WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 83

Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

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. Specialist Diagnostic Services Pty Ltd t/as Laverty Pathology v Naqi [2020] NSWSC 1791
2. Secretary, Department of Communities and Justice v Topic [2020] NSWSC 1824
3. BQ v BT [2020] NSWWCCPD 70
4. Romeo v Vangarde Pty Ltd [2020] NSWWCCPD 71
5. Workers Compensation Nominal Insurer v Elias Bader t/as Genuine Kitchens (No 5) [2020] NSWWCCPD 72
6. Morcos v Deosa Enterprises Pty Limited [2020] NSWWCCPD 73
7. Galal v University of New South Wales [2020] NSWWCCPD 74

Supreme Court of NSW – Judicial Review Decisions

Review of decisions of the delegate of the Registrar and MAP – Held: The decisions did not reveal jurisdictional error – No failure to respond to any substantial and clearly articulated argument resulting in a constructive failure to exercise jurisdiction – No obligation for Registrar to provide reasons

Specialist Diagnostic Services Pty Ltd t/as Laverty Pathology v Naqi [2020] NSWSC 1791 – Acting Judge Schmidt – 11/12/2020

In November 2019, the worker filed an ARD claiming compensation under s 66 *WCA* for a psychological injury suffered in February 2018, as a result of bullying and harassment, understaffing, excessive workload and the nature and conditions of her employment with the plaintiff. In February 2020, Dr Parmegiani issued a MAC, which assessed 13% WPI. However, the worker appealed against the MAC and the plaintiff opposed the appeal.

In April 2020, a delegate of the Registrar allowed the appeal to proceed as a ground of appeal was made out. In June 2020, the MAP revoked the MAC and issued a fresh MAC that assessed 17% WPI.

The plaintiff applied for judicial review of both decisions. It asserted that the delegate's decision: (1) was made in excess of jurisdiction, as the gatekeeper role did not extend to having jurisdiction to finally determine the appeal by finding that the AMS made a demonstrable error; (2) contained a jurisdictional error, by finding the AMS made a demonstrable error, contrary to the decision in *Jenkins v Ambulance Service of New South Wales* [2015) NSWSC 633; and (3) was made in constructive failure to exercise jurisdiction, as they failed to respond to a substantial, clearly articulated argument relying on established facts and the authority of *Jenkins,* which it raised in its written submissions.

The plaintiff asserted that the MAP's decision to re-examine the worker: (1) was made without jurisdiction because it failed to determine whether the AMS had made an error. In the alternative, it failed to give reasons for that decision; (2) contained a jurisdictional error; and (3) was made in constructive failure to exercise jurisdiction.

Acting Justice Schmidt noted that the delegate stated, relevantly:

> 5. Upon examination of the MAC and on the fact of the application and submissions made, I am satisfied that a ground of appeal as specified in subsection 327 (3) of the *1998 Act* has been made out. ***The AMS has made a demonstrable error when assessing the PIRS category of employability***. (emphasis added)

The plaintiff argued that the highlighted sentence established that the delegate did not understand her statutory function and fell into the same jurisdictional error as that identified in *Ballas*. However, her Honour rejected that argument and she stated:

> 19 To make good the submission that the delegate did fall into jurisdictional error, Specialist Diagnostic Services thus relied on the delegate's single sentence: "*The AMS has made a demonstrable error when assessing the PIRS category of employability*". That, it was argued, established that the delegate had similarly misunderstood and gone beyond her statutory task.
>
> 20 It must be accepted that what the delegate said in the disputed sentence was unnecessary, because the Registrar is not by s 327 required to identify which ground of appeal it is concluded has been made out. But that is a slim basis for the serious conclusion that the delegate went beyond her jurisdiction. After all, "*the reasons of an administrative decision-maker are meant to inform and not to be 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*": *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272; [1996] HCA 6.
>
> 21 That there was jurisdictional error is a view which I consider the Court would thus be slow to reach on the basis of the single sentence relied on. That conclusion would also require the result of the delegate's examination of the challenged certificate, the face of Ms Naqi's application and the submissions, namely, the referral of Ms Naqi's appeal to the Appeal Panel for determination, not to be given the weight that I consider it requires.

Her Honour held that the delegate did not exceed the gatekeeper role and/or jurisdiction and if the delegate had not identified this ground, the appeal would still have to be referred to the MAP as it was under s 327 (4) *WIMA*. Unlike the situation in *Ballas*, the disputed sentence cannot have impacted on the referral or determination of the appeal under s 327 *WIMA*, as s 328 (2) obliged the MAP to conduct its review of the appeal "*limited to the grounds of appeal on which the appeal is made*". There is no reason to doubt that this the MAP did this.

In any event, the delegate's conclusion that a "*demonstrable error*" had been "*made out*" did not purport to finally determine the appeal. That accords with Simpson J's approach in *Bunnings Group Ltd v Hicks* [2008] NSWSC 874, which was referred to in *Ballas,* where her Honour discussed the Registrar's current task under s 327 and observed:

> [67] No longer is the Registrar or her delegate required only to '*form an opinion*' (see *Riverina Wines*) about the existence of a ground for appeal; he/she is to 'be satisfied' (in my opinion, a more stringent test); no longer is he/she to address the question whether the ground of appeal '*exists'*; the question to be addressed is whether the ground of appeal '*has been made out*' (also, on the express authority of SRA, a more stringent test)…
>
> [68] The question remains as to the extent to which it is necessary for a would-be appellant to satisfy the Registrar if an appeal is to be permitted to proceed. It may be that the key to this is to be found, not in the use of the words 'exists' and 'made out', but in the use of the word '*demonstrable*' as distinct from '*demonstrated*'.

> [69] As Mason P pointed out in *Pitsonis*, in a related but slightly different context, '*demonstrable*' means '*capable of being demonstrated*' – that is, capable of being demonstrated to the tribunal charged with the determination of the appeal. That tribunal is the Appeal Panel. It is not the Registrar or her delegate. '*Demonstrable*' does not mean '*has been demonstrated*'. It is true that '*demonstrable*' is, in common parlance, frequently used to mean, or as interchangeable with, '*demonstrated*'. But an Act of Parliament is not common parlance, and the legislature (and its parliamentary drafting teams) are taken to be familiar with the niceties and nuances of language. Recognition of the proper meaning of '*demonstrable*' would yield an interpretation of subs (4) that would retain the role of the Registrar as '*gatekeeper*,' and preserve the role of the Appeal Panel as the tribunal to which determination of the appeal is, by that section, committed.

Her Honour rejected the plaintiff's argument that the addition of the disputed sentence may have confined the MAP's jurisdiction. The SOR confirm that it did not understand it was confined by the delegate's conclusion and that it undertook the task that s 328 required, considered the grounds, gave reasons for its conclusions about the ways in which the AMS erred and explained why it ultimately reached a different conclusion about the level of impairment.

Her Honour found that there was no jurisdictional error in the delegate's decision and she rejected the plaintiff's argument that the delegate did not constructively fail to exercise jurisdiction.

Her Honour found that the MAP's decisions were within jurisdiction and she stated:

> 104 Contrary to the case it advanced, there is compelling evidence that the Appeal Panel found error in Dr Parmegiani's certificate at the time of its preliminary review, before the further assessment was directed by the 21 April notice. Namely, the reasons given at [31] of the Panel's June statement of reasons.
>
> 105 The April advice was not the Panel's decision, but rather advice of the result of its preliminary review, namely a decision that Ms Naqi needed to be assessed again by Professor Glozier. There was no obligation in that notice to give reasons for the view formed at the preliminary review…
>
> 107 There is nothing in the statutory scheme or Guidelines which precluded the Appeal Panel adopting the course it pursued of providing the reasons for the error it found in the certificate at its preliminary review, which resulted in the decision to have Professor Glozier assess Ms Naqi again, in its June statement of reasons. As well as the reasons appearing at [31], there the Panel also said about its preliminary review that:
>
> > 6. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the Workers compensation medical dispute assessment guidelines.
> >
> > 7. As a result of the Appeal Panel's preliminary review, the Appeal Panel determined that it was necessary for the worker to undergo a further medical examination for the reasons explained below.

Her Honour held that there is no reason why the MAP would falsely say that it identified errors before it required the worker to be assessed again. There needs to be a proper foundation for such a serious conclusion and the disputed sentence in the delegate's decision cannot sensibly provide that foundation. She also found that the MAP's decisions do not contain jurisdictional error and it did not constructively fail to exercise jurisdiction.

Accordingly, her Honour dismissed the summons and made a costs order against the plaintiff.

Decision of Registrar's delegate to refuse to refer an appeal to a MAP was not affected by jurisdictional error

Secretary, Department of Communities and Justice v Topic [2020] NSWSC 1824 – Adamson J – 15/12/2020

On 31/10/2004, the worker suffered work-related injuries. She claimed compensation under s 66 *WCA* and in 2009, she received compensation for permanent impairment.

On 21/11/2018, the worker made a further claim under s 66 *WCA* with respect to physical injuries and on 5/02/2019, she made a further claim under s 66 *WCA* with respect to a psychological injury as a result of the nature and conditions of her employment between 31/10/2004 and 26/01/2006.

On 11/03/2019, the insurer disputed liability for the physical injuries claim and on 17/05/2019, it disputed the psychological injury claim. The worker then commenced WCC proceedings.

On 27/11/2019, ***Arbitrator Perrignon*** issued Consent Orders, under which: (1) the claim for compensation for injury to the left upper extremity was discontinued; (2) he found that as a result of the events on 31/10/2004, the worker suffered both primary and secondary psychological injuries; and (3) he remitted the s 66 disputes to the Registrar for referral to an AMS to assess the degree of permanent impairment of: (a) the cervical spine and right upper extremity; and (b) primary psychological impairment as a result of the 2004 incident; and (3) primary psychological impairment due to the nature and conditions of employment. The Arbitrator noted that the insurer withdrew its reliance on s11A *WCA* with respect to the nature and conditions claim.

On 30/01/2020, Dr Morris issued a MAC, which assessed 0% WPI with respect to the primary psychological injury in 2004 and 15% WPI with respect to the nature and conditions injury.

The plaintiff appealed against the AMS' decision under ss 327 (3) (c) and (d) *WIMA*. The worker opposed the appeal.

On 1/04/2020, the Registrar's delegate McAdam determined that he was not satisfied that at least one of the plaintiff's grounds of appeal against the AMS' decision (regarding the degree of permanent impairment) was made out and he did not allow its appeal to proceed.

The plaintiff applied for a reconsideration of that decision, but the Registrar decided not to reconsider the decision on of the ground that it was correct.

On 22/06/2020, the Commission issued a COD that awarded the worker compensation under s 66 *WCA* for 8% WPI for physical injuries on 31/10/2004 based upon a MAC issued by Dr Crane and 15% WPI for the psychological injury due to the nature and conditions of employment.

The plaintiff applied to the Supreme Court of NSW for judicial review of the both decisions. It argued that the AMS made 2 demonstrable errors, namely: (1) he made findings regarding causation that were contrary to the COD dated 27/11/2019, which included a determination that the worker suffered both a primary and secondary psychological injury as a result of events on 31/10/2004; and (2) he failed to appreciate that he was bound by that determination.

Adamson J noted that the Registrar's role in performing the statutory function conferred by s 327 (4) *WIMA* is that of a gate-keeper. In deciding whether the refer an application to a MAP, the Registrar is to look at the capacity of the appeal ground to be made out, that is whether there is an arguable case of error, and is not to determine the appeal: determine the appeal: *Vannini v Worldwide Demolitions Pty Ltd* [2018] NSWCA 324 at [83] (Gleeson JA, Macfarlan JA and Barrett AJA agreeing) and *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86 (Ballas) at [67] (Bell P and Payne JA) and [150] (Emmett AJA).

Her Honour stated that in *Dominice v Allianz Australia Insurance Ltd* [2017] NSWCA 171 (*Dominice*), Basten JA addressed applications for review of gateway decisions in the analogous statutory context of the *Motor Accidents Compensation Act 1999 (NSW)* as follows (footnotes omitted and emphasis added):

[4] … [T]he appellant's case was based on four inter-related assumptions which were inadequately explored.

[5] The first was an assumption that judicial review was available in relation to a decision of the proper officer referring an application for review. A writ of certiorari was, historically, available only to quash the legal effect or the legal consequences of a decision or order under review. Under s 63 of the *Motor Accidents Compensation Act*, each party was entitled to seek referral to a review panel on the ground that the assessment was incorrect in a material respect. The role of the proper officer, who is not a medical assessor, is a protection for the party satisfied with the initial assessment from frivolous or insubstantial challenges to that assessment. The decision of the proper officer operates as a gateway to reviewing the correctness of the initial decision.

[6] The proper officer gave brief reasons for her decision, in compliance with the requirement in cl 14.8 of the Medical Assessment Guidelines, which have force pursuant to s 65 (1) of the *Motor Accidents Compensation Act*.

[7*] Where the proper officer refuses to grant a review on the basis of a legal misunderstanding as to the scope of his or her powers, there may well be grounds for judicial review of that decision. Its effect may be to deny a claimant an opportunity to obtain damages for non-economic loss.* However, when the error is said to have resulted in the failure of the proper officer to refuse a referral, the legal consequences are quite different. If the basis of her suspicion had been misconceived, one would expect that misconception to be identified by the review panel, which would dismiss the application and confirm the original certificate of assessment. A judge faced with a judicial review application in such circumstances, at least where the bona fides of the proper officer was not in question, would have strong reasons for rejecting the application on discretionary grounds.

[8] The second assumption was that the reasonableness of the officer's opinion was itself reviewable. As the primary judge correctly noted, it is the officer who must be satisfied that there was reasonable cause for suspicion that the first certificate was incorrect in a material respect. There was no suggestion in this case that the officer did not hold the opinion stated. It was submitted, however, that the opinion was unreasonable and therefore not valid. The basis on which it was said to be unreasonable was that the officer had misunderstood the operation of a clause in the Permanent Impairment Guidelines. That would not have established unreasonableness, but, possibly, error of law. Whether such an error would invalidate the opinion was not explored. The Guidelines were formulated in broad language and were directed to those responsible for undertaking medical assessments. Their operation was pre-eminently a matter for the proper officer to determine; there was no reason to suppose that the true construction of the Guidelines was something intended by the legislature to be determined by a court. Accordingly, even if the officer gave an interpretation or operation to cl 1.43 which was not the only available reading, that would not of itself reveal reviewable error.

[9] The third assumption was that the decision of the proper officer could be set aside because of error revealed in her brief written reasons. Although the appellant alleged error of law on the face of the record, that could only be established by reference to the written reasons given by the proper officer for referring the application to a review panel. Under the general law, those reasons would not have formed part of the record. It was, therefore, necessary for the appellant to rely upon s 69(3) and (4) of the Supreme Court Act. As explained in QBE v Miller, a challenge to the decision of a proper officer to refer an application for review to a review panel does not involve a challenge to the 'ultimate determination of a court or tribunal in any proceedings', for the purposes of s 69(3). Accordingly, the expansive definition of the "record" in s 69(4) was not engaged.

[10] Fourthly, even if the decision were reviewable on the grounds referred to above, there remained a large question as to whether, and if so why, an error on the part of the proper

officer in referring the application to a review panel would necessarily invalidate the decision of the review panel. The evidence revealed that the review panel had already considered and upheld the challenge to the original certificate and replaced that certificate with its own certificate prior to the hearing before the primary judge. Again, if error had been identified, there would have been a strong case for refusing any form of relief on a discretionary basis.

Her Honour stated that as the plaintiff in this matter challenged the decision to refuse to refer the matter for review to a MAP, many of Basten JA's observations do not apply, but it is significant that the section requires the Registrar to hold a particular belief. There are important statutory differences in the wording between *the WIMA* and the *MACA* and, importantly, the *WIMA* prohibits the Registrar from allowing an appeal to proceed unless he is satisfied, on the face of the application and any submissions in support, that at least one of the grounds for appeal specified in s327 (3) *WIMA* has been made out.

Her Honour identified the reconsideration decision as being "*operative*" as it confirmed the original decision.

Her Honour stated that the questions posed by the delegate were the correct ones and the reasons disclose no jurisdictional error

Accordingly, her Honour dismissed the summons and she noted that the parties agreed that no costs order should be made.

WCC – Presidential Decisions

Satisfying the monetary threshold under s 352 (3) WIMA

BQ v BT [2020] NSWWCCPD 70 – Deputy President Snell – 1/12/2020

On 4/09/2019, the worker died as a result of a MVA that occurred in the course of his employment. Compensation was claimed under ss 25 and 26 *WCA* on behalf of the appellant (his widow) and 4 infant children. The employer accepted liability.

On 17/06/2020, the employer's solicitors lodged the ARD. There was no dispute that the children were entitled to weekly payments under s 25 (b) *WCA* and that the employer was liable to pay funeral expenses. The issue for determination was the apportionment of the lump sum benefit between dependants.

On 17/08/2020, ***Senior Arbitrator Capel*** issued a COD, in which he found that the appellant was partially dependent upon the deceased at the time of his death and that the children were wholly dependent. The largest share of the lump sum was apportioned to the appellant and substantial sums apportioned to the children. The Senior Arbitrator also made orders for the payment of interest on the lump sum.

The appellant stated that she planned to invest "*a portion of the monies that [she received] to ensure that the children and [her] will be comfortable into the future*". She said she had taken advice "*regarding the investment of the funds payable to the children*" and that her education included tertiary qualifications in business. She sought an order that she should manage any monies payable to the children and not paid to the Public Trustee. She also stated that she planned to keep the monies paid to the children invested and not make any withdrawal from these funds until the children attain the age of 18 years, except in the case of any medical emergency or extraordinary educational expenses. The submissions lodged on behalf of the children generally supported this course of action.

The Senior Arbitrator found that he has no reason to doubt the appellant's evidence and her present intentions, but "*who knows what the future holds*" and he ordered the payments for the children should to be paid to the NSW Trustee and Guardian to hold on trust until each of them turns 18 years of age. He stated that "*there is no compelling reason for departing from the usual practice. This ensures that the funds are protected for the children's future*."

The appellant appealed against that decision and asserted that: (1) it was affected by an error of discretion in stating "*who knows what the future holds*"; (2) it was affected by an error of discretion in stating that there was "*no compelling reason*" to depart from the normal practice, which is an error in the exercise of discretion; and (3) the use of the words "*compelling reason*" was an incorrect application of the requirements of s 85A WCA and therefore the decision was affected by both an error of discretion and law.

Deputy President Snell refused to allow the appeal to proceed because the monetary threshold in s 352 (3) *WIMA* was not satisfied. He stated, relevantly:

> 22. It was held in *Patrick Operations Pty Ltd v Watson* that the "*monetary threshold is a mandatory requirement which must be met before the Commission may hear an appeal*". This is consistent with the clear words of the section. It was observed in *Tagg v International Flavours and Fragrances (Australia) Ltd* that the '*amount of compensation at issue on the appeal*' "*may be different from the amount of compensation at issue in the dispute as a whole*". The words of the section clearly direct attention to the amount '*at issue on the appeal'*.
>
> 23. In *Fletchers International Exports Pty Limited v Regan*, Fleming DP said:
>
> > While a decision of an Arbitrator may not concern an '*award*' of compensation (as in *Mawson*), the appeal must nonetheless affect an '*amount of compensation at issue on the appeal*' to pass the threshold test in section 352 (2) (b). Purely procedural decisions, such as a decision to adjourn a telephone conference (*Tagg v International Flavours and Fragrances (Australia) Ltd* [2003] NSW WCC PD 5), a decision in relation to costs only (*Grimson v Integral Energy* [2003] NSWWCC PD 29), and a decision to schedule a further telephone conference (*Falcon v Narellan Enterprises Pty Limited* [2003] NSW WCC PD 34) do not meet this threshold criterion. The decision must have a real capacity to put the amount of compensation, determined by reference to the decision or the claim (*Sheridan v Coles Supermarkets Australia Pty Limited* [2003] NSWWCC PD 3), in issue in the appeal (as in the case of the filing of a '*Reply*' (*ADCO Constructions Pty Ltd v Ferguson* [2003] NSWWCCPD 21)). (underlining added)
>
> 24. *O'Callaghan v Energy World Corporation Ltd* dealt with an appeal in a matter where the worker sought to set aside consent orders for lump sum compensation, so that she could pursue a medical appeal pursuant to s 327 (3) (a) of *the 1998 Act*, with a view to achieving the threshold for a '*work injury damages*' claim. Roche DP said:
>
> > The Commission is concerned with the current claim and whether, in respect of that claim, the amount of '*compensation at issue on the appeal*' is at least $5,000.
>
> 25. The Deputy President concluded that the threshold was not satisfied, stating that there was no compensation at issue on the appeal. I followed this approach in *Abu-Ali v Martin-Brower Australia Pty Ltd*, an application to set aside a Certificate of Determination so as to permit a worker to seek assessment of permanent impairment, to be assessed on a different basis to that employed originally.
>
> 26. It has been regularly held that Presidential appeals against arbitral decisions in '*Workplace Injury Management Disputes*' do not satisfy the monetary threshold in s 352 (3).
>
> 27. The Arbitrator in the current proceedings was required to deal with dependency, apportionment of the lump sum provided in s 25 (1) (a) of *the 1987 Act* between those found to be dependant, interest on that lump sum and the way in which payment of the lump sums apportioned to the dependants under the age of eighteen years was to be made. The only aspect of the Arbitrator's decision challenged on this appeal goes to his orders for payment of the various sums apportioned to dependants under the age of eighteen to the NSW Trustee. The appeal does not relate in any way to the quantum of

the amounts to be paid, the orders for apportionment are not challenged. The issue on appeal relates to the exercise of the Arbitrator's discretion in respect of the orders for payment.

28. The first of the requirements in s 352 (3) is that at subs (a), that the "*amount of compensation at issue on the appeal*" be at least $5,000. I cannot see that there is any amount of compensation at issue on the appeal. The amount of compensation awarded overall, and to each of the dependants individually, will not be varied by the outcome of the appeal. If the appeal were to succeed, the only practical effect would be to the identity of the trustee to which payment was to be made. The first of the requirements in s 352 (3) is not satisfied.

29. As there is no amount of compensation at issue on the appeal, it follows that the requirements of subs (b) of s 352 (3) similarly cannot be satisfied.

Factors to take into account when determining whether to allow a reconsideration of a decision – Samuel v Sebel Furniture Ltd [2006] NSWWCCPD 141 applied

Romeo v Vangarde Pty Ltd [2020] NSWWCCPD 71 – Deputy President Wood – 19/12/2020

The appellant was employed by the respondent as a Senior Property Manager. On 1/12/2017, his employment was terminated after a random compliance check disclosed irregularities in the respondent's trust account. He claimed compensation alleging a psychological injury caused by "an overbearing workload, feeling hostility from other staff and due to an ordeal in which he accidently (sic) misappropriated funds".

On 4/04/2019, the respondent issued a dispute notice which raised issues under ss 4, 11A, 14 and 60 *WCA* and ss 260 and 261 *WIMA.*

On 22/12/2019, ***Arbitrator Wynyard*** issued consent orders as follows:

1. There will be an award for the respondent in respect of the claim for weekly benefits under s 37 of the 1987 Act from 5 October 2018.
2. There will be an award for the respondent in respect of the claim for medical expenses under s 60 of the 1987 Act from 22 November 2018.
3. There will be an award for the respondent in respect of the claim for permanent impairment under s 66 of the 1987 Act.
4. The balance of the claim is discontinued and I dispense with the necessity for the applicant to file a Notice of Discontinuance.

Note

A. The respondent will make the following payments to the applicant on a compromise, voluntary, without prejudice and without admission of liability basis as follows:

(i) Pursuant to s 37 of the 1987 Act, $500 gross per week from 25 January 2018 to 4 October 2018 agreed to equal $18,000;

(ii) Pursuant to s 60 of the 1987 Act, $2,000 incurred up to 22 November 2019 upon production of accounts, receipts and/or Medicare Notice of Charge.

B. The applicant agrees and admit that:

(i) On payment of the amount of weekly compensation noted in paragraph A of the notations, the applicant will have received all of his [entitlements] to weekly compensation and medical expenses arising out of his employment with the respondent to date.

(ii) From 22 November 2019 the applicant has fully recovered from the effects of the injuries sustained with the respondent.

(iii) The applicant will be able to earn the same, if not more, than his pre-injury average weekly earnings with the respondent from 22 November 2019.

C. The settlement is on a compromise, without prejudice and without admission of liability basis and the respondent makes no admission about the allegations made by the applicant.

D. I note the Consent Orders signed by the parties, initialled by me and retained by me.

Within 2 days of the settlement, the appellant took issue with the resolution and he applied to have the consent orders reconsidered. ***Arbitrator Burge*** refused that application.

The appellant alleged that the Arbitrator erred: (1) by failing to properly exercise the Commission's discretion whether to grant the reconsideration sought by the appellant; (2) by not referring to and not taking into account the appellant's submission in reply as to the appellant's lack of understanding and consent to the specialised terms in the Consent Orders and their meaning, as opposed to the monetary value of the settlement; (3) by failing to find whether a durable and properly consented to settlement had been achieved; (4) by finding that the solicitor's email dated 26 November 2019 recounted the provision of instructions to resolve the matter on the terms which were entered; (5) Ground Five: by finding that the settlement did not represent any injustice to the appellant because the contemporaneous evidence (which the Arbitrator accepted) established that the appellant provided instructions to compromise his claim in a manner consistent with the Consent Orders, and (6) Ground Six: by not addressing or not considering the lack of prejudice to the respondent when exercising his discretion. The respondent opposed the appeal.

Deputy President Wood determined the appeal on the papers. She considered grounds (2) to (6) before determining ground (1).

Wood DP rejected ground (2) and held that the appellant's allegation is not borne out by the Arbitrator's detailed summation of the submission made to him and his reasons for not accepting it.

Wood DP rejected ground (3) and held that the Arbitrator clearly considered the Commission's objective of achieving "fairness" between the parties. She noted that the Arbitrator stated:

> Adopting the approach and test set out in the *Railcorp* decision referred to at [16], I have weighed up the competing principles of finality in litigation with the need to rectify any clear-cut injustice. In doing so, I do not believe the settlement in anyway represents such an injustice to the applicant. His matter was contentious, and there was a very real risk he would have lost had it proceeded. Moreover, the evidence establishes he provided instructions to compromise his claim in the manner set out in the Consent Orders. That evidence from his former solicitor is contemporaneous and I accept it.
>
> In accordance with section 350(3) of the 1998 Act, and approaching the matter in a beneficial manner, I do not propose to exercise my discretion to reconsider this matter. In my view, the facts do not establish an injustice having taken place between the parties. The settlement is, in my view, a reasonable compromise between the parties given the issues in the case.

Wood DP held that this clearly indicated that the Arbitrator considered whether the settlement had been properly agreed to and was therefore "durable". She stated:

> 79. All of those reasons are sufficiently clear to show that the Arbitrator reached a conclusion that there was no evidence that the Consent Orders were not properly entered into and thus the settlement constituted a fair and durable settlement in accordance with s 367 of *the 1998 Act.* The allegation that the Arbitrator failed to make a finding in relation to whether the settlement was durable is not made out and Ground Three of the appeal fails.

Wood DP rejected ground (4) and held that the Arbitrator's observation and finding as to what was in the appellant's previous solicitor's email must be read in the context of his earlier reasons. The Arbitrator determined that the appellant had not established that his ability to provide an informed consent was impaired and that the email did not suggest that there was any issue in relation to his instructions.

Wood DP rejected ground (5) and held that there is nothing in the Arbitrator's reasoning process that discloses that he did not properly understand the appellant's case or fail to give regard to his submission.

Wood DP rejected ground (6) and stated, relevantly:

> 87. The appellant's submissions do not support or explain this ground of appeal. In any event, the Arbitrator did consider whether there was any prejudice to the respondent when he determined that the delay involved in having the application heard was not a matter that weighed against the appellant because the appellant had made his position clear just a few days after the settlement took place. Elsewhere in this appeal, the appellant refers to the fact that there would be no prejudice to the respondent because if the Consent Orders were revoked, the matter would proceed to arbitration. Such a consideration is not a matter that should weigh in favour of the application for reconsideration. If it were, then the same would be the case in every matter. In any event, the respondent has paid a sum of money to resolve the claim. If the matter proceeded to arbitration and the appellant lost, in the usual circumstance there would be no redress available to the respondent for having paid the settlement moneys erroneously. In that scenario, the respondent would clearly be prejudiced, not the appellant.
>
> 88. The appellant's submissions again rely on the purported error on the part of the Arbitrator in determining that the appellant had properly consented to the Consent Orders. Once again, for the reasons expressed above, the alleged error is not made out.

Wood DP held that ground (1) is reliant upon the remaining grounds of appeal succeeding and none were made out. She stated:

> 92 In *Samuel*, Roche ADP observed as follows (citations omitted):
>
> > Having regard to the above authorities and the provisions and objectives of the 1998 Act I believe that the following principles are applicable to reconsideration applications under section 350 (3) of *the 1998 Act*:
> >
> > 1. the section gives the Commission a wide discretion to reconsider its previous decisions;
> > 2. whilst the word '*decision*' is not defined in section 350, it is defined for the purposes of section 352 to include "an award, order, determination, ruling and direction". In my view 'decision' in section 350 (3) includes, but is not necessarily limited to, any award, order or determination of the Commission;
> > 3. whilst the discretion is a wide one it must be exercised fairly with due regard to relevant considerations including the reason for and extent of any delay in bringing the application for reconsideration;
> > 4. one of the factors to be weighed in deciding whether to exercise the discretion in favour of the moving party is the public interest that litigation should not proceed indefinitely;
> > 5. reconsideration may be allowed if new evidence that could not with reasonable diligence have been obtained at the first Arbitration is later obtained and that new evidence, if it had been put before an Arbitrator in the first hearing, would have been likely to lead to a different result;

6. given the broad power of 'review' in section 352 (which was not universally available in the Compensation Court of NSW) the reconsideration provision in section 350(3) will not usually be the preferred provision to be used to correct errors of fact, law or discretion made by Arbitrators;
7. depending on the facts of the particular case the principles enunciated by the High Court in *Port of Melbourne Authority v Anshun Pty Ltd* may prevent a party from pursuing a claim or defence in later reconsideration proceedings if it unreasonably refrained from pursuing that claim or defence in the original proceedings;
8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration, and
9. the Commission has a duty to do justice between the parties according to the substantial merits of the case.

Wood DP found that the Arbitrator's approach was consistent with *Samuel* and the various authorities that followed and the appellant has not established that the Arbitrator erred in the exercise of his discretion by refusing to reconsider the matter.

Accordingly, Wood DP confirmed the COD dated 31/08/2020.

Section 151AA WCA - Credibility

Workers Compensation Nominal Insurer v Elias Bader t/as Genuine Kitchens (No 5) [2020] NSWWCCPD 72 – President Phillips DCJ – 10/12/2020

This matter was previously reported in Bulletins no. 28 and 48, but the following is provided by way of background.

The employer began business as a sole trader in/about 2013, but in February 2014, the worker asked him for work and he began working with him for 5 days per week (although there was conflicting evidence about his starting date). On 20/10/2014, the worker badly cut his left thumb while using a circular saw and did not return to work. The employer was uninsured at that time.

On 14/08/2015, the Nominal Insurer served a notice upon the employer under s 145 (1) *WCA* seeking reimbursement $30,815.82. He filed a Miscellaneous Application under s 145 (3) *WCA* and argued that he was an "*exempt employer*" under s 155AA *WCA*. On 2/02/2016, that dispute was resolved and Consent Orders indicate that the employer agreed to voluntarily repay a compromised amount to the Nominal Insurer.

On 15/01/2018, the Nominal Insurer served a further notice upon the employer under s 145 (1) *WCA* seeking reimbursement of a further $70,188.02. The employer filed a further Miscellaneous Application under s 145 (3) *WCA* and again argued that he was an exempt employer. He also sought reconsideration of the 2016 Consent Orders. The Nominal Insurer disputed that application.

On 1/08/2018, ***Arbitrator Homan*** issued a COD. She declined to reconsider the Consent Orders and held that the employer was not an exempt employer under s 155AA *WCA*. She found that while the accountant's evidence appeared to corroborate the employer's evidence, this was inconsistent with the fact that he obtained insurance shortly after the injury occurred. She also expressed concern that the accountant's evidence "*was not given under oath or affirmation*" and said that she was not satisfied that this was sufficient to overcome her concerns regarding the employer's evidence.

The employer appealed and ***Deputy President Wood*** allowed the appeal. She held that while s 354 (2) *WIMA* permits the Commission to "*inform itself on any matter in such manner*" it thinks fit it is obliged to comply with the rules of procedural fairness and the employer was denied procedural fairness. She revoked the COD and remitted the matter to another Arbitrator for re-determination.

Upon remitter, ***Arbitrator Perry*** held that: (1) The employer was an exempt employer within the meaning of s155AA *WCA* between 1/07/2014 and 24/10/2014; (2) The employer is deemed to have obtained from the first respondent, and the first respondent is deemed to have issued, a policy of insurance in accordance with s 155 *WCA* for that period; and (3) The employer is not estopped from arguing that he was an exempt employer with respect to the notice issued by the first respondent on 15/01/2018, under s 145 (1) *WCA*. However, he refused the employer's claim for an order that he is not liable to reimburse the first respondent in respect of its notice under s 145 (1) *WCA* dated 14/08/2015.

The appellant appealed and alleged that the Arbitrator erred: (1) in accepting that the worker was employed on a casual basis and a temporary basis and accepting the employer as to credit; (2) with respect to the FYE 2015 tax return; (3) in finding that the Nominal Insurer and the worker did not adequately contradict the service of the notice of termination; and (4) in finding at [157]–[158] the letter dated 21/02/2015 only established the worker having work for the next day after 20/10/2014.

President Phillips DCJ dismissed the appeal for reasons that are summarised below.

His Honour rejected ground (1) and he stated, relevantly:

> 235. The learned Arbitrator with respect to the question of the nature of Mr Abdelahad's employment, that is was it casual, temporary or permanent, deals with this matter in some detail, particularly at [121] and [122] of the Reasons. He also deals with Mr Abdelahad's statement of 12 November 2014 upon which reliance is now placed by the Nominal Insurer at [120] of the Reasons. Ultimately in weighing up these matters, the learned Arbitrator reached a view that "*it is likely he did inadvertently fail to tick the 'temporary' box. I accept his evidence in that respect too.*"[137] At [124] of the Reasons, the learned Arbitrator agrees with the submission that it is often a matter of legal argument as to what the terms associated with employment law, namely part-time, permanent, full-time and casual, actually mean. It is obvious that the Arbitrator gave Mr Bader the benefit of the doubt when he reviewed all of the evidence. At [125] of the Reasons, he refers to the interview with Mr Gottstein on 10 December 2014 where it was asserted that Mr Abdelahad was employed on a casual basis. Ultimately the learned Arbitrator was satisfied that Mr Abdelahad had been told that he could not be employed on a permanent basis and that that led to a reasonable person believing that the total amount of wages would be no more than $7,500.[138]
>
> 236. The Nominal Insurer asserts these pieces of evidence as if they were uncontradicted. They were put in issue and the learned Arbitrator, as he was duty bound to do, carefully weighed the explanation contrary to what appeared in those documents. The learned Arbitrator accepted that explanation and having regard to the evidence put forward by Mr Bader, this was certainly open for the learned Arbitrator to make a finding as he did. I do not accept the Nominal Insurer's allegation that the mistakes made in filling out the two documents were improbable.

His Honour also noted that the appellant also sought to attack the first respondent for his use of an interpreter when being cross-examined. However, the Arbitrator dealt with that submission and held that he did not seek to use the benefit of the interpreter for any reason other than to assist him when he needed it. That finding was available on the evidence and the Arbitrator was best placed to evaluate this issue.

His Honour rejected ground (2) and held that the Arbitrator's findings were available to him and consistent with the evidence.

His Honour rejected ground (3). He noted that the appellant complained that the worker's solicitor's letter dated 21/05/2018 was admitted into evidence without objection and took issue with the Arbitrator's finding that the worker did not adequately contradict the service of the notice of termination. He stated that this submission fundamentally misunderstands the nature of

proceedings in the Commission and the fact that under s 354 (2) *WIMA*, the Commission is not bound by the rules of evidence and that the appellant sought to import into this jurisdiction all of the consequences that arise when the rules of evidence do apply to a document that is admitted without objection. That is, the party who does not object to the tender generally cannot later take issue with the veracity of the document unless consent to the tender was conditional.

His Honour held that, properly understood, the worker's solicitor's letter became a matter of weight and he noted that the Arbitrator accepted that the solicitor would not have made his submission without instructions, but that it is not evidence. He agreed with the Arbitrator's approach and stated that the reasons contain a succinct statement of the Arbitrator's duty with respect to s 155AA as expounded by President Keating in *Kula.* He also found that there was no denial of procedural fairness, as alleged or at all.

His Honour rejected ground (4). He found that the Arbitrator's findings were available to him and it cannot be said that he was wrong to give the letter little or no weight having undertaken his analysis of the evidence generally.

Accordingly, his Honour confirmed the COD.

Section 32A WCA – no current work capacity

Morcos v Deosa Enterprises Pty Limited [2020] NSWWCCPD 73 – Acting Deputy President Parker SC – 17/12/2020

On 23/05/2017, the appellant injured his right knee and on 4/12/2017, his knee gave way and he fell onto his right arm, causing a triceps tendon avulsion of the elbow, which required surgery. He also developed a secondary psychological condition.

The appellant received weekly payments of compensation for 130 weeks until 11/01/2020. The insurer advised him that weekly payments would cease due to the operation of s 38 (3) *WCA.*

On 5/08/2020, ***Arbitrator Isaksen*** issued a COD, which determined that the appellant failed to establish that he has had no current work capacity from 12/01/2020 to the date.

The appellant appealed and alleged that the Arbitrator erred: (1) in determining that he has current work capacity; and (2) by failing to determine the application or otherwise of ss 32A and 38 WCA.

Acting Deputy President Parker SC upheld ground (1) and he remitted the matter to the Arbitrator for re-determination in accordance with his reasons for decision.

Parker ADP SC held that the report of Dr Teoh was plainly ambiguous, as he opined that the appellant was unable to work at all while providing an opinion regarding the impairment rating that he was fit for suitable duties, but it was for the appellant to adduce evidence to resolve this ambiguity. The appellant did not apply to adjourn the proceedings to obtain further evidence from Dr Teoh to clarify the ambiguity, which meant that the arbitrator was required to resolve it. It was open to the Arbitrator to not be satisfied with Dr Teoh's evidence. However, the Arbitrator's rejection of the evidence of Dr Khan (treating psychiatrist) was in error.

Parker ADP SC stated, relevantly:

> 59. The evidence is that while the appellant may have a physical capacity for some types of part-time work as found by the Arbitrator, the treating psychiatrist expressed the opinion that he was not fit for any employment at the present time and would not be likely to have recovered so as to return to any employment within the next 12 months. Accepting that there is an internal inconsistency in Dr Teoh's report there is nevertheless a consistency with the views of Dr Khan. The respondent called no psychiatric evidence to contradict the evidence of Drs Teoh or Khan. The rejection of the evidence of Dr Khan at least was an error going to the outcome of the proceedings that the appellant had failed to persuade the Arbitrator.

60. On the basis of all of the evidence, both physical and psychiatric, the Arbitrator should have reached the conclusion that the appellant did not have any ability to return to work either in the pre-injury employment of electrician or in suitable employment. It follows that the Arbitrator should have found that as 12 January 2020 the appellant had "no current work capacity".

61. For completeness I add that I do not detect any error in the Arbitrator's approach to the determination of what should be regarded as "*suitable employment*" for the appellant. Furthermore, I do not detect any tension in the approaches adopted to the issue of suitable employment in *Dewar* and *Popal*.

Parker ADP SC held that it was not necessary to determine ground (2).

Parker ADP SC found that the Arbitrator received submissions from the parties' counsel relevant to whether the appellant was "*likely to continue indefinitely to have no current work capacity*" within s 38 (2) *WCA*, but the Arbitrator expressly refrained from determining that issue. However, as neither party advanced submissions or raised this issue for determination in the appeal and there was no basis upon which he could determine the issue. He found no reason why the same Arbitrator could not determine that dispute.

Appeal against factual determination – principles applicable to whether there is a contract of service – deemed worker

Galal v University of New South Wales [2020] NSWWCCPD 74 – Deputy President Wood – 21/12/2020

On 8/11/2017, the appellant was offered admission as a Higher Degree Research Candidate for the purpose of obtaining a PhD. She was also granted an Australian Government Research Training Program scholarship, which was administered by the respondent, and a Research Training Program fees offset scholarship as a contribution to her training fees.

On 9/05/2018, while performing her research duties, the appellant accidentally sprayed viral fluid into her eyes, lips and mouth. Two days later, she developed a high fever, blocked nose, enlarged lymph nodes, fatigue and nausea and sought medical attention. She continued to suffer symptoms of chronic fatigue, shaking and pain and she terminated her PhD studies about 6 months after the incident occurred. She claimed compensation, but the respondent disputed that she was a worker and/or a deemed worker.

On 14/08/2020, ***Arbitrator Bell*** issued a COD which determined that the appellant was neither a worker nor a deemed worker.

The appellant appealed and alleged that the Arbitrator erred in fact and law: (1) when he failed to consider the correct contract being the contract created by the acceptance of the offer dated 29/11/2017 and 5/03/2018; (2) when considering that the worker's indicia were not relevant to the true nature of the relationship; (3) in concluding that she was not a worker; and (5) in finding that she was not a deemed worker. She also alleged that the Arbitrator erred in fact: (4) in finding that the respondent retained the intellectual property in the work of all PhD students.

Deputy President Wood determined the appeal and confirmed the COD. Her reasons are summarised below.

Wood DP rejected ground (1). She stated that in order to succeed, the appellant must establish that the Arbitrator overlooked material facts, gave undue or too little weight to probative evidence or that the opposite view was so preponderant that it shows that the Arbitrator was wrong. She found that the Arbitrator discussed and applied the relevant indicia that might or might not point to the contract being a contract of service. He considered the nature of the relationship between the appellant and the respondent and concluded that the payment of the stipend, in the context of the many other elements of the contract, did not elevate the relationship to the level of a contract of service. His reasons identified why he reached that conclusion, which was open to him.

Wood DP rejected ground (2) and stated that the Arbitrator clearly referred to and applied the indicia to the facts in this case in his reasons and the complaint is limited to his conclusion, which was arrived at after considering each of the indicia, that the indicia pointed to a student/teacher relationship and were therefore not relevant to the true nature of the relationship. In that context, that conclusion was open to him.

Wood DP rejected ground (3) and held that the Arbitrator provided sound reasons as to why the payment of the stipend did not have the character of payment in reward for work. She found nothing inherently wrong with the Arbitrator's reasoning process or his conclusion that the appellant was not a worker and he correctly applied the authorities in determining that an objective assessment of the relationship was required and in identifying the true nature of the relationship between the parties.

Wood DP rejected ground (4) and found that there was no error in the Arbitrator's approach in failing to be satisfied that this factor was indicative of an employment relationship between the parties.

Wood DP rejected ground (5) and found that there is no correlation between the work performed as an employed researcher and that of a student pursuing a higher degree through research work. No error was established.