WIRO
Workers Compensation independent review office

HOME ... ABOUT US ... CONTACT

Bulletin

MONTHLY
UPDATES
INFORMATION
TRENDS

ISSUE NUMBER 73

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. Batshon v Sydney Trains [2020] NSWSC 831
2. Batshon v Sydney Trains [2020] NSWSC 1266
3. Ali v Linksmart Pty Ltd [2020] NSWWCCPD 56
4. Secretary, Department of Communities and Justice v Miller and Anor (No. 7) [2020] NSWWCCPD 57
5. Wolfe v Secretary, Department of Education [2020] NSWWCCMA 144
6. Mani v Secretary, Department of Education [2020] NSWWCC 308
7. Yang v Halliday Engineering Pty Ltd [2020] NSWWCC 298
8. Mitropoulos v Qantas Airways Limited [2020] NSWWCC 297

Supreme Court of NSW – Judicial Review Decisions

Psychological injury – Plaintiff requested re-examination by a member of the MAP – No re-examination by MAP – No reasons or consideration given – Matter listed for further directions as to whether the plaintiff should be granted leave to amend the summons

Batshon v Sydney Trains [2020] NSWSC 831 – Harrison J – 30/06/2020

The plaintiff suffered a primary psychological injury at work prior to 17/12/2015.

On 10/11/2015, the plaintiff was assessed by Dr Allnutt at the request of his former solicitor. He assessed 4% WPI. However, on 17/05/2018, Dr Selwyn Smith diagnosed a major depressive disorder and assessed 24% WPI.

On 31/05/2019, Dr Hong issued a MAC, which assessed 8% WPI. However, the plaintiff appealed against the MAC under ss 327 (3) (c) and (d) *WIMA.* A delegate of the Registrar decided that a ground of appeal under s 327 (3) (d) was made out and referred the appeal to a MAP. On 30/08/2019, the MAP confirmed the MAC.

The plaintiff applied to the Supreme Court of NSW for judicial review of the MAP's decision.

Harrison J noted that the plaintiff raised 2 principal concerns, namely: (1) he was not examined by the MAP despite his written request for this to occur; and (2) he took issue with the accuracy and authenticity of the diagnosis of his condition at which the MAP appeared to arrive. His Honour stated that under the Guidelines, the MAP is entitled to determine its procedure and that it obviously decided that it would not re-examine the plaintiff. However, there is no indication in its statement of reasons either why it did not re-examine the plaintiff despite his request, or more significantly, whether it even considered his request. He stated:

> 19 In the nature of things, this issue was neither formulated as a ground of appeal nor correspondingly was it argued before me. It seems apparent that Mr Batshon may well have wished to promote this circumstance as an additional ground of appeal if he had been so advised. However, it is not currently an issue that I could properly decide for a number of reasons, not the least of which is that Mr Batshon's opponents have neither been given notice of the point nor an appropriate opportunity to confront it.
>
> 20 In these circumstances, I consider that the preferable course is to list this matter before me for further directions. This can be done at a time convenient to the parties to be arranged in consultation with my Associate. I will then hear submissions on the question of whether or not Mr Batshon wishes to seek leave to amend his summons and expand his grounds of appeal and whether or not he should be granted such leave if he does. Other issues may well also arise for consideration. In approaching the matter in this way I should indicate that I have formed no final view about the disposition of Mr Batshon's appeal as presently framed or about his prospects of success in the event that he is permitted to argue some further ground or grounds of appeal.

