question referred for its opinion. In performing that function, the Medical Panel is doubtless obliged to observe procedural fairness, so as to give an opportunity for parties to the underlying question or matter who will be affected by the opinion to supply the Medical Panel with material which may be relevant to the formation of the opinion and to make submissions to the Medical Panel on the basis of that material. The material supplied may include the opinions of other medical practitioners, and submissions to the Medical Panel may seek to persuade the Medical Panel to adopt reasoning or conclusions expressed in those opinions ... The function of a Medical Panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and to give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

72. In *Guzman*, the Deputy President said this:

> In a matter where no liability issues are raised, and the remaining issue is one going to assessment of permanent impairment (which requires referral to an AMS) it is difficult to see a basis on which a view could be formed by an arbitrator, consistent with General Steel, that the matter is clearly not reasonably arguable. The assessment by the AMS will be based on not only the evidence of the parties, but also his or her own medical experience and expertise, and cannot be known before it is carried out. The test applied by the Senior Arbitrator was an incorrect one, in that she dismissed the proceedings on the basis of the perceived lack of viability of the permanent impairment claim on quantum, when that was not a matter for her to decide. (emphasis added)

73. A similar error occurred in this matter. The Arbitrator implicitly assumed that the evidence of the qualified specialists would in the event carry the day. But it is not the views of Dr Wong and Dr Powell that are determinative. Further the Arbitrator had no jurisdiction to assess the degree of permanent impairment and therefore did not have jurisdiction to determine that the degree of permanent impairment was 0%.

74. Even under the amended s 65 the degree of permanent impairment that results from the injury is to be assessed by the AMS: s 65 (1). Furthermore in this matter the Arbitrator was not concerned at this point with making an award of compensation for permanent impairment rather, the issue with which he was concerned was whether the left upper extremity was to be included in the referral.

75. The Arbitrator's role at this point was to determine whether or not there was a dispute within the meaning of s 319. That question depended on the stated position of the respondent that the appellant was not entitled to permanent impairment compensation for injury resulting from the nature and conditions of the employment.

76. There was a dispute between the parties as defined by s 319. It follows that the degree of permanent impairment was to be assessed by an AMS. It was not open to the Arbitrator to assume that the assessment for the left upper limb was 0%.

Parker ADP upheld ground (2). He stated that the Arbitrator expressed no reason for adopting the position that he adopted and he expressed adequate reasons as to why there was no assessed percentage from Dr Wong, but he did not grapple with why there was no medical dispute within the meaning of s 319 *WIMA*.

Accordingly, Parker ADP amended the COD to include a referral to the AMS to assess the degree of permanent impairment with respect to the left upper extremity.

## PIC – Medical Appeal Panel Decisions

### *No demonstrable error identified regarding PIRS assessment for social and recreational activities*

**Ibrahim v State of New South Wales (South Western Sydney Local Health District) [2021] NSWPICMP 92 – Member Rimmer, Prof. N Glozier & Dr P Morris – 16/06/2021**

On 24/11/2015, the appellant suffered a psychological injury as a result of bullying and harassment at work.

On 11/02/2021, Dr D Andrews issued a MAC which assessed 7% WPI (8% less a 1/10 deduction under s 323 *WIMA*).

The appellant appealed against the MAC and asserted that the AMS fell into demonstrable error in relation to the PIRS categories of "*Social functioning*" and "*Social and recreational activities*". She argued that the AMS noted the role of pharmaceuticals in controlling his insomnia (and other symptoms) but did not apply an adjustment for treatment as required by para 1.32 of the Guidelines. The AMS also failed to give reasons for failing to apply such an adjustment and should have assessed the relevant PIRS categories as class 3 and not class 2, based on an incorrect history.

The MAP referred to the decision in *Parker v Select Civil Pty Ltd* [2018] NSWSC 140, in which Harrison AsJ stated:

66. In relation to Classes of PIRS there has to be more than a difference of opinion on a subject about which reasonable minds may differ to establish error in the statutory sense…

70. To find an error in the statutory sense, the Appeal Panel's task was to determine whether the AMS had incorrectly applied the relevant Guidelines including the PIRS Guidelines issued by WorkCover. Even though the descriptors in Class 3 are examples not intended to be exclusive and are subject to variables outlined earlier, the AMS applied Class 3. The Appeal Panel determined that the AMS had erred in assessing Class 3 because the proper application of the Class 2 mild impairment is the more appropriate one on the history taken by the AMS and the available evidence.

> 71. The AMS took the history from Mr Parker and conducted a medical assessment, the significance or otherwise of matters raised in the consultation is very much a matter for his assessment. It is my view that whether the findings fell into Class 2 or Class 3 is a difference of opinion about which reasonable minds may differ. Whether Class 2 in the Appeal Panel's opinion is more appropriate does not suggest that the AMS applied incorrect criteria contained in Class 3 of the PIRS. Nor does the AMS's reasons disclose a demonstrable error. The material before the AMS, and his findings supports his determination that Mr Parker has a Class 3 rating assessment for impairment for self-care and hygiene, that is to say, a moderate impairment of self-care and hygiene…

The MAP also referred to the decisions in *Chalkias v State of New South Wales* [2018] NSWSC 1561, in which Adamson J found that the MAP's assessment of the self-care category did not amount to a mere difference of opinion of the kind described in *Parker* and that the MAP coming to a different assessment did not "*convert*" its initial finding of error into a mere difference of opinion. Adamson J dismissed the worker's appeal against the MAP's decision and found that there was no error of law or jurisdictional error.

Based upon the evidence before it, the MAP held that it was appropriate for the AMS to assess the appellant in class 2 for both of the disputed PIRS categories.

With respect to the alleged failure to make an allowance for treatment, the MAP stated:

> 1. The AMS noted that the appellant had been prescribed Quetiapine 50 to 300mg each night and Vortioxetine 20 mg daily.
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> 2. It was clear that the appellant used medication which had some effect on her condition and enabled her to sleep well. However, the Guidelines provide that there must be substantial or complete elimination of impairment for an assessor to increase the percentage of WPI. There has not been a substantial or complete elimination of permanent impairment in this case and therefore the assessor cannot make an adjustment for effects of treatment. The Appeal Panel noted that neither Dr Smith nor Dr Bisht made an adjustment for effects of treatment.
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> 3. In *Vitaz* the Court held that no reasons are required in circumstances where the alternative conclusion is not presented by the evidence and is not shown to be necessarily available. Having failed to demonstrate that an alternative conclusion was necessarily available, there can be no criticism that the AMS has failed to give reasons for his opinion.

The MAP held that no adjustment for effects of treatment could be made in this case as there has not been a substantial or complete elimination of permanent impairment and the failure to give reasons for not applying such an adjustment was not an error.

Accordingly, the MAP confirmed the MAC.