Bulletin

Independent Review Office

RECENT CASES

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

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1. Trustees of the Roman Catholic Church for the Diocese of Parramatta v Stewart [2021] NSWPICPD 5
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WCC - Presidential Decisions

Section 4 (b) (ii) WCA – Requirement of 'main contributing factor'

Trustees of the Roman Catholic Church for the Diocese of Parramatta v Stewart [2021] NSWPICPD 5 – Deputy President Snell – 8/04/2021

The worker was employed by the appellant from about 1997 and performed maintenance and cleaning work at various schools, including gardening, ground maintenance, garbage collection, general labouring work and cleaning. He sometimes moved furniture, including up and down stairs. The duties he described were relatively strenuous and he alleged that there was a lot of bending and heavy lifting, which placed a "*large amount of strain*" on his back.

On 2/03/2018, the worker suffered a frank injury to his back while collecting rubbish in a school playground. He was off work until early April 2018 and resumed light duties, which were eventually upgraded to full duties. However, on 31/05/2018. He suffered a further back injury and left leg pain while using a shovel, mattock and crowbar to dig out a stump. He did not return to work and underwent a left L3/4 and L4/5 microdiscectomy on 1/11/2016.

The appellant accepted liability for weekly payments and s 60 expenses.

The worker's solicitors qualified Dr Bodel and on 28/10/2019, he assessed 16% WPI. On 4/12/2019, he claimed compensation under s 66 *WCA.*

The appellant qualified Dr Davies, who assessed 13% WPI, but this was reduced to 12% WPI after a deduction under s 323 *WIMA.* The appellant's solicitors made an offer based on this assessment of 12 per cent but reserved its rights "*to dispute any allegation of injury due to the nature and conditions of employment*" if the offer was rejected.

The worker commenced WCC proceedings, alleging injury as a result of the 2 frank incidents and the nature and conditions of employment. The appellant disputed injury simpliciter and disease injury as a result of the nature and conditions of employment, 'main contributing factor' and relied upon s 9A *WCA.*

Arbitrator Beilby conducted an arbitration on 12/08/2020. On 22/09/2020, the arbitrator issued a COD, which determined that the worker "*sustained an injury to his lumbar spine arising from the nature and conditions of employment with the [appellant]*". The matter was referred to an AMS to assess "*whole person impairment in relation to the nature and conditions of employment, an injury on 2 March 2018 and a further injury on 31 May 2018*". However, the appellant appealed.

Deputy President Snell determined the appeal on the papers. He noted that the worker disputed that the monetary threshold under s 352 (3) *WIMA* was satisfied and argued that the only disputed injury was that involving the nature and conditions of employment and that this only went to the deduction under s 323 *WIMA* and it was not compensation. The worker also argued that even if this was compensation, the 2% deduction assessed by Dr Davies would not satisfy the threshold.

Snell DP rejected the worker's argument as the 'nature and conditions' allegation was part of the injury for which compensation under s 66 *WCA* was claimed. He stated, relevantly (at [14]):

> … In *Fine Meats (Boners PM) Pty Ltd v Hart*, Roche DP dealt with satisfaction of the monetary threshold in circumstances where no compensation was awarded at first instance:
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> > As no compensation has been awarded in this matter the amount of compensation at issue on appeal is determined by reference to the compensation claimed in the Application. Mr Hart claimed lump sum compensation totalling $32,250.00. Therefore, the quantum of compensation '*at issue*' on appeal exceeds the $5,000.00 threshold in section 352 (2) (a). As no compensation has yet been awarded it is not necessary for the Appellant Employer to satisfy the threshold in section 352 (2) (b) (*Mawson v Fletchers International Exports Pty Ltd* [2002] NSWWCCPD 5).

Snell DP applied the approach in *Hart* and found that the quantum of compensation that may be assessed as resulting from the '*nature and conditions*' injury is an unknown, but having regard to the amount claimed, the monetary threshold is satisfied.

The appellant raised the following grounds of appeal: (1) Error of fact and law in failing to find that employment had been the main contributing factor to injury sustained due to the nature and conditions of employment; (2) ''Error of fact and law in erroneously weighing and considering the medical evidence, and in accepting that the opinion of Dr Bodel properly supported injury due to the nature and conditions of employment/disease; (3) Error of fact and law in failing to find the nature of the injury sustained by the [respondent] due to the nature and conditions of employment as required pursuant to [s 4 of *the 1987 Act*]; and (4) The [Member] fell into error of fact and law in failing to find the deemed date of injury required by [s 16 of *the 1987 Act*] with respect to the claimed injury due to the nature and conditions of employment (s 4(b) [of *the 1987 Act*]) and failing to address the submissions advanced by the appellant at pages 30 – 32 of the transcript.

As the appeal concerned an interlocutory decision, leave was required under s 352 (3A) *WIMA*. After discussing the decision of Gibbs J (as his Honour then was) in *Licul v Corney*, Snell DP determined that it was appropriate to grant leave to the appellant.

Snell DP noted that the case was run on the basis of a single discrete issue, namely whether the worker's employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of a disease (s 4 (b) (ii) *WCA*). He found that the Arbitrator did not make a specific finding that the employment was the main contributing factor to the injury within the terms of s 4 (b) (ii) *WCA* and that it was necessary for her to deal with whether the statutory requirements were satisfied. This was not a case where satisfaction of that test was merely a formality.

Snell DP upheld ground (1) and stated:

> 55. Overall, the medical evidence did not satisfactorily address whether employment was the 'main contributing factor' to the alleged '*nature and conditions*' injury. The Member was alert to the difficulty (see the passage quoted at [40] above). It is possible for the test to be satisfied on the evidence overall, even if the medical evidence does not specifically deal with the issue (see [47] above). In the circumstances it was necessary that the Member deal with whether '*main contributing factor*' was established and expose her reasoning in that regard. This was not done. I accept that the error in Ground No. 1 is established.

Accordingly, Snell DP held that it was not necessary to determine the remaining grounds of appeal. He revoked the COD and remitted the matter to another member for re-determination.

WCC – Medical Appeal Panel Decisions

Psychological injury – AMS failed to make a deduction for a pre-existing condition and failed to provide adequate reasons – Deductible of 1/10 applied under s 323 WIMA

State of New South Wales (Hunter New England Local Health District) v Fred [2021] NSWPICMP 40 – Member Rimmer, Dr D Andrews & Prof. N Glozier – 7/04/2021

The worker suffered a psychological injury in the course of her employment as a midwife (deemed date: 26/09/2017).

On 289/12/2020, Dr Takyar issued a MAC which assessed 22% WPI as a result of the psychological injury. He noted that the worker suffered depression in 2000 or 2001, following a relationship breakdown and bankruptcy and a further episode in 2003, after which she remained on anti-depressant medication. However, the AMS failed to apply a deductible under s 323 *WIMA* and he did not provide any explanation for this.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* It asserted that the AMS proceeded on the mistaken assumption that the worker's alleged recovery from any pre-existing psychological injury amounted to a finding that her pre-existing condition did not contribute to the assessable impairment. In making that finding, the AMS placed undue weight on the worker's self-reporting that she had recovered from any pre-existing psychological injury. However, that finding was without foundation and was contradicted by the medical evidence and the history provided to the AMS. This was a demonstrable error and a deductible of at least 1/10 should be applied under s 323 *WIMA.*

The MAP held that the worker suffered pre-existing depression and anxiety, which did not fully resolve and she continued to manage her symptoms with medication. This was evidence of an actual pre-existing condition rather than a predisposition or susceptibility and in those circumstances, the AMS failed to provide adequate reasons for concluding that no proportion of the current WPI was due to a pre-existing condition. It applied a deductible of 1/10 under s 323 *WIMA*, revoked the MAC and issued a fresh MAC that assessed 20% WPI (after rounding).

WCC – Arbitrator Decisions

Section 261 WIMA – Alleged injuries to right shoulder and lumbar spine – Award for the respondent with respect to injury to the lumbar spine – dispute under s 66 WCA not referred to an AMS because the threshold under s 66 (1) WCA was not satisfied

Grbasliev v Tooheys Pty Limited [2021] NSWPIC 61 – Member Haddock – 6/04/2021

The worker alleged that he injured his right shoulder and lumbar spine in a fall at work on 20/11/2013. On 20/11/2013, he completed an "*Incident Notification Only*" (the Notification) which stated that he "*tripped and fell down the stairs from the promenade walkway to the shrink wrapper*" and suffered "*Multiple Injuries – Unknown at this stage*". It also indicated that no time was lost.

In May 2016, the worker ceased work due to a psychological condition that he claimed arose out of or in the course of his employment. On 4 July 2016, he claimed compensation for that injury and stated that he had never previously made a claim for compensation.

The respondent disputed liability for the psychological injury.

On 1/05/2017, the worker completed a Claim Form (the Claim Form) for the injury on 20/11/2013, and stated that he fell downstairs, approximately 6 steps, and "*lay upside down for over 20 min, could not get up*". He alleged that he suffered injuries to the right shoulder, back and right knee. He stated that he delayed reporting the injury because he "*didn't want to complain and kept on working, no one even checked up on me after I returned to work and no assessment was done*".

On 10/05/2017, the insurer issued a dispute notice and disputed: (a) injury on 20/11/2013; (b) that employment was a substantial contributing factor to any injury; (c) that the worker was prevented from working as a result of an injury; and (d) that medical treatment was reasonably necessary as a result of an injury. It also stated that the worker had "*lodged a claim*" alleging injury to his lower back on 20/11/2013 but he sought no treatment and did not submit any certificates of capacity (COC), but that on 2/05/2017, the worker submitted a COC indicating that he was unfit for work due to injuries suffered in 2013. Based upon the COC and other medical evidence, it decided that the worker was suffering a pre-existing degenerative condition that was not work-related and the original injury resolved without treatment and the current symptoms were not related to the 2013 injury.

On 19/10/2017, the insurer issued a further dispute notice, which referred to the claim for injury to the lower back, both knees and right shoulder. It disputed that he sustained an injury; that employment was a substantial contributing factor to the injury; that he was prevented from working as a result of the injury; and that medical treatment was reasonably necessary as a result of the injury.

On 4/04/2018, the insurer issued a further dispute notice, which disputed that the worker was entitled to compensation under s 66 *WCA.* It also disputed the alleged injuries to the right shoulder and lumbar spine and that employment was a substantial contributing factor to the injury. It also relied upon s 4 (b) *WCA* and asserted that employment was not the main contributing factor to the disease injury.

On 6/03/2020, the worker formally claimed compensation under s 66 *WCA* for 15% WPI with respect to the right upper extremity (shoulder) and lumbar spine.

On 15/07/2020, the insurer issued a further dispute notice. It set out the history of the matter, disputed that the worker aggravated pre-existing conditions in 2013; and asserted that if he was suffering from a work-related aggravation, he was not entitled to compensation under s 66 (1) *WCA* because the injury had not resulted in more than 10% permanent impairment.

On 16/12/2020, the insurer issued a further dispute notice, in which it also asserted that the worker had failed to give of his injury in accordance with s 254 *WIMA* and he had not made a claim in accordance with s 261 *WIMA.*

On 15/12/2020, the worker alleged an ARD, which alleged that on 20/11/2013, he fell down approximately 10 to 12 stairs, lay upside down for over 20 minutes and injured his lumbar spine and right shoulder. He claimed continuing weekly compensation from 25/05/2016, s 60 expenses including the future cost of right shoulder surgery; and compensation under s 66 *WCA* for 15% WPI.

In its reply, the respondent also asserted that the worker was not entitled to weekly benefits under s 52 *WCA* and he was not entitled to s 60 expenses under s 59A (1) *WCA*.

During a teleconference on 21/01/2021, the worker disputed his claims for weekly payments and the cost of future surgery.

Member Haddock identified the issues in dispute as: (1) Whether the worker complied with s 261 *WIMA* in making his claim; (2) Whether the injurious event to the right shoulder, which the respondent conceded, resulted in a pathological change or merely a temporary physiological change; and (3) Whether the worker injured his lumbar spine on 20/11/2013. The respondent withdrew the dispute under s 254 *WIMA.*

Member Haddock determined that the worker had complied with s 261 *WIMA* and that it was not necessary for her to determine whether the injury resulted in serious and permanent disablement. She also held that the worker inured his right shoulder on 20/11/2013 and that it would be up to an AMS to determine whether he suffered any permanent impairment as a result of that injury. However, there is no contemporaneous evidence to support the allegation of injury to the lumbar spine on 20/11/2013 and she stated, relevantly:

153. The applicant's evidence that he sustained an injury to his lumbar spine on 20 November 2013 is not supported by any contemporaneous evidence at all. His own evidence about this is unreliable, given that he stated x-rays were taken of his right shoulder and lumbar spine at Westmead, which was not the case.

154. The only reference to the applicant's lumbar spine in Westmead's records is to an examination of all areas of his spine – cervical, thoracic and lumbar – with no tenderness found. This does not support his claim to have sustained injury to his lumbar spine, any more than it would support a claim that he injured his cervical or thoracic spines. It was obviously a precautionary measure on the part of the medical examiner.

155. The various COCs attached to the Application that commence on 1 May 2017 in my view do not assist the applicant, in the absence of any contemporaneous evidence. The first COC was issued on 1 May 2017, some 3.5 years after the injury.

156. McDougall J (McColl JA and Bell JA agreeing) said in *Nguyen v Cosmopolitan Homes* [2008] NSWCA 236:

> A number of cases, of high authority, insist that for a tribunal of fact to be satisfied, on the balance of probabilities, of the existence of a fact, it must feel an actual persuasion of the existence of that fact…

Accordingly, Member Haddock entered an award for the respondent with respect to the injury to the lumbar spine on 20/11/2013 and, as the worker had not suffered permanent impairment of greater than 10% as a result of the injury to his right shoulder, she held that the medical dispute could not be referred to a Medical Assessor.

Claim for s 60 expenses for total hip replacement - Worker ceased to perform work, which could aggravate arthritis several years before his hip became symptomatic; Worker's medical case assumed an incorrect history – Held that the worker had not established injury

Buckley v Rivalea (Australia) Pty Ltd [2021] NSWPIC 62 – Member Sweeney – 6/04/2021

The worker commenced employment with the respondent as a labourer in 2982. After several promotions, he was currently employed as the retail accounts manager. He had suffered pain in his right hip for some time and in December 2019, Dr Kirwan recommended right total hip replacement surgery. The worker alleged that the nature and conditions of his employment aggravated osteoarthritis in his right hip and that the need for surgery results from that injury.

However, the respondent disputed liability.

Member Sweeney conducted an arbitration and on 6/04/2021, he issued a COD which determined that the worker had not established an injury to his right hip. He entered an award for the respondent and his reasons are summarised below.

Member Sweeney noted that it was common ground that the worker performed diminishing amounts of arduous physical work as he progressed to his current position by a series of promotions. The respondent argued that the worker had not performed regular physical work after 2000 and that the more remote the onset of the hip symptomatology was to that physical work, the more tenuous was the connection between employment and the onset of the hip symptoms. However, the worker argued that when his hip symptoms commenced there was still a physical component to his work, which would have exacerbated his hip condition.

Member Sweeney noted that this dispute was relevant to the issue of whether there was a fair climate for accepting the opinions of the medical specialists: *Paric v John Holland Constructions Pty Ltd* [1984] NSWLR 505.

Member Sweeney found that the worker suffered the onset of hip symptoms in 2012 and that the more difficult question was the nature of the work that he performed in his roles as boning room supervisor, boning room manager and retail account manager. He stated that he found it difficult to reconcile the evidence of the witnesses on this issue, but as individuals approach jobs differently, it was probably prudent to give weight to the worker's evidence regarding his tasks in the first 2 of those roles. However, he stated:

> 64. In the circumstances, I am not able to make a positive finding that the applicant performed the type of physical work which the medical practitioners implicate as the cause or material aggravating factor of osteoarthritis after he became the boning room production manager. It follows that there is a significant temporal gap between his performance of heavy physical work and the onset of hip symptoms which occurred, at the earliest, in 2009, or, more probably, in 2012.
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> 65. In *Fernandez v Tubemakers of Australia Ltd* (1975) 2 NSWLR 190, Glass J A said this at 197:
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> > The issue of causation involves a question of fact upon which opinion evidence, provided it is expert, is receivable. But a finding of causal connection may be open without any medical evidence at all to support it: *Nicolia v Commissioner for Railways (NSW)* (1970) 45 ALJR 465, or when the expert evidence does not rise above the opinion that a causal connection is possible: *EMI (Australia) Ltd v Bes* [1970] 2 NSWR 238; appeal dismissed (1970) 44 ALJR 360N. The evidence will be sufficient if, but only if, the materials offered justify an inference of probable connection. This is the only principle of law. Whether its requirements are met depends upon the evaluation of the evidence.
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> 66. I doubt whether the evidence in this case permits an inference to be drawn on the issue causation: see the discussion by McColl JA in *Tudor Capital Australia Pty Limited v Christensen* [2017] NSWCA 260(17 October 2017) at [381-386]. It is, therefore, necessary to consider the medical evidence against the background of the finding I have made in respect of the nature of the applicant's employment in conformity with the reasoning in *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWLR 127.
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> 67. It is not entirely clear whether Dr Powell concludes that it is unlikely the applicant suffered an aggravation injury or that he did, but that the primary arthritis and need for surgery did not result from it. I suspect the former is probable. It is clear, however, that Dr Powell does not accept there was a provable causal connection between the arduous work which the applicant undoubtedly performed in his early employment with the respondent and the onset of symptoms of osteoarthritis "*six or seven years before the consultation*". It is the lengthy temporal gap between the arduous work and the onset of symptoms which gives rise to the doubt as to causal nexus.
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> 68. Obviously, the presence of symptoms is not a prerequisite for proof of injury. There are medical conditions that may be influenced by work which progress silently. If, however, a particular activity or a particular class of employment causes symptoms an inference can readily be drawn of a causal connection between the employment and the disease. If symptoms commence a long time after the activity, it may be incumbent on the party asserting a connection to explain the lacuna. I doubt that the medical evidence in this case does this.

Member Sweeney found that none of the medical experts had obtained histories that were entirely consistent with his findings, but that recorded by Dr Powell best approximates his findings of fact regarding the worker's employment. Importantly, it recorded the gap between the performance of heavy work and the onset of symptoms and he gave weight to that opinion.