Bulletin

Edited by Michelle Riordan

Independent Review Office

FROM THE INDEPENDENT REVIEW OFFICER

Welcome to edition 100 of the Bulletin.

The WIRO Bulletin was first published in August 2016. Over the past 5 years our intention has been consistent – to provide accessible and timely resource material so that lawyers and others can stay up to date on the cases and law that apply to the workers compensation scheme, and since 1 Mar 2021 to the motor accidents compensation scheme.

The Bulletin is one of the ways we contribute to a high-performing personal injury system, ensuring those who work in the area have access to the latest cases in a regular and free publication.

Over the past 5 years we have summarised almost 600 case reports and disseminated them to more than 2500 Bulletin subscribers. Most respondents to our survey in 2020 stated that the Bulletin was timely, informative and easy to read – or in the words of one reader: I find the Bulletin great to read at the end of the day when it is received particularly as it is a great tool to assist with issues that arise with clients.

Michelle Riordan, IRO's Manager Legal Education has edited the Bulletin for the past 3 years, and been responsible for the last 81 editions. Michelle's strong knowledge of personal injury compensation and commitment to keeping herself and colleagues up to date on the latest developments are reflected in her curation of cases for the report, and short summaries of the key points. We acknowledge Michelle's great work in this, our centenary edition.

As we embark on the next 100 editions, we welcome your feedback about what we include, and how we can continually improve. Michelle can be contacted via email if you have any suggestions: editor@iro.nsw.gov.au.

Simon Cohen
Independent Review Officer

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. Turner v Truss-T-Frame Timbers Pty Ltd [2021] NSWSC 1088
2. Windley v Workers Compensation Nominal Insurer [2021] NSWSC 1125
3. Nonconformist Pty Ltd v Fisher [2021] NSWPICPD 26
4. Whittle v State of New South Wales (Hunter New England Local Health District) [2021] NSWPIC 319
5. Sarcasmo v AAI Limited t/as GIO [2021] NSWPIC 337

Supreme Court of NSW – Judicial Review Decisions

Judicial review – Demonstrable error – Failure to consider assessment criteria for Complex Regional Pain Syndrome – MAC revoked

Turner v Truss-T-Frame Timbers Pty Ltd [2021] NSWSC 1088 – Schmidt AJ – 27 August 2021

In 2016, the Plaintiff injured his right arm at work and he subsequently developed a complex regional pain syndrome, type 1 (CRPS). He claimed compensation under s 66 *WCA* for 26% WPI based upon an assessment from Dr Lai, but the defendant disputed the claim based upon an assessment of11% WPI from Dr Breit, who diagnosed epicondylitis or tennis elbow and not CRPS.

The dispute was referred to an AMS and Dr Ho issued a MAC that assessed 6% WPI, on the basis of a diagnosis of epicondlylitis and not CRPS.

The Plaintiff appealed against the MAC and argued that the AMS did not have necessary regard to Ch 17 of the Guidelines and did not give reasons for his conclusion that he did not suffer CRPS.

The MAP dismissed the appeal and confirmed the MAC.

The Plaintiff applied for judicial review of the MAP's decision and argued that the MAP failed to have necessary regard to the Guidelines, did not consider or deal with his complaint about the inadequacy of the AMS' reasons and failed in its obligations to give reasons for its decision.

Schmidt AJ held that Ch 17 of the Guidelines contains a table that prescribes a set of criteria for type 1 CRPS, which Dr Lai applied. That table had to be considered by the AMS in resolving the medical dispute over whether the Plaintiff suffered from CRPS: *Ebsworthy v Forgacs Engineering Pty Ltd* [2018] NSWSC 1638 at [5]-[9]. Chapter 17 also requires that the diagnosis of CRPS must have been present for at least one year, to ensure accuracy and to permit adequate time to achieve maximum medical improvement.

Her Honour found that the AMS both understood and resolved the disagreement between Dr Breit and Dr Lai about whether the Plaintiff suffered from CRPS, but like Dr Breit he made no reference to Ch 17 of the Guidelines. She noted that on appeal, the MAP stated:

> The MA's role is to make an independent assessment on the day of the examination. He has to rely on his findings on the day of examination and must make clinical judgments using his clinical expertise. He is not bound to follow the opinion of other experts whose opinions are in evidence before him. The MA has had clear regard to the other opinions that were before him and given a brief explanation of why his opinion differs. He is not required to do more than this. The MA's findings on physical examination, and his regard to the other evidence that was before him, provide sufficient reasons to support his finding that CRPS is not a rateable impairment as a result of the injury referred to him.
>
> The panel can discern no error in the assessment by the MA that CRPS was not a rateable diagnosis in this case.

Her Honour found that this was the extent of the MAP's reasons for dismissing the Plaintiff's appeal and it did not refer to the complaints that the Guidelines were not applied or that the AMS' reasons were inadequate. Accordingly, the MAP erred by not concluding that the AMS failed to give adequate reasons. Her honour stated:

> 101 The assessor's reasons had to be read in the way explained in *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996)185 CLR 259; [1996] HCA 6 at 272. That is, without being construed "*minutely and finely with an eye keenly attuned to the perception of error*" or "*scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed*": at [271]- [272]. But such a reading does not permit gaps in the reasoning to be filled or reworked in order to provide reasoning which is not present: *Sadsad v NRMA Insurance Ltd* [2014] NSWSC 1216; 67 MVR 601 at [47].

102 In a case where more than one conclusion is open, it is also necessary for some explanation to be given for the preference of one conclusion over another, although the reasons given need not "be extensive or provide detailed explanation of the criteria applied by medical specialists in reaching a professional judgment": *Vegan* at [121]-[123].

103 In this case, however, the assessor having concluded that Mr Turner did not any longer suffer from complex regional pain syndrome, not having doubted that when examined by Dr Lai he was suffering that condition, an explanation, albeit short, had to be given for that conclusion by reference to the applicable criteria. Thus, the assessor's reasons not only had to refer to the criteria specified in Table 17.1, they had to explain why the assessor concluded that they were no longer satisfied.

104 The assessor agreed with Dr Breit's diagnosis, but because the criteria specified in Ch 17 arose to be considered, it was not sufficient for the assessor to give an account of a claimants' history and symptoms, to refer to the competing medical opinions and to prefer one over the other. The path of reasoning which led to the conclusion that Mr Turner had suffered, but had recovered from complex regional pain syndrome, had to be disclosed, including by reference to the applicable criteria imposed by Ch 17.

105 The assessor also came to a different conclusion than Dr Breit about the extent of Mr Turner's impairment. That also had to be explained by more than the observation that his clinical examination of Mr Turner's range of movement in his right elbow and wrist "*is probably even better than*" Dr Breit's examination findings 6 months ago.

Her Honour also held that the MAP erred by not finding that the AMS failed to apply the correct criteria. The MAP was required to consider whether the AMS had given necessary consideration to the Guidelines and it was not at liberty to resolve the appeal by simply stating that it reached the same conclusion as the AMS as it could only come to that conclusion by having regard to the criteria in Table 17.1.

Her Honour also found that the MAP failed to provide adequate reasons for its decision as if failed to disclose its path of reasoning. Accordingly, her Honour revoked the MAC and remitted the matter to the President of the PIC for determination according to law.

Judicial review – Demonstrable error – Error of law on the face of the record

Windley v Workers Compensation Nominal Insurer [2021] NSWSC 1125 – Harrison AsJ – 3/09/2021

On 27/03/2015, the Plaintiff injured his right hand at work, but he was subsequently diagnosed with CRPS and underwent treatment, which included implantation of a stimulator device. On 11/02/2020, Dr Lai assessed 56% based upon a diagnosis of CRPS. The insurer disputed the claim under s 66 based upon an opinion from Dr Reiter, who did not diagnose CRPS and assessed 18% WPI.

The dispute under s 66 was referred to an AMS and Dr Ho issued a MAC which assessed 5% WPI.

The Plaintiff appealed against the MAC and the appeal was referred to a MAP.

The MAP concluded that a deduction for a pre-existing condition was incorrect, but it rejected the Plaintiff's argument that the AMS erred in his consideration of Table 17.1 of the Guidelines.

The Plaintiff applied for judicial review of both the AMS' decision and the MAP's decision.

The Plaintiff argued that the MAP:

(1) misunderstood and misapplied ss 327 and 328 *WIMA* and the impact of the decisions in *Petrovic v BC Serve No 14 Pty Ltd t/as Broadlex Cleaning Service* [2007] NSWSC 1156 and *Lukacevic v Coates Hire Operations Pty Limited* [2011] NSWCA 112 when considering whether it should receive fresh evidence in an appeal;

(2) erred in not concluding that the AMS erred and did not comply with his obligation to provide reasons in respect of his assessment under Table 17.1 and for upper extremity impairment;

(3) erred in relying on the notion that the Plaintiff's symptoms and conditions changed markedly from time to time and this was an explanation for why the AMS' findings and impairment assessment were markedly different to the findings made by others, when there was no evidence to support this; and

(4) in holding that the AMS erred in relation to s 323 *WIMA,* but its own impairment assessment was the same as that of the AMS and it provided no reasons as to why this was the correct outcome.

Harrison AsJ held that the MAP correctly applied the decisions in *Petrovic* and *Lukacevic* and that it was entitled to exercise its discretion to reject the Plaintiff's fresh evidence in the appeal.

Her Honour noted that in *Elsworthy*, Fagan J stated that the 4 requirements in (a) to (d) of Table 17.1 of the Guidelines are strict and demanding. It would be expected that the AMS would make some specific reference to and identify which of the requirements he was addressing, but he did not address Table 17.1. Her Honour stated:

> 79 It is my view, that even through the Appeal Panel's reasons are to be given a beneficial reading, that beneficial reading does not extend to filling in the gaps of reasoning that is not present, as underlined earlier by the plaintiff in his submissions, or reformulating and reworking that is not present. As set out in S*adsad*, the Appeal Panel has filled in the gaps in reasoning in the Medical Assessor's reasoning. The Appeal Panel has made a jurisdictional error and an error on the face of the record. The decision of the Appeal Panel should be set aside.

Accordingly, her Honour found that the MAP had made a jurisdictional error and an error of law on the face of the record and she set aside its decision and remitted the matter to the President of the PIC for determination according to law.

PIC - Presidential Decisions

Epidemiological evidence and the question of causation – Principles applicable to establishing error in accordance with s 352 (5) WIMA

Nonconformist Pty Ltd v Fisher [2021] NSWPICPD 26 – Deputy President Wood – 19/08/2020

The deceased was employed by the appellant as a courier driver. He was the sole director of that company and performed courier services through a sub-contract arrangement between the appellant and Direct Couriers (Aust) Services Pty Ltd (Direct Couriers). On 22/01/2016, in the course of his employment, the deceased died while driving his van during his last delivery run for the day.

The death certificate listed the cause of death as ischaemic heart disease and coronary artery atherosclerosis. The autopsy report prepared for the coroner listed the direct cause of death as ischaemic heart disease with an underlying condition of coronary artery atherosclerosis as an antecedent cause.

The deceased's widow claimed lump sum compensation under s 25 (1) *WCA*. The widow alleged that she was totally dependent upon the deceased and 2 adult children alleged that they were partially dependent. However, the appellant disputed the claim on the following grounds: (1) the death did not result from an injury in the course of the deceased's employment - s 4 *WCA*; (2) the deceased's employment was not a substantial contributing factor to any injury – s 9A *WCA*; (3) the nature of the deceased's employment did not give rise to a significantly greater risk of injury than if he had not been employed in employment of that nature – s 9B *WCA*; (4) If the injury was a disease within the meaning of s 4 *WCA*, it was not contracted in the course of employment and the deceased's employment was not the main contributing factor to the injury or aggravation of the injury.

Arbitrator Edwards issued a COD on 18/12/2020, which found that the appellant liable to pay the compensation claims. The issues of dependency and apportionment were remitted to the Registrar to fix a date for further arbitration.

The appellant appealed and asserted that the Arbitrator erred as follows:

> (1) by finding that the deceased's employment was the "main contributing factor" under s 4 (b) (ii) WCA in the absence of evidence to support that finding;
>
> (2) by making incorrect findings on, and giving undue weight to, medical literature, in particular the World Health Organisation review;
>
> (3) in law in the assessment of evidence and approach to causation;
>
> (4) in law in failing to give proper, or lawful reasons concerning causation;
>
> (5) in fact in relation to the reports of Dr Herman concerning the scientific studies;
>
> (6) in failing to make a finding of personal injury pursuant to s 4 (a) *WCA*;
>
> (7) in fact in relation to the reports of Mr Strautins; (8) in law in the application of s 9B *WCA*;
>
> (9) in fact in determining whether Dr Herman undertook a comparison of the risk regarding s 9B *WCA*; and
>
> (10) in failing to give proper, or lawful reasons concerning the application of s 9B *WCA*.

Deputy President Wood considered grounds (2) and (5) together. She noted that the appellant asserted that the Arbitrator erred in finding that the scientific literature supported a connection between exposure to air pollutants and ventricular fibrillation or cardiac arrest and that the literature fell short of establishing the connection as a certainty.

Wood DP noted that the Arbitrator did not explain why he included reference to that particular research study as a basis for accepting Dr Helprin's opinion, as the doctor's observations about that study do not appear to be indicative of the study being supportive of his opinion on causation. The Arbitrator did not address the divergent opinion of each of the medical experts regarding the conclusion reached in that study. In any event, Dr Helprin did not consider the WHO review and the appellant asserted that the WHO review specifically noted that there were critical gaps in the studies that needed further research in order to assess the contribution of air toxicity to adverse health outcomes. The many points made in the studies about the limitations indicated that the outcomes were consistent with Dr Herman's conclusion that the scientific studies remained a hypothesis.

The Arbitrator rejected Dr Herman's evidence in part because it was inconsistent with the WHO review and also because the association between exposure to air pollutants and cardia events could not be classed as a hypothesis. He did not engage with the Appellant's submissions about the limitations of the findings other than to say that in circumstances where science can only assert possibilities, a tribunal can determine on the basis of the whole of the evidence that the causal link is established on the balance of probabilities.

Wood DP held that the observations made by Spigelman CJ (Stein JA and Davies AJA agreeing) in *McGuiness* are relevant*:*

> Epidemiology … is concerned with the study of disease in human populations. It is not, of itself, directed to the circumstances of an individual case.
>
> Evidence of possibility, including expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn. Where, however, the whole of the evidence does not rise above the level of possibility, either alone or cumulatively, such an inference is not open to be drawn.

And:

> Some of the epidemiological evidence suggests some increase in risk. On the approach I believe to be appropriate, that evidence and that conclusion are circumstantial facts which may be taken into account as 'strands in the cable' for the purpose of drawing the inference that the particular exposure caused or materially contributed to the injury in the specific case.

The epidemiological evidence about the association between exposure to air pollutants and cardiac events constituted "strands" in the causal chain of connection consistent with Kirby P's observations in *Kooragang* but were not, of themselves, evidence establishing the necessary causal connection between the exposure to air pollution, if accepted, and the deceased's ventricular fibrillation resulting in death. An assessment of the competing expert evidence regarding the question of causation was a further step in the consideration of the question of causation and an assessment of the evidence of the experts required an examination of whether the opinions were properly founded upon the facts and the conclusions in the scientific literature. It followed that the "strands in the cable" that formed the circumstantial facts upon which the Arbitrator could draw the necessary inference that the exposure to air pollutants materially contributed to the injury were not sufficiently exposed. Without having dealt with that issue, the Arbitrator was not in a position to reject the opinion of Dr Herman on the basis that it was inconsistent with the findings in the research.

Wood DP held that the Arbitrator overlooked material evidence and fell into appealable error which affected his finding on causation. Accordingly, it was not necessary to determine the remaining grounds of appeal. She revoked the COD and remitted the matter to another member for re-determination.

PIC – Member Decisions

Section 11A (1) WCA – Nurse suffered a psychological injury when suspended from work following complaints of misconduct by other staff – Held that the evidence required to establish reasonableness depends on the circumstances of the case and provision of all relevant primary material before a factual investigation is not a prerequisite to proof of reasonableness – Held that the injury was predominantly caused by reasonable action in respect of discipline

Whittle v State of New South Wales (Hunter New England Local Health District) [2021] NSWPIC 319 – Member Sweeney – 1/09/2021

On 22/11/2018, the Chief Executive of the Respondent was advised by the Australian Health Practitioner Regulation Agency (AHPRA) that a decision had been made to caution the worker and impose conditions on his registration as a Nurse, as a result of his conduct while practising in Tasmania in 2017. It was incumbent upon the Respondent to monitor the enforcement of these conditions, which included: (a) the worker was not to practise as a nurse in charge; (b) the worker was to undertake and successfully complete a program of education approved by the AHPRA, and (c) the worker was to be supervised by another registered health practitioner when practising as a registered nurse so that the supervisor "*is always physically present in the workplace and available to observe and discuss the management of patients and/or performance of the practitioner when necessary and otherwise at daily intervals*".

As the Respondent was unable to facilitate this supervision at Armidale (where the worker was working in the emergency department as part of the mental health assessment team), he was transferred to the Manning Base Hospital at Taree in 2019. He was supervised by an accredited nurse and clinical supervisor.

On 29/06/2020, the service manager of the Manning Mental Health Service advised the worker by telephone that the respondent had received allegations relating to his conduct in the workplace and that he was to be stood down on full pay pending the outcome of an investigation. Generally, the allegations concerned sexual harassment of female staff and patients and bullying and intimidation. He was requested to attend a meeting on 15/07/2020, which would be attended by the Director of Nursing and HR consultant of the Health District.

On 2/07/2020, the worker received a letter and email from the service manager formally advising him of the allegations of misconduct.

On 7/07/2020, the worker attended on his GP, who diagnosed depression and referred him to a psychologist. On 15/07/2020, the worker advised his GP of his intention to claim compensation and the doctor certified him as unfit for work. He has not worked since then.

There was no dispute that the worker's psychological condition is an injury arising out of and in the course of his employment. However, the respondent disputed liability under s 11A (1) *WCA* on the basis that the injury resulted wholly or predominantly from reasonable action taken it in respect of transfer, discipline and dismissal. The worker claimed continuing weekly compensation from 7/07/2020 and alleged that he suffered an aggravation etc. of a disease on that date.

Member Sweeney conducted an arbitration on 14/07/2021, during which he directed the parties to provide written submissions on the relevance of the reasoning in *Rail Corporation NSW v Aravanopules*.

Member Sweeney cited the decision of Sackville AJA in *Heggie* as a useful starting point for any decision involving s 11A (1) *WCA*. His Honour stated at [59]:

> The following propositions are consistent both with the statutory language and the authorities that have construed s 11A(1) of the WC Act:
>
> (i) A broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
>
> (ii) Nonetheless, for s 11A (1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.
>
> (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
>
> (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
>
> (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.
>
> (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.
>
> (vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.

The Member held that the case law establishes that a finding that an employer has not proven that a disciplinary action is reasonable is not a finding that it is unreasonable, but reasonableness does not require the employer's actions to be flawless. There is a long line of Presidential authority that "predominantly" can be equated to "mainly".

After discussing the medical evidence, the Member observed that the two psychiatrists had obtained radically different histories from the worker. He found that it is probable that the disciplinary action in June and July 2020 is the predominant cause of the worker's psychological injury, based on the evidence of the GP and the opinion of Dr Anand. He stated, relevantly:

96. It is likely that the applicant experienced psychological problems prior to the disciplinary proceedings. In the note of 30 October 2019 there is a reference to his relationship breakdown but the mood disorder from that was "improving". The significant restrictions on his right to practice imposed by AHPRA may have caused some "deterioration" in his psychological health. His employment at the Manning Base Hospital was undoubtedly stressful for a number of reasons. It is understandable that a very senior nurse working under supervision would attract attention and, probably, some degree of suspicion. But, contrary to some aspects of the applicant's evidence, he made no complaint of a deterioration in his psychological condition at the consultation of 30 October 2019 and he did not consult a medical practitioner thereafter until the commencement of the disciplinary proceedings.

97. This history together with the applicant's account of the effect on his health of the disciplinary actions, and the florid condition of his psychological condition following the disciplinary actions suggests that these actions are the predominant or chief cause of his injury. These matters are consistent with the history and conclusions of Dr Anand….

99. In my opinion, aspects of the applicant's attack on the reasonableness of the respondent's actions are misplaced. They proceed on the basis that the fact-finding Act investigation was the equivalent to a trial after which would determine his culpability in respect of the allegations. Thus, it was critical that he have available the entirety of the material on which the prosecution would rely in order to adequately defend himself. Failure to provide all of that material was self-evidently unfair.

The Member noted that Cl 5.1 of the Respondent's Managing Misconduct policy defines "investigation" and states that "*An investigation proceeds, and is separate from, any final decision by a decisionmaker about whether to accept or not to accept findings and about whether and what further action (disciplinary or other) is required"*. The outcome of the enquiry may be detrimental to the worker, but equally the investigators may conclude that the complaints were vexatious or trivial or that there was insufficient information to contemplate any charge of misconduct. What was proposed by the letter dated 2/07/2020 was a fact-finding investigation antecedent to a determination of misconduct. The policy provides that if misconduct is to be alleged against a staff member then they have a right of access to relevant information "*sufficient to enable the staff member to understand fully any alleged misconduct*". At that stage, the staff member is entitled to provide submissions and any additional information in respect of the proposed finding and any proposed penalty.

The Member stated, relevantly:

105. Contrary to Mr Goodridge's submission, I do not believe that it was obligatory for the respondent to provide the applicant with statement evidence from Ms Scott and the other complainants, or the CCTV footage, for the purposes of the investigation. Conversely, he would undoubtedly be entitled to it if the investigation established that disciplinary action was required. While nothing turns on it, is not entirely clear that there was statement evidence from Ms Scott at this time. MM requires that the staff member concerned should be advised about the allegations against him or her and the advice "*must contain sufficient information about the allegations to allow the staff member concerned to provide a considered response*."

106. The letter of 2 July 2020 sets out in some detail the allegations in respect of sexual harassment and bullying and then presents an overview of other allegations which might generally be described as infringements of the precepts for nursing at the Manning Base Hospital. It seems to comply with the requirements of MM and the principle of fairness. My impression is that it provided the applicant with a clear summary of the allegations made by the complainants and that it placed him in a reasonable position to provide a considered response in writing and at the interview to the allegations.

107. When considering the process overall, I have the impression that the respondent sought to comply with its policy, and to act to fairly in the fact-finding investigation. It is necessary, however, to consider some of the specific arguments put by the applicant before reaching a final conclusion .

108. It was argued that without the primary evidence from the complainants the Commission could not be satisfied of the reasonableness of the respondent's action in commencing an investigation. I do not accept that argument. Mr Louis has given evidence that the complaints about the applicant's conduct was made and, subject to one matter, there is no good reason to reject his evidence. That is a sufficient basis to find that the investigation was reasonable. Mr Louis' evidence was not impugned at the arbitration hearing. It is difficult to imagine that he is manufacturing the complaints.

109. Ms Kennedy suggested in her statement that Mr Louis had not followed the respondent's policy in commencing the investigation but that does not appear to be established by the other evidence. She also submitted that he had a personal interest in pursuing the applicant. However it is difficult to understand what Mr Lewis might have to gain professionally or otherwise from initiating the enquiry.

110. While there are many cases where it will be necessary for the respondent to call evidence to prove that a protocol or other action is reasonable, there will be others where it can be inferred from the circumstances that an action is reasonable: see *State of New South Wales v Stokes* [2014] NSWWCCPD 78 (26 November 2014). There is nothing in *Aravanopules* which conflicts with this approach.

111. The purpose of having the investigation in this case was to establish the credibility of the complaints. It was to establish whether they could be proven or substantiated to adopt the language employed in the applicant's submissions. Certainly, some of the allegations are of relatively innocuous kind as the applicant submitted. Others are more serious and demand an investigation to establish whether they occurred.

112. Mr Goodridge submitted that the respondent had failed to apply its own policy document, and had acted unreasonably, in suspending the applicant from duty. He referred to Clause 4 of MM. In short, it states that suspension from duty could only occur after a risk assessment which a demonstrated a potential risk to other staff from a staff member the subject of a complaint . There are other matters which may be justify a suspension arising from s 150 of the Health Practitioner Regulation National Law (NSW) and these may be relevant to this case. The risk assessment prepared by Mr Louis and signed by relevant executives of the respondent is in evidence. It is redacted in parts. However, it includes the following, which may be relevant to this issue.

> The information is credible based on a number of sources. Staff members have approached management (NUM and service manager) with initial emails and follow-up emails with further information. Staff members range from New Graduate RN, junior RN, senior RN, psychologist from Community mental health. All staff have had direct interactions with the employee.

The risk assessment also said this:

> All witnesses express concern for reprisal from employee. There is a sense of fear that his actions will continue and that they will be subject to his behaviour that is not under direct control by management.

113. The risk assessment noted that there was difficulty in rostering the applicant on morning/day shift as there was not "*a continuous suitable primary supervisor*" available to meet the AHPRA conditions of employment. The applicant's supervisor worked on evening shift but that involved a risk as there was "*less management available during that period*". The risk assessment, therefore, recommended suspension from duty. It concluded thus:

> Recommend suspension from duty pending formal investigation of misconduct. This recommendation is placed due to risk of retribution towards other employees, inability to change shifts to remove from affected staff members, can continues to work in an area that has mental health risk patients-sexual Safety risk/vulnerability risks.

114. In my opinion, these matters are sufficient to establish that the applicant's suspension from duty on full pay was reasonable. I have recently held that a condition imposed upon a worker not to discuss the issue with other members of staff, during the course of a very short investigation, effectively deprived him of his right to interview and secure witnesses to assist in his defence . In that case, however the evidence did not suggest any reason why the worker should be prevented from communicating with workers other than the complainants. The evidence here, however, does suggest reasons why the applicant should be constrained from speaking about the matter with other staff during the course of the investigation.

The Member held that it was open to the worker to request that the respondent obtain statements from those witnesses who might advance his case before, or at the time of the interview, and before any determination had been made in respect of his conduct. In these circumstances, there is no proper basis to conclude that his rights have been impinged by the restriction.

Accordingly, the Member concluded that the worker's psychological injury was predominantly caused by reasonable action taken by the respondent with respect to discipline and he entered an award for the respondent.

ACCIDENTS - Miscellaneous assessment – Held: insured driver was keeping a proper lookout and did not breach the duty of care owed and the accident was not caused by the fault of the insured driver - Accident caused wholly by the fault of the claimant.

Sarcasmo v AAI Limited t/as GIO [2021] NSWPIC 337 – Member Williams – 7/09/2021

On 12/05/2020 at approximately, the claimant was crossing a road at an intersection on his electric scooter. The insured driver was approaching the intersection and a collision occurred. The claimant claimed personal injury benefits and the insurer accepted liability to pay statutory benefits for the first 26 weeks after the accident, but on 26/08/2020, the insurer denied liability to pay statutory benefits after the first 26 weeks on the basis that the accident was caused mostly by the fault of the claimant (it assessed the claimant's contributory negligence at 75%).

The claimant requested an internal review and on 19/11/2020, the insurer determined that the accident was caused wholly by the fault of the claimant and he was not entitled to weekly payments of statutory benefits or benefits for treatment and care more than 26 weeks after the accident.

On 1/12/2020, the claimant commenced proceedings in the DRS and argued that the accident was caused neither wholly nor mostly by his fault. The matter was determined in the PIC.

On 3/08/2021, Member Williams conducted an assessment conference, at which the claimant sought to rely upon documents obtained from NSW Police under the GIPA Act. The Member admitted that evidence subject to giving the insurer an opportunity to consider it and to provide further written submissions. The parties lodged an agreed statement of facts and at the conference, they agreed that:

(a) At all times when the claimant was crossing the road he had a red 'don't walk' pedestrian signal facing him;

(b) The insured driver did not see the claimant at any time before the accident;

(c) The only evidence in relation to the point at which the claimant came into contact with the insured's vehicle is from the insured driver;

(d) At the time of the accident the insured driver was travelling at 50 km/h; and

(e) There is no evidence about the speed at which the claimant was travelling on his scooter immediately before, or at the time of, the accident.

Counsel for the claimant conceded that the insured driver's ability to see the claimant was partly obscured by the presence of cars in lanes 3 and 4 and that the claimant was at fault for the accident.

The parties agreed that the critical matters for determination were:

(1) Whether the accident was caused by the fault of the insured driver; and

(2) If so, whether the accident was caused mostly by the fault of the claimant. The parties agreed that if the PIC found that the accident was not caused by the fault of the insured driver, it would find that the accident was caused wholly by the fault of the claimant.

The Member noted that NSW Police considered that the claimant was at fault for the accident. He also noted the contents of the witness statements produced by NSW Police, which supported that opinion.

The claimant argued that:

(a) The insured driver had a duty to proceed through an intersection with caution and at a reasonable speed that would allow them to give way to any vehicles or pedestrians in or approaching the intersection;

(b) A reasonable driver in the position of the insured driver would have reduced their speed and proceeded through the intersection with caution, as clearly the line of traffic was a detail that caught her attention;

(c) Should the insured driver have reduced her speed, she would have had the opportunity to observe the claimant crossing the road;

(d) While there is a component of contributory negligence on his part, his contribution is less than 61%. Accordingly, the accident was caused neither wholly nor mostly by his fault;

(e) The insurer is speculating in relation to the speed of the claimant as he travelled across the pedestrian crossing;

(f) The fact that a driver behind the insured vehicle did not say that they saw the claimant beforehand is a different thing to them affirmatively asserting that they did not see the claimant beforehand; and

(g) Witness 4's vision would have been partially obscured by the insured vehicle, so that Witness 4's capacity to view the claimant cannot be compared to that of the insured driver.

Counsel for the claimant argued that the insured driver failed to keep a proper lookout, as if she had kept a proper lookout she would have seen the claimant and, having seen him, she could have slowed down or taken evasive action, thereby avoiding the accident. The factors that ought to have alerted the insured driver to the prospect that pedestrians may be present on or near the road were: (a) the immediate proximity of the intersection to a school; (b) the time of day, being inside school hours; and (c) the marked pedestrian crossing at the intersection; and cars were stopped in lanes 3 and 4 waiting to turn right at the intersection. Therefore, the accident was caused by the insured driver, fault should be apportioned 50:50 between the claimant and the insured driver and the accident was caused neither wholly nor mostly by the fault of the claimant.

The insurer argued that it was not reasonable to expect the insured driver to have seen the claimant at any time before the accident, she was travelling below the speed limit and at a reasonable speed and as the claimant collided with her vehicle, there was no breach of duty or fault on her part.

The Member made findings in accordance with the agreed facts and also found that the claimant collided with the front driver's side of the insured driver's vehicle.

The Member held that the duty of the driver of a motor vehicle to users of the roadway, including pedestrians, is to take reasonable care for their safety having regard to all the circumstances of the case: *McHugh J: Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422. Driving requires reasonable attention to all that is happening on and near the roadway that may present a source of danger and more often than not, it requires simultaneous attention to, and consideration of, a number of different features of what is already, or may later come to be, ahead of the vehicle's path: *Manley v Alexander* [2005] HCA 79 at [11].

However, a driver is not required to know or predict every event which happens in the vicinity of the vehicle so as to be able to take reasonable steps to react to such events and they are not required to be in a position where they can react to everything which may happen in the vicinity of the vehicle. The driver is not required to travel at a speed which is within the limits of visibility and control so as to be able to react to whatever ventures into the vehicle's path. A motorist must always be conscious of the fact that a pedestrian may do something silly and must adjust his or her driving to account for that possibility. On the other hand, a motorist can hardly drive in such a way that they expect such accidents to occur every minute, as otherwise no traffic would ever move. Unless there is some reason for a motorist to look to the right or the left, it is not surprising that they may be looking straight ahead when driving their motor vehicle.

The Member was comfortably satisfied that the insured driver did not breach the duty of care owed to the claimant and was driving reasonably having regard to the prevailing circumstances. The insured driver was keeping a proper lookout and there was nothing that should have put her on notice that a person on a motor scooter was likely to emerge on the pedestrian crossing from her right against a red don't walk sign when she was faced with a solid green traffic signal. The insured driver was travelling at an appropriate speed and there was no factor that should have caused her to reduce her speed. The accident was not caused by the fault of the insured driver and it was caused wholly by the fault of the claimant.