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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Local Court of New South Wales – Private prosecution decision

Insurer found guilty of failure to determine a claim under s 283 (1) WIMA in a private prosecution under s 14 of the Criminal Procedure Act 1986

Heise v Employers Mutual Limited 2020/00200346 – Magistrate Lacy – 16/06/2021

The background to this matter was previously reported in Bulletin no. 26.,

The prosecutor was a police officer who claimed compensation under s 66 *WCA on 11/04/2017*. On 11/04/2017, the defendant retained solicitors to represent its interests and on 1/05/2017, they requested further and better particulars of the claim from the prosecutor, including details of her treating doctors and signed authorities to enable them to obtain clinical records. Correspondence was exchanged between the solicitors addressing matters including whether the request for signed authorities was a proper request for further and better particulars. On 16/03/2018, the prosecutor's solicitors provided the signed authorities and on 23/03/2018, the defendant's solicitors served them on the treating doctors.

On 7/06/2018, the prosecutor's solicitors sent an email to the defendant's solicitors asking whether the defendant proposed to determine the claim, but there was no response and further emails to them dated 8/07/2018, 29/06/2018, 10/07,2018 and 16/07/2018 also went unanswered. On 16/07/2018, a further email was sent noting that the private prosecutor had been waiting for 12 months for a response to the claim and that day, the defendant's solicitors replied that they were awaiting instructions from the defendant and they could not provide a timeframe.

On 20/07/2018, the prosecutor filed an application with the WCC and on 26/09/2018, she initiated her private prosecution in the Local Court. On 23/11/2018, the claim under s 66 *WCA* was resolved and on 19/12/2018, the WCC ordered the employer to pay a total of $43,600 to the prosecutor. The defendant denied criminal responsibility for the offences on 2 grounds: (1) That the proceeding is incompetent because EML is not a person capable of committing the offence charged as a matter of statutory construction; and, (2) in the alternative, even if EML were the appropriate defendant, which it denies, the prosecutor has not established the elements of the offence beyond a reasonable doubt.

Magistrate Lacy noted that the Court was asked to undertake an exercise in statutory interpretation to ascertain the meaning of "*a person who determined the claim*" and other words such as "*insurer*" contained in Ch 7 *WIMA*. If the Court was not satisfied that the defendant was the insurer as referred to in ss 281 and 283 *WIMA*, or that it was not the person on whom the claim was made or a person who determined the claim, the prosecution must fail.

Her Honour stated that if the Court finds that the defendant is the proper defendant, the second issue can be broken into 2 issues: (a) If the prosecutor's failure to provide a signed authority to it to access her medical records could be considered a failure to provide all relevant particulars under s 282 *WIMA*. If that is accepted, the defendant states that the time to determine the claim never commenced and it cannot be found to have committed an offence under s 283 *WIMA;* and (b) Whether the failure constituted a reasonable excuse under the Workers Compensation Guidelines for the defendant not to comply with s 283 (2) *WIMA*. If so, the defendant was required to notify the prosecutor in writing of that failure as soon as practicable. Did the defendant comply with that notice provision? Alternatively, if the claim was already disputed, had a s 74 notice been issued to the prosecutor? If so, the case would fail. Conversely, if the Court was satisfied beyond a reasonable doubt that the defendant did not have a reasonable excuse for the failure to determine the claim within the required timeframe or did but failed to comply with the notice requirements, the prosecution would have made out the charge to the required standard.

Her Honour noted that on 11/10/2017, the defendant advised the prosecutor in writing that it disputed liability for her claim for lump sum compensation and it enclosed a s 74 notice. A further s 74 notice dated 27/08/2018 disputed liability for a claim for work injury damages. The defendant had responsibility for determining the claim and the decision rights were conferred upon it by SiCorp through the claims management agreement. The word "*insurer*" in s 281 (2) (b) *WIMA* makes provision for both a licenced insurer and a self-insurer and she rejected the defendant's argument that it could only be considered the insurer's claims manager. If that argument was accepted, it would lead to an irrational outcome that is at odds with the purpose of the *WIMA*, which is to deliver its objectively efficiently and effectively.

Her Honour found that the defendant was the person on whom the claim was made and the person who failed to determine the claim. She referred to the final stage of the interpretation process that was outlined by the High Court in *Victims Compensation Fund Corporation v Brown* and stated that the interpretation of s 283 *WIMA* argued by the defendant would lead to an irrational or anomalous outcome. That is, if the defendant is a licenced insurer and is the person on which the claim is made and the one determining the matter and who has not done so in the timeframe without reasonable excuse, it would defy logic and common sense if another person, other than the defendant, be responsible for that failure.

Her Honour held that the request for signed authorities cannot be considered a relevant particular for the purposes of s 281 (2) (b) *WIMA* and that the prosecutor can be taken to have provided all relevant particulars once she attended the insurer's medical assessment on 14/09/2017 and the clock governing the commencement date under s 282 (2) (b) started from as early as 14/11/2017. If she was wrong on that point, then the time started from when she provided the defendant with a report from Dr Robinson on 7/02/2018. In any event, there was no determination of the claim by the defendant within the 2-month period required under s 281 (1) and there was no reasonable excuse for that failure.

Accordingly, her Honour found that the prosecutor had established the offence under s 283 (1) *WIMA* beyond a reasonable doubt and she adjourned the matter part-heard to 30/08/2021.

PIC - Presidential Decisions

The applicant carried on his own business and was not a worker – Section 352 WIMA - Requirement to show error on appeal

Jafarian v WildFire Interiors Pty Ltd [2021] NSWPICPD 24 – Acting Deputy President Parker SC – 4/08/2021

The appellant alleged that on 15/02/2018, he fell from a ladder whilst in the course of employment with the respondent and injured his cervical and lumbar spines. He claimed s 60 expenses including the costs of spinal fusion surgery at the L5/S1 level. However, the insurer disputed that he was a worker within the meaning of s 4 *WIMA*.

Senior Arbitrator Capel found that the appellant was not a worker and entered an award for the respondent. His reasons are summarised below.

The Senior Arbitrator cited a number of specific matters that he relied upon, namely: (a) the tax invoices that were submitted to the respondent included a business ABN and a business logo; (b) GST is only charged if a party was registered for GST and is not payable in an employer/employee situation; (c) it was "*an extremely odd coincidence*" that the only tax invoice to exclude GST was that dated 16/02/2018, the day after the appellant's injury; (d) the appellant issued similar invoices, i.e. on EHS's letterhead, to other clients; (e) all payments were made into the EHS business account not the appellant's personal Westpac Choice or eSaver accounts; (f) the appellant's personal and business tax returns were combined and identified the business name of Efficient Handyman Services and included the appellant's ABN; (g) the appellant claimed expenses of $12,889, which were well above the normal expenses usually claimed by an employee. He also found that the declared income of $21,154 was "*arguably*" profit and he referred to the appellant's tax return tax estimate, in which he made PAYG instalment deductions of $3,066, which could relate to income that he earned as a sole trader. He found that the appellant was the business contact and that the business was engaged to paint officers.

The Senior Arbitrator considered the issue of control and the right to dictate the place and hours of work, quoting from the High Court's decision in *Zuijs v Wirth Brothers Pty Limited* and found that the evidence disclosed minimal, if any, control over the appellant's activities, but that this was not determinative. It was significant that the appellant did not work exclusively for the respondent because that was not consistent with an employer/employee relationship. He concluded that the appellant had contracted with the respondent and stated:

> 220. Each case must be considered on its own facts. No two matters are strictly identical as there will nearly always be some variants. Having regard to the principles referred to in *Malivanek* and *On Call Interpreters*, the critical question is whether the [appellant] was working in the respondent's business or in his own. The fact that the [appellant] worked elsewhere and submitted similar tax invoices is irrelevant, although it has some bearing on the indicium of exclusivity. …
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> 222. There is a great deal of evidence that suggests that the [appellant] was in fact conducting a trade or business in his own name. I have identified this evidence above, such as the tax invoices containing the business ABN, business address and inclusion of GST, the lack of exclusivity, the lack of the provision of statutory entitlements, superannuation payments and PAYG tax deductions, the claims for business deductions, the agreed rate of pay, the business website and the advertisements, the absence of employees, and a worker's compensation policy that only covered one person, namely the [appellant]. …
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> 225. As discussed by the Deputy President in *Malivanek*, the focal point is whether the [appellant] was working in the business of respondent or in his own business. Having regard to the evidence and a consideration of the 'totality of the relationship' in accordance with Hollis, I am satisfied on the balance of probabilities that the [appellant] was in fact undertaking work that was incidental to a trade or business regularly carried out by him for his company at the time that he sustained injury on 15 February 2018.
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> 226. Further, I am satisfied that the [appellant] satisfies the 'practical test' discussed by Bromberg J in *On Call Interpreters*, namely that the [appellant] was an entrepreneur who owned and operated a business and in performing the work, he was working in and for his business as a representative of that business, rather than in and for the respondent's business. Accordingly, there will be an award for the respondent.

On appeal, the appellant argued that the Senior Arbitrator made mixed errors of fact and law as follows: (1) in failing to find that he was a worker within the meaning of s 4 *WIMA* having regard to the evidence before him and the principles set out in *On Call Interpreters*; (2) in treating one formal aspect of the relationship between himself and the respondent, the presentation of invoices issued in his name company, as decisive and failing to recognise that the work that was being performed by

him at the time of his injury was as a subordinate worker performing duties under the control of and in the business of the respondent, and as a representative of that business, not as an independent entrepreneur performing work for his own business, and as a representative of that business; and (3) in treating the fact that he had a business as decisive of the question as to whether he was a worker without examining whether notwithstanding that he had a business he was at the material time performing work for the respondent.

Acting Deputy President Parker SC dismissed the appeal and his reasons are summarised below.

Parker ADP rejected ground (1) and found that the appellant had not identified any error of fact, law or discretion on the part of the Senior Arbitrator. He stated:

> 79. The assertion of a contrary view with respect to any piece of evidence does not establish that the Senior Arbitrator was incorrect to take the view that he took. This is particularly the case in matters such as the present where the individual items of evidence give rise to different views and where the ultimate conclusion is derived from the Senior Arbitrator's assessment of the evidence as a totality.
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> 80. It is to be expected in an appeal such as the present that the appellant will identify specific conclusions or propositions or findings of the Senior Arbitrator in relation to fact, legal principle or discretion that cannot be supported by reference to specific evidence, legal principle or the consideration of relevant matters.
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> 81. The appellant's engagement by the respondent, to use a neutral expression, involved elements that could reasonably be relied upon in support of the proposition that the relationship was one of employment. The statement evidence as to Mr Rujnic's need for another worker and the evidence of the appellant that he needed work, as it were to tide him over between jobs, the integration of the appellant into the "team" of painters point towards the relationship being one of employment. But there were matters against such a conclusion as outlined by the Senior Arbitrator in his decision at paragraphs [220]–[226].
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> 82. The appellant asserts that the Senior Arbitrator was wrong in relation to the findings and inferences that he drew from this material. But the appellant does not identify in Ground 1, so far as I can see, any factual conclusion which is disputed. The appellant is left with an argument that the facts as found by the Senior Arbitrator, which are essentially unchallenged, do not support the conclusion that he drew that the appellant was not a worker. The appellant was required to displace the Senior Arbitrator's conclusion. It was not enough to show that a different inferential conclusion was available on the same factual findings.
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> 83. I am not persuaded that the appellant has identified or established error of fact, law or discretion such as to enliven the appellate jurisdiction. Furthermore, I am not persuaded that the Senior Arbitrator did not address adequately the relevant legal principles in his determination adverse to the appellant. In my view, none of the matters complained of under Ground 1 in the submissions could be advanced any higher than matters in which minds could differ as to the conclusion.

Parker ADP rejected ground (2). He found that the Senior Arbitrator did not fail to address the issue of whether the appellant was working in his own business or working in the respondent's business. He stated, relevantly:

> 106. The appellant does not engage with the Senior Arbitrator's rejection of the submission at the hearing that the documentary evidence was not relevant and that the focus should be on the substance of the arrangement between the appellant and the respondent. Consideration of the substance of the relationship necessarily included consideration of the documentary evidence. The Senior Arbitrator was correct at [224] of the reasons when he observed that if he failed to take the documentary evidence into account he would be in error…

Parker ADP also rejected ground (3) and based on the reasons provided in relation to ground (2), he found that the Senior Arbitrator did not treat as decisive the fact that the appellant had his own painting business.

Weight of evidence in the PIC – Application of Onesteel Reinforcing Pty Ltd v Sutton [2012] NSWCA 282 - Failure to examine all of the material relevant to the particular issue – application of Waterways Authority v Fitzgibbon [2005] HCA 57; 79 ALJR 1816

Secretary, Department of Education v Sadler [2021] NSWPICPD 25 – Deputy President Snell – 10/08/2021

The worker was a deputy principal in the public school system. In about 2015, he was seconded to the School Safety and Response Unit (later known as the Incident Support Unit (ISU)), which comprised seconded deputy principals, seconded police officers and departmental officers and offered guidance on the handling of incidents of a criminal/serious nature.

In about February 2017, the ISU's functions were to be transferred from the Safety and Security Directorate to the Health and Safety Directorate and it was to be relocated from Blacktown to Bankstown. The ISU was very unhappy about the relocation. The worker complained of bullying and harassment that commenced before the relocation occurred and alleged that on 16/05/2017, during an in-house training day, he was told that the consultant commented that the team was difficult and would not share information. He told the consultant that the team was concerned about the ramifications of that comment in a normal tone.

However, later that day, the Executive Director came into the training room and told the worker to accompany her office. He was shown a document concerning what had occurred and his employment within the unit ended that afternoon. He took some time off on leave and then did some casual teaching. He developed psychological symptoms and eventually claimed compensation. However, the appellant issued a dispute notice on 10/05/2019 – it disputed injury and the entitlement to weekly payments and s 60 expenses and raised a defence under s 11A *WCA* on the basis that the alleged injury was wholly or predominantly caused by reasonable action with respect to discipline.

The worker claimed compensation under s 66 *WCA* for 22% WPI based upon an assessment from Dr Dinnen and Dr George (qualified by the appellant) assessed 23% WPI).

On 11/11/2020, ***Arbitrator Bell*** conducted an arbitration. On 18/12/2020, the Arbitrator issued a COD, which found that the worker suffered a psychological injury that was deemed to have occurred on 16/05/2017, to which employment was the main contributing factor. He rejected the s 11A defence and referred the s 66 dispute to an AMS.

The appellant appealed on 7 grounds, namely: (1) The Arbitrator erred in law by failing to consider all the evidence before him when deciding what occurred in the 'morning meeting'; (2) The Arbitrator erred in fact and law by determining the evidence of Ms O'Brien and Ms Gerardis lacked credit; (3) The Arbitrator erred in fact as to what occurred at the 'Office Meeting' on 16/05/2017; (4) The Arbitrator erred in fact finding that the respondent's conditions of employment prior to 16/05/2017 contributed towards his psychological injury; (5) The Arbitrator erred in fact and law by determining that the respondent's psychiatric condition was a disease; (6) The Arbitrator erred in fact and law in failing to have regard to critical evidence relevant to his determination of the worker's credit; and (7) The Arbitrator erred in fact and law in finding that the appellant's policies or guidelines were not in evidence, and/or in failing to have regard to those policies and guidelines (which were in evidence), in circumstances where those policies and guidelines were relevant to each party's case and regarded as important by the Arbitrator.

Deputy President Snell allowed the appeal. He upheld ground (1) and found that the Arbitrator had failed to consider a significant part of the evidence as to what occurred during the meeting on 167/05/2017. That evidence was relevant and while the Arbitrator was not obliged to accept it, it was clearly relevant and had the capacity to affect the result. He cited the decision of Hayne J in *Waterways Authority v Fitzgibbon:*

> Rather, because the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact-finding. In particular, it is revealed as a failure to examine all of the material relevant to the particular issue.

Snell DP held that as credit issues are involved, it is not appropriate that he re-determine the matter and he therefore ordered that the COD be revoked and that the matter be remitted to a different Member for re-determination.

PIC – Medical Appeal Panel Decisions

Medical assessor failed to give reasons for not making a deduction under s 323 WIMA – MAP applied a 10% deductible, but rounding up produced the same result – MAC confirmed despite finding of error

JELD-WEN Australia Pty Ltd v Chand [2021] NSWPICMP 140 – Member Sweeney, Dr J Ashwell & Dr R Crane – 3/08/2021

The worker injured her cervical and lumbar spines at work on 29/06/2016. She claimed compensation under s 66 WCA for permanent impairment of her cervical and lumbar spines based on a report of Dr Gehr, who assessed combined 17% WPI.

The appellant disputed the claim and the dispute was referred to a medical assessor. On 23/02/2021, Dr Berry issued a MAC that assessed 12% WPI.

The appellant appealed against the MAC under ss 327 (3) (c) and (d) *WIMA* and a delegate of the President referred the appeal to a MAP.

The MAP determined that it was not necessary to re-examine the worker as the appeal was essentially concerned with whether the AMS erred by not applying a deductible under s 323 *WIMA*. It referred to the medical assessor's statutory obligation to provide reasons and noted that the High Court reasoned in *Wingfoot Australia Partners Pty Limited v Kocak* 88 ALJR 52 (*Kocak*) that it is only necessary for the MAC to explain the actual path of reasoning of the assessor in sufficient detail to enable a court or an appeal panel to determine whether there is error in its findings. In *Kocak*, it was said that:

> The function of a medical panel is neither arbitral nor adjudicative: it is neither to choose between competing arguments, nor to opine on the correctness of other opinions on that medical question. The function is in every case to form and give its own opinion on the medical question referred to it by applying its own medical experience and its own medical expertise.

The reasoning in *Kocak* has been applied to medical assessments under the NSW Workers Compensation legislation: see, for example *El Masri v Woolworths Ltd* [2014] NSWSC 1344 (26 September 2014).

The MAP found that the medical assessor did not record or address Dr Casikar's assertion that the worker's pre-existing degenerative disease of the lumbar spine materially contributed to the lumbar spine impairment. He did not refer to any aspect of the evidence that is relevant to the issue of whether there should be a deduction for a pre-existing injury or abnormality and he provided no reason why he concluded that there should be no deduction for the pre-existing condition. Section 325 (2) *WIMA* requires the medical assessor to set out the facts on which his assessment is based and the reasons for his assessment. While it is unnecessary for him to consider the competing hypotheses of other medical practitioners, it remains the case he is obliged, in accordance with the reasoning in *Kocak*, to explain the "*actual path of reasoning*" by which he arrived at an opinion. That obligation extends to the opinion which the MA expressed in relation to a deduction for a pre-existing injury or condition pursuant to s 323 *WIMA*.

In this matter, the evidence suggests that the worker received compensation in respect of back impairment in 2003 and underwent scans of her lumbar spine on 16/06/2003, 24/09/2004, 22/10/2007,19/02/2008 and 20/08/2012. There is a reference to back pain in the notes of Dr Sidrak on 5/11/2011, to L2/3, L3/4, L4/5 "*disc bulge*" on 29/11/2011, to back pain on 20/08/2012 and 21/08/2012, and to a lumbar disc bulge on 15/05/2013. There are opinions of several doctors that the worker's symptoms are caused by degenerative disc disease or soft tissue injury superimposed on degenerative disc disease. This evidence requires a response and in the absence of any explanation in the MAC of how he reached the opinion that there should be no deduction for a pre-existing injury or condition, the medical assessor has failed to explain the actual path of his reasons, which is a demonstrable error.

The MAP held that the small award for permanent impairment of the back in 2003 would not, of itself, dictate that there should be a deduction pursuant to s 323 as the worker may have recovered from the effects of the earlier injury and/or it may not have contributed to any impairment of the lumbar spine attributable to the 2016 injury: see *Cole v Wenaline Pty Ltd* [2010] NSWCA 78 and *Fire & Rescue NSW v Clinen* [2013] NSWSC 629 (28 May 2013). However, there is no medical evidence which directly addresses the nature of the 2003 back injury and it is therefore difficult to assess whether it has any significance for the current back condition. However. The history Dr Sidrak's notes indicates a symptomatic lumbar degenerative condition from time to time in the past and the MAP opined that it is probable that these underlying degenerative changes contribute to the worker's current impairment of the lumbar spine.

The MAP held that a deduction of 1/10 should be made to the lumbar spine assessment under s 323 (2) *WIMA.,* but the appellant had not proven that a deduction is appropriate for the cervical spine.

However, a deduction of from the assessment of 5 % WPI for the lumbar spine still produces an assessment of 5% WPI after rounding up. Therefore, while the MAP found error in the medical assessor's approach it re-assessed the WPI as that in the MAC and it declined to revoke the MAC.

PIC – Member Decisions

Section 19B WCA – The deceased contracted COVID-19 and died whilst working in New York – The respondent provided dental technician services in Australia and the USA and paid the wages of its Australian employees – Held: The virus was probably contracted during the period of travel to the USA, which included passing through customs at San Francisco – There was no evidence that the deceased's employment was transferred to a US company – Therefore, the virus was contracted in the course of employment

Sara v G & S Sara Pty Ltd [2021] NSWPIC 286 – Member Harris – 10/08/2021

On 23/07/2020, the deceased was admitted to hospital in New York and was diagnosed with COVID-19. He suffered several heart attacks and strokes whilst hospitalised and on 21/11/2020 he died from complications of the virus.

The applicant (the deceased's widow and executor) filed 2 applications: (1) She claimed weekly compensation from 24/07/2020 to 21/11/2020, s 60 expenses alleged to exceed $USD11,000,000; and (2) She claimed funeral costs and associated expenses and lump sum benefits under s 25 *WCA*. The applicant is the deceased's sole dependant.

The applicant alleged that the deceased was exposed to COVID-19 from 15/07/2020 to 23/07/2020 and that the deemed date of injury is 23/07/2020, being the diagnosis under s 19B (4) (a) *WCA*. She also alleged injury under ss 4 (a) and (b) *WCA*.

The principal issue for determination was whether the deceased was in the course of his employment with the respondent when he contracted the virus. The respondent argued that the work that he performed in the USA was for an American company and that it is not liable under the NSW scheme.

The respondent was incorporated on 27/02/1990 and its directors were the deceased and the applicant. Stoneglass Dental Laboratories Pty Ltd (Stoneglass Australia) was incorporated on 17/06/2003 and its directors were the deceased and the applicant. It was initially created to provide dental technician services across the healthcare sector in NSW, but it expanded into developing software for precision dental modelling and fabrication targeted at the east coast of the USA and it was later incorporated in the USA (Stoneglass US). The deceased was the MD and president of the US company. Stoneglass US secured contracts with Columbia University, Rutgers University, Virginia Commonwealth University and the University of West Virginia and with some dentists practising in New York.

Section 19B *WCA* provides, relevantly:

> (1) If a worker, during a time when the worker is engaged in prescribed employment, contracts the disease COVID-19 (also known as Novel Coronavirus 2019), then for the purposes of this Act, it is presumed (unless the contrary is established)-

(a) that the disease was contracted by the worker in the course of the employment, and

(b) the employment-

(i) the case of a person to whom clause 25 of Part 19H of Schedule 6 applies—was a substantial contributing factor to contracting the disease, or

(ii) in any other case—was the main contributing factor to contracting the disease.

(2) A worker is taken to have contracted COVID-19 for the purposes of this Act if the result of a medical test-

(a) that complies with requirements prescribed by the regulations in relation to the disease, and

(b) that was carried out for the purpose of determining if the worker has contracted the disease,

is a result prescribed by the regulations in respect of the disease.

(3) A worker is taken to have contracted COVID-19 for the purposes of this Act if the worker is classified by a medical practitioner as having COVID-19, having satisfied the epidemiological or clinical criteria (or both) prescribed by the regulations for the purpose of making that classification.

(4) For the purposes of this Act, the date of the injury in relation to COVID-19 is the date of whichever of the following occurs first-

(a) the worker is diagnosed by a medical practitioner as having COVID-19 following a prescribed test result, as referred to in subsection (2),

(b) the worker is classified by a medical practitioner as having COVID-19, as referred to in subsection (3),

(c) the worker dies as a result of COVID-19.

….

(9) In this section- prescribed employment means employment in any of the following-

(a) the retail industry (other than businesses providing only on-line retail),

(b) the health care sector, including ambulance officers and public health employees.

Member Harris held that the entry of COVID-19 into the body caused a pathological change by causing strokes, heart attacks and the destruction of the lungs, and constituted an injury within the meaning of s 4 (a) *WCA*. He also held that whilst work was done for Stoneglass US, some of the work was undertaken for Stoneglass Australia and that there was a continuity of employment between the deceased and the respondent. He declined to draw an inference that the deceased was in the US for work other than for the respondent.

The respondent argued that the deceased was the respondent's worker "at times", but not at the relevant time. Member Harris stated, relevantly:

123. The respondent relied on the work that was performed in the United States which is summarised earlier in these Reasons…

125. In *Pitcher v Langford* the Court was required to determine which of two parties was the employer of the worker. There was no dispute that the worker was employed by one of the two parties. The worker was part of a gang of shearers initially in the employ of Pitcher. These workers would move from property to property for the purpose of shearing sheep. Approximately one week prior to being due to shear at the Langford property, there were discussions between Pitcher and Langford of a change in the arrangements to the engagement of the shearers. These discussions arose due to Pitcher receiving a recent increase of 28% in his workers compensation premium.

126. By reason of an agreement to the change in the arrangements, Langford took a number of steps. He advised his workers compensation insurer that he was employing the shearers, he paid the premium for the extra workers and paid money directly to the worker for his work. The final payment by way of cheque to the worker described him as his "employee".

127. The trial judge held that "nothing really changed" insofar as the employment arrangements were concerned and held that, despite the change in the payment arrangements to the worker, Pitcher remained the employer. Several factors indicated that the original employment arrangement between the worker and Pitcher continued, including the supply of rations and Langford's answers to a series of questions regarding Pitcher's right to hire and fire the shearers. In these circumstances, Kirby P held that there was evidence upon which the trial judge could make a determination that Pitcher was the employer and no question of error of law by reason of lack of evidence arose.

128. Priestley JA stated:

> The trial judge's reasoning does not appear to have been based on the alterations in the arrangements for the August shearing being in fact shams, at least in the usual sense, for a description of which see *Esanda Ltd v Burgess* [1984] 2 NSWLR 139 at 153-154. Rather, his reasoning was on the basis that whatever the parties had agreed between themselves, as evidenced by various documents which came into existence, they in fact conducted themselves not pursuant to their agreement, but upon the basis of the arrangements in force upon earlier shearings. This kind of approach is sanctioned by such authoritative cases as *R v Foster; Ex parte Commonwealth Life (Amalgamated Assurances) Ltd* [1952] HCA 10; (1952) 85 CLR 138, especially at 151 and *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd* [1963] SR (NSW) 260; 80 WN (NSW) 408.

129. During the course of his reasons, Handley JA stated:

> His Honour then noted (at 8) that here '*the question is by whom the person is employed, it not being disputed that he was a worker employed by either of them or perhaps by both*' the owner and the contractors.
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> In my opinion the trial judge did not err in holding that the courts are entitled, independently of any statutory power in that behalf, to consider the reality of purported contractual arrangements. No case was sought to be made at the trial that the written agreement between the owner and the worker was a sham: compare *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 per Diplock LJ and *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162. Furthermore no such case was sought to be made in this Court either. But independently of the sham principle the courts can consider what the parties to a contract have done, in order to see whether it has been ignored or abandoned.
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> In *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Ltd* [1952] HCA 10; (1952) 85 CLR 138, in a case where the prosecutor alleged that its insurance canvassers employed under a written agreement were independent contractors because the agreement so provided, Dixon, Fullagar and Kitto JJ said (at 151 and 155):
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> > … if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly deserves would be ineffectual … The case for the respondent union simply is that [the agreement] does not represent the reality of the relation in practice of the agents and the prosecutor company … [the evidence fails] to exclude to our satisfaction the possibility that the real relation between some or all of the agents and the prosecutor company in their actual work, week in week out, is in fact that of employer and employee, whatever the agreement may say.

This decision was applied in *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd* [1963] SR (NSW) 260; 80 WN (NSW) 408, in determining whether a deed of 'licence' between the parties prevented their relationship being that of landlord and tenant. Sugerman J said, quoting from earlier authority (at 269; 414): '*… It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties.*'

Later he said (at 272; 416):

> In determining whether the fair rents board had jurisdiction … it is necessary to have regard to the real character of the relationship of the parties if this be found, as their relations worked out in fact, to have differed from the relationship which might be taken as intended to be constituted by the deed of licence if considered alone.

In my opinion this is what the trial judge did in the present case. He held (at 5) that '*no actual difference could be discerned between how the operation was carried out on that occasion*' from how it had been carried out on earlier occasions when the relationship of employer and employee undoubtedly existed between the contractors and the shearers. He said (at 9) 'that nothing really changed' and (at 10) that '*it was business as usual*'. To these findings must be added the finding that the signing of the written contract by the owner (at 9) was a 'mere formality".

130. This passage was applied by Brereton J in *Sturesteps v A G McGrath* and referred to by Katzmann J in *Coghill v Indochine Resources Pty Ltd*.

131. *Pitcher* was considered by the Court of Appeal in *Shaw v Bindaree Beef Pty Ltd*. In the course of his reasons Giles JA stated:

> The result in *Pitcher v* Langford turned on its own facts, and on the need for error in point of law. There is no doubt, however, that without going so far as to find a sham the 'reality of purported contractual arrangements' (per Handley JA) can be considered, and the case illustrates that it can extend to the identity of a contracting party and that it can be found that a purported contracting party was not in reality party to the contract even where a written contract gives it as the party.

132. Similar observations were made by Edmonds J in *Gothard*, in a matter of *AFG Pty Limited (in liq) v Davey* when his Honour stated:

> Unsurprisingly, the outcome in cases which have been concerned with identifying an employer of a person or group of persons from two or more possibilities, whether from within the same group of companies or otherwise, has turned on their own facts and, in consequence, the case law in this area is of limited assistance. Nevertheless, it is possible to discern certain general principles that the courts have applied in the identification process. The courts have adopted the position that in undertaking this exercise, they are entitled to take a wide view of the putative relationship, beyond the terms of the contractual documentation, to examine how the parties conducted themselves in practice and whether, where there is contractual documentation, the reality of the situation accords with the terms of that documentation or whether it points to another entity being the employer.

133. In *Re C & T Griter Transport Services Pty Ltd; Ex parte Fitzgerald* Finn J set out a number of principles with respect to the identification of an employer. His Honour stated:

> 20. The principles to be applied in the identification of the employer of an employee where there are two or more possible employers, are reasonably well settled. For present purposes I would note the following:
>
> > (1) A contract of service cannot be transferred by one employer to another or novated as between them without the employee's consent: *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014; *Re Coogi Nominees Pty Ltd (Administrators appointed)*; *McCluskey v Karagiosis* [2002] FCA 1137; (2002) 120 IR 147. Questions of estoppel apart: *Smith v Blandford Gee Cementation Co Ltd* [1970]

3 All ER 154; the employee's consent must be a real one whether express or implied and is "*not to be raised by operation of law*": *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437 at 443.

(2) The totality of the circumstances surrounding the relationships of the various parties including conduct subsequent to the creation of an alleged employment relationship is relevant to the assessment to be made: *Romero v Auty* (2001) 19 AGLC 206 at [10] and [42]-[44].

(3) Documentation created by one or more of the parties describing or evidencing an apparent employment relationship will be relevant to, but not necessarily determinative of, the true character of that relationship: *Pitcher v Langford* (1991) 23 NSWLR 142; *Marrs Fabrics Pty Ltd & Nathan Wholesale Fabrics Pty Ltd v Whipps* (1991) 33 AILR 167. In determining the identity of a disputed employer, the Court is entitled to consider "*the reality of purported contractual arrangements*": *Dalgety Farmers Ltd t/a Grazcos v Bruce*, NSWCA, 3 August 1995. The documentation may have been brought into existence for other purposes, for example, tax minimisation or the reduction of insurance premiums, without reflecting the reality of the parties relationship: ibid; *Pitcher v Langford*, at 149; *Sharrment Pty Ltd v Official Trustee in Bankruptcy* [1988] FCA 179; (1988) 18 FCR 449 at 454.

(4) Conversations and conduct at the time of the alleged engagement of the employee is of considerable significance: Romero, at [9]. The beliefs of the employees as to the identity of their employer is admissible and is entitled to weight: *Pitcher v Langford*.

(5) In cases of the engagement of new employees to work in a business in which a number of separate corporate entities participate otherwise than as partners:

> ... it was open to those controlling the business to select which company should be the employer provided that the selection was consistent with the financial and administrative organisation of the business and was not otherwise a sham.

See *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd*, FCA, Ryan J, 19 November 1998.

Member Harris held that while there was no written contract of employment, the deceased, the respondent and Stoneglass Australia conducted themselves on the basis that the deceased was employed by the respondent. The clear objective facts show that the Stoneglass Group was organised in a manner that the deceased was paid as an employee of the respondent and there is no evidence that he consented to a change in his employment status. The fact that the deceased was a working director meant that many of the indicia such as the right to control, dismiss and delegate will not be present. He stated:

> 145. In *Stephan v Pacesetter Cleaning Services Pty Ltd* (*Stephan*) Rolfe AJA observed that many of the indica where the director was a worker "*fall by the wayside*". These observations were applied by the Court of Appeal in *Bootle v Barclay* when Sackville AJA observed that the significance of the decision in Stephan "*lies in the approach taken by characterising the relationship between a company and a director and shareholder where the director provides services to the company and effectively controls the company*." ...
>
> 148. I conclude that it was the clear objective intention of Mr Sara, the respondent and Stoneglass Australia that Mr Sara was a worker employed by the respondent who would undertake work for the benefit of the Stoneglass Group. The observations of Ryan J in *Textile Footwear and Clothing Union of Australia v Bellechic Pty Ltd* adopted by Finn J in *Griter Transport* appear particularly relevant to the manner in which the Stoneglass Group organised its administration in providing the respondent as the corporate vehicle for employing Mr Sara...

> 169. I am also positively satisfied that the employment relationship between Mr Sara and the respondent continued throughout the time he was in the United States.

Member Harris held that the injury was sustained in the course of the deceased's employment and he stated, relevantly:

> 180. I accept the respondent's submission, based on the principles set out in *PVYW*, that not all the activities in the United States may be considered as occurring in the course of the respondent's employment. However, the period of travel to the United States was clearly within the course of the employment with the respondent as that activity was induced and encouraged by the respondent. Consistent with this finding and that Mr Sara was probably infected with the COVID-19 virus whilst he was travelling, Mr Sara sustained injury in the course of his employment with the respondent.

The respondent conceded that s 19B *WCA* was established if the deceased sustained injury in the course of his employment. As a result, Member Harris did not need to determine whether the injury arose out of the employment or if s 9A *WCA* was satisfied.

Accordingly, Member Harris held that liability was established under s 19B *WCA*. He awarded the applicant lump sum benefits, funeral expenses and weekly compensation and stood over the claim under s 60 to a further teleconference to be conducted after the appeal period expired.