Plaintiff given leave to appeal to amend summons – MAP failed to consider mandatory consideration regarding Plaintiff's request for re-examination – Jurisdictional error found

Batshon v Sydney Trains [2020] NSWSC 1266 – Harrison J – 17/09/2020

His Honour stated, relevantly:

> 5. In my opinion, the Medical Appeal Panel was obliged to consider Mr Batshon's request. It amounted in the circumstances to a relevant mandatory consideration that the Medical Appeal Panel failed to take into account. The conclusion that it was mandatory follows from the fact that the opportunity to be re-examined by an Approved Medical Specialist who is a member of the Medical Appeal Panel is specifically contemplated by the form that Mr Batshon was required to complete when seeking to appeal from the original decision of the Approved Medical Specialist. That form reflects the procedure for an appeal prescribed by the *Work Injury Management and Workers Compensation Act 1998* and the *Workers Compensation Guidelines*. The inference that Mr Batshon's request was not considered or taken into account arises clearly from the fact that there is no reference to it at all in the Medical Appeal Panel's reasons. It cannot be inferred that consideration was given to the request but that it was refused.
>
> 6. An established failure by the Medical Appeal Panel to have regard to a mandatory consideration constitutes a jurisdictional error, as it amounts to a failure to exercise the decision-making power in accordance with the terms on which jurisdiction was conferred: *Attorney-General of NSW v Chiew Seng Liew* [2012] NSWSC 1223 at [73]; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [91]. What is required on the part of a decision-maker in respect of mandatory factors was explained by the Full Court of the Federal Court of Australia

in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59 (at [44]):

> The obligation of a decision-maker to consider mandatory relevant matters requires a decision-maker to engage in an active intellectual process, in which each relevant matter receives his or her genuine consideration (see *Tickner v Chapman* (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105]). However, in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for the decision maker to determine the appropriate weight to be given to them. The failure to give any weight to a factor to which a decision-maker is bound to have regard, in circumstances where that factor is of great importance in the particular case, may support an inference that the decision-maker did not have regard to that factor at all. Similarly, if a decision-maker simply dismisses, as irrelevant, a consideration that must be taken into account, that is not to take the matter into account. On the other hand, it does not follow that a decision-maker who genuinely considers a factor but then dismisses it as having no application or significance in the circumstances of the particular case, will have committed an error. **The Court should not necessarily infer from the failure of a decision-maker to refer expressly to such a matter, in the reasons for decision, that the matter has been overlooked**. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. Whether that inference should be drawn will depend on the circumstances of the particular case (see *Minister for Immigration and Citizenship v Khadgi* (2010) 274 ALR 438 at [58]-[59]) (Emphasis added.)

> 7. In my opinion, this is a case in which the total absence of any reference to Mr Batshon's request gives rise to the very strong inference that the Medical Appeal Panel did not consider it. There is no indication that it was given even cursory consideration. This amounts to a jurisdictional error, being a failure to exercise its decision-making power in accordance with the terms on which jurisdiction was conferred.

His Honour granted the plaintiff leave to amend the summons to allege a further ground:

> 14. That the Medical Appeal Panel committed jurisdictional error by failing to consider Samir Batshon's request to be re-examined by an Authorised Medical Specialist who is a member of the Medical Appeal Panel.

His Honour allowed the appeal, set aside the MAP's decision dated 30/08/2019 and remitted the matter to the Registrar for referral to a differently constituted MAP under s 328 WIMA for re-determination according to law. He made no order as to costs.

WCC – Presidential Decisions

Application to extend the time to appeal refused – acceptance and weight to be afforded to the evidence – onus of proof

Ali v Linksmart Pty Ltd [2020] NSWWCCPD 56 – Deputy President Wood – 7/09/2020

On 5/08/2018, the appellant suffered an amputation of the tip of his left index finger at work. He underwent surgery and was discharged 2 days later with his arm in a sling. He claimed compensation and the respondent accepted liability.

The appellant later reported difficulties with his 3rd, 4tj and 5th fingers (diagnosed as a Chronic Regional Pain Syndrome), gastrointestinal difficulties and pain in his cervical, thoracic and lumbar spines.

On 24/10/2019, the appellant claimed compensation under s 66 *WCA* for combined 20% WPI, comprising 15% WPI for the cervical spine, 4% WPI of the right [sic, left] upper extremity/Complex [referred to as Chronic] Regional Pain Syndrome; 1% WPI in respect of scarring, and 2% WPI of the gastrointestinal organs.

On 27/11/2019, the respondent disputed liability for ongoing weekly payments on the basis that any incapacity was not attributable to the left index finger injury in 2018. It later disputed that the worker suffered any consequential injuries.

The appellant filed an ARD, which alleged the injury to the left index finger and that he subsequently suffered pain in his neck, back, and left middle and ring finger and left hand, CRPS, surgical scarring and gastrointestinal symptoms.

On 31/03/2020, ***Senior Arbitrator Bamber*** issued a COD, in which she accepted that the appellant suffered consequential conditions in the upper digestive tract and CRPS, but she was not satisfied that he suffered a consequential cervical spine condition. She declined to refer the s 66 dispute to an AMS because the impairments resulting from the accepted injuries did not satisfy the threshold under s 66 (1) *WCA.*

The appellant sought to appeal against the Senior Arbitrator's finding regarding the cervical spine, but a delegate of the Registrar rejected it because if failed to comply with r 16.2 (5) of the Rules. A compliant appeal was lodged outside the time prescribed in s 352 (4) *WIMA* and the appellant sought an extension of time under r 16.2 (5) and r 16.2 (6) of the Rules.

Deputy President Wood determined the appeal on the papers. With respect to the request for extension of time, she noted that r 16.2 (5) requires her to consider whether "*exceptional circumstances*" exist. In *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290, Campbell JA stated (citations omitted):

> (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered;
>
> (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors;
>
> (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional;
>
> (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision, and
>
> (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case.

Wood DP stated that the reasons put forward by the appellant's solicitor are not exceptional as it is their responsibility to ensure that the appeal complies with the procedural requirements and Practice Direction No. 6 makes it clear that an appeal may be rejected if it does not comply. The fact that the appellant acted quickly to remedy the procedural flaws ignores the fact that the original appeal should have conformed in the first place.

In relation to whether a refusal to extend the time to appeal would cause the appellant a substantial injustice, Wood DP considered the merits of the appeal.

The appellant alleged that the Senior Arbitrator erred as follows: (1) by failing to find that the cervical spine was a consequential condition that resulted from the left finder injury; (2) by finding that there was no expert evidence to support the causal connection; (3) by failing to find whether she accepted Dr Rimmer's opinion; and (4) by applying the wrong standard of proof.

Wood DP noted that the appellant asserted errors of fact, which required consideration of the evidence and the inferences that can be drawn from it. She held that in determining whether there was an error of fact, the Commission has consistently applied the principles set out by Barwick CJ in *Whiteley Muir & Zwanenberg Ltd v Kerr*, which Roche DP summarised in *Raulston v Toll Pty Ltd.*

Wood DP stated that both Dr Rimmer and Dr Herald found no pathological explanation for the cervical complaints. The Senior Arbitrator noted that Dr Herald did not provide an opinion on causation and that he "…*seems dismissive of the same having considered the MRI scan, he says there is no organic cause for the pain.*" It was this finding that the Senior Arbitrator considered supportive of Dr Rimmer's view and it was available to her on the evidence. The doctors were *at idem* in respect of there being an absence of any pathological investigation for the cervical symptoms.

Wood DP noted that there was no direct evidence from the appellant about when the cervical spine symptoms commenced. She stated, relevantly:

> 87. …The Senior Arbitrator referred to that lack of contemporaneity. As the Senior Arbitrator noted, Dr Khan's brief statement of opinion did not involve any reasoning process or explanation for his conclusion. Further, the Senior Arbitrator noted that there were two competing causes put forward by Dr Teychenne, Dr Rimmer could not determine any pathology or causal link, and Dr Herald concluded that there was no organic explanation for those symptoms.
>
> 88. The view expressed by Dr Khan that the cause of the neck symptoms was "*likely*" to have been the wearing of the sling sat in the face of the various different opinions expressed by those other experts. It was the task of the Senior Arbitrator to assess the weight to be afforded to each of the opinions expressed. It is well settled that the acceptance or rejection of evidence and the weight to be afforded to particular evidence is generally a matter that falls within the province of the primary decision maker.

Wood DP held that an assertion that the Senior Arbitrator should, or ought to have arrived at a different conclusion is not sufficient to disturb the decision. The Senior Arbitrator considered that Dr Khan's evidence was "*a bald assertion*" and his opinion was expressed in the absence of a reasoned pathway. Her assessment of the evidence was consistent with the principles set out by Heydon JA in *Makita* and by Beasley JA (as her Honour then was) in *Hancock.* In *Makita,* Heydon JA said:

> In short, if evidence tendered as expert opinion evidence is to be admissible ... it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration of the scientific or other intellectual basis of the conclusions reached ....[45]

Further, in *Hancock*, Beazley JA observed that in the Commission, which is a non-evidence-based jurisdiction, the question of the acceptability of expert evidence is a question of weight, as observed by Hodgson JA in *Brambles Industries Pty Ltd v Bell.*

Wood DP held that the Senior Arbitrator considered Dr Khan's evidence in conjunction with the history provided to Dr Herald and reached a conclusion about that evidence. The appellant did not identify any material that she overlooked, or any persuasive reason to establish that she afforded Dr Khan's evidence too little weight, or that an opposite inference could be drawn that is so preponderant that it shows that she was wrong.

Wood DP stated that applying the principles set out in *Makita*, Dr Khan's evidence could not be considered "*expert evidence*" and it was a "*bald assertion*". The Senior Arbitrator discounted that evidence and, having done so, there was no expert evidence to support a casual connection between the left index finger injury and the cervical spine complaints.

Wood DP also rejected the appellant's assertion that the Senior Arbitrator failed to determine whether she accepted Dr Rimmer's evidence. She noted that the Senior Arbitrator stated:

> Even if I were to discount Dr Rimmer's opinion, I am not convinced that Mr Ali has discharged his onus of proving a consequential condition in the cervical spine as a result of the left index finger injury by virtue of wearing a sling on his left arm. There is no expert opinion to support such a thesis. Given Dr Teychenne, a neurologist specialist, puts forward two other explanations for the cervical complaints, I find to be satisfied about the sling thesis a doctor needed to consider all of these possible explanations and advise why the wearing of a sling, as opposed to the other scenarios, caused the cervical spine to become symptomatic. We do not even know from Mr Ali's statement how the cervical pain came on or even how long he wore the sling. He does not mention the sling at all.

Wood DP also noted that the appellant seemed to argue that the decision in *Nguyen* requires the tribunal of fact to apply a higher standard of proof than that of "*on the balance of probabilities*", a standard that is not consistent with the decision in *Kooragang*. She held:

> 106. It is apparent from a consideration of that passage that Nguyen does not operate to apply any other standard of proof other than that of "*on the balance of probabilities.*" The Senior Arbitrator concluded that she was "*not satisfied on the balance of probabilities that [the appellant] ha[d] established that the symptoms he complained of in the cervical spine were caused by the wearing of the sling ...* ." It is apparent that the Senior Arbitrator did nothing more than apply the civil standard of proof. As McDougall J explained and, as the respondent submits, the requirement of an actual persuasion is in respect of a fact relied upon in the chain of causation, upon which an inference can be drawn and an ultimate conclusion reached that, on the balance of probabilities, the causal chain is established.

Accordingly, Wood DP held that the appeal has no merit and she refused to grant an extension of time in which to appeal.

Principles applicable to an application for reconsideration – s 350 (3) WIMA and Samuel v Sebel Furniture Limited [2006] NSWWCCPD 141 considered

Secretary, Department of Communities and Justice v Miller and Anor (No. 7) [2020] NSWWCCPD 57 – President Judge Phillips – 8/09/2020

This matter has a lengthy history, which was reported in Bulletin no. 67.

On 17/06/2020, in *Secretary, Department of Communities and Justice v Miller and Anor (No. 5)*, President Phillips made the orders that included revoking the COD dated 11/10/2019 and remitting the matter to another Arbitrator to be dealt with in accordance with his reasons for decision.

However, upon remitter, the parties disagreed regarding the effect of these orders. On 1/07/2020 (Miller No 6), Phillips P noted that the applicant indicated that an application for reconsideration was being filed and he stated that it is appropriate that the reconsideration application be determined before the matter proceeds further. On 12/08/2020, David Miller and Terren Tuhi filed an application for reconsideration. The respondent opposed that application.

Phillips P stated that the principles regarding the Commission's power of reconsideration are well settled. In *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141 (Samuel), Roche ADP made the following observations:

> 1. the section gives the Commission a wide discretion to reconsider its previous decisions ('*Hardaker*');
>
> 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 ('*Schipp*');
>
> 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 ('*Hilliger*');
>
> 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 ('*Maksoudian*');
>
> 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* ('*Anshun'*) 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 ('*Anshun*');
>
> 8. a mistake or oversight by a legal adviser will not give rise to a ground for reconsideration ('*Hurst*'); and
>
> 9. the Commission has a duty to do justice between the parties according to the substantial merits of the case ('*Hilliger*' and section 354 (3) of *the 1998 Act*).

His Honour noted that although s 352 *WIMA* was amended after *Samuel* was decided, the Commission has indicated that the observations set out in *Samuel* remain relevant and he stated:

> 11. In terms of the Samuel principles outlined above, in considering this application for reconsideration I am having particular regard to principles 1, 3, 4 and 9. For the reasons that I have referred to above, and in particular the subject matter of this litigation and its lengthy history, principle 4 from Samuel figures highly in my consideration of this application. The respondent has taken what I consider to be a very responsible view to this application and has not identified any prejudice or unfairness to it should the orders sought by Mr Miller and Mr Tuhi be made.
>
> 12. In my view, it is in the interests of justice for the remaining issues in dispute, as identified by me in Miller No 5, to be dealt with in accordance with the reasons that I gave in that decision.

His Honour granted the application for reconsideration and he amended his orders dated 17/06/2020 to indicate that the matter was remitted to another Arbitrator to determine the appellant's claims with respect to issue estoppel and *Anshun* estoppel.

WCC – Medical Appeal Panel Decisions

Psychological injury – AMS' examination by video link was conducted in an appropriate manner – No error in assessment

Wolfe v Secretary, Department of Education [2020] NSWWCCMA 144 – Arbitrator Rimmer, Dr D Andrews & Dr P Morris – 8/09/2020

On 29/09/2019 (deemed), the appellant suffered a primary psychological injury in the course of her employment as a special education teaching assistant.

On 27/05/2020, Professor Glozier examined the appellant via Zoom. On 11/06/2020, he issued a MAC, which assessed 5% WPI.

The appellant appealed against the MAC under s 327 (3) (d) *WIMA* and she requested a re-examination by a member of the MAP.

Upon preliminary review, the MAP determined that it was not necessary to re-examine the appellant as there was sufficient evidence on which to make a determination.

The appellant sought to admit a statement dated 24/06/2020 as fresh evidence in the appeal. She argued that the AMS' examination was conducted in a manner inappropriate for an approved medical examination, as there was a lack of privacy from the AMS' location and interruptions occurred. She was not "on her own" and had a family member present, which inhibited her from reporting a full and proper history. However, the respondent argued that the appellant sought to introduce evidence of her criticism of the AMS' assessment as fresh evidence and it opposed its admission.

The MAP stated:

> 20. The issue concerning "*additional relevant information*" which is a separate ground of appeal under s 327 (3) (b) was addressed by Hoeben J in *Petrovic v BC Serv No 14 Pty Limited t/as Broadlex Cleaning Services* [2007] NSW SC1156 (*Petrovic*). Hoeben J held that a statutory declaration addressing the way in which an AMS carried out his examination was not "*additional relevant information*" as it was not information of a medical kind or which directly related to the decision made by the AMS. At [31], Hoeben J said:
>
> > In my opinion the words '*availability of additional relevant information*' qualify the words in parentheses in s327 (3) (b) in a significant way. The information must be relevant to the task which was being performed by the AMS. That approach is supported by subs 327 (2) which identifies the matters which are appealable. They are restricted to the matters referred to in s326 as to which a MAC is conclusively taken to be correct. In other words, '*additional relevant information*' for the purposes of s327 (3) (b) is information of a medical kind or which is directly related to the decision required to be made by the AMS. It does not include matters going to the process whereby the AMS makes his or her assessment. Such matters may be picked up, depending on the circumstances, by s327 (3) (c) and (d) but they do not come within subs 327 (3) (b).
> >
> > 32. It follows that the statutory declarations which related to the way in which the AMS carried out his examination and the way in which questions and answers were interpreted during the examination were not '*additional relevant information*' for the purposes of subs 327 (3) (b) and should not have been treated as such by the Registrar.
>
> 21. Hoeben J noted that once the matter came before an Appeal Panel, the matter in the statutory declaration could be considered by the Appeal Panel.

22. As noted in *Pitsonis v Registrar of WCC & Anor* (2008) NSWCA 88 (*Pitsonis*) at [48] an appeal under section 327 is not an opportunity for an application on the basis of fresh evidence tendered without any constraint and/or on the basis of no more than an Appeal Panel being invited to decide an application afresh. Allowing the introduction of the fresh evidence is not consistent with the statutory process of resolving medical disputes. The purpose of referral to an AMS is to bring finality to medical disputes, other than where there are legitimate grounds of appeal. It is expected that the parties will place all relevant documents before an AMS in the referral documents.

23. In *Lukacevic v Coates Hire Operation Pty Ltd* [2011] NSWCA 1122 (*Lukacevic*) at [78], Hodgson JA said:

> A dispute by the workers as to the history set out in the certificate, or the observations made by the AMS, can be readily raised; and it could be raised honestly or dishonestly, on strong or flimsy grounds. Having regard to the matters I have set out, in my opinion it would be reasonable for an AP not to admit evidence raising such a dispute unless that evidence had substantial prima facie probative value, in terms of its particularity, plausibility and/or independent support. …

24. Allowing the evidence to be admitted would unfairly prejudice the respondent, who would not be capable of adducing evidence to respond to the allegations concerning the manner in which the assessment was undertaken…

26. Although the statement of Mrs Wolfe came within the literal definition of "*fresh evidence*" as referred to in s 328 (3) in that it contained comments as to what took place in the examination by the AMS, the Appeal Panel decided to disregard that evidence since it was quite contrary to the purpose of the Act. The Appeal Panel does not understand the intention of the legislature to be that such criticisms of an AMS ought to be admitted as fresh evidence. The Appeal Panel believes that the purpose of the legislation is to give some prima facie credence to the opinion of an AMS in situations where he has examined the worker and all the competing medical views. The system would not be able to operate properly if the AMS's view could be overturned merely because of some untested documentary evidence as to the events that occurred during the examination. It should also be noted that Mrs Wolfe in her statement said, for example, that she "believed" she told the AMS that she did not do the reported activities daily or even regularly. Her statement was prepared nearly a month after the examination by the AMS. Mrs Wolfe's statement also addressed her Globus symptoms. However, she is not a medical practitioner and no real weight could be attached to her views on Globus. In those circumstances, the Appeal Panel considered that her evidence concerning the details of the examination by the AMS and the MAC would have little, if any, probative value.

The MAP did not admit the appellant's further statement, as it was not evidence of such probative value that it was reasonably clear that it would change the outcome of the case. It also felt it was significant that the appellant did not make any complaint about the manner in which the examination was conducted immediately or shortly after it took place and any complaint should have been made at that stage, when it could have been addressed by the AMS, rather than after the issue of the MAC.

In relation to the worker's complaint that she was not on her own, the MAP referred to the Commission's E-Bulletin 101 dated April 2020, which addressed AMS assessments by video-consultation as follows:

The worker must undertake the following measures in preparation for a video consultation:

• The worker should be in a quiet room, where the door can be closed. This will ensure that no children, pets or others will interrupt the assessment.

• Before commencing the assessment, the worker must inform other persons in the premises that they must not interrupt the consultation or enter the room for any other purpose unless it is an emergency.

• The room lighting must be adequate, and the light source should face the worker.

• The mobile phone (or laptop or desktop computer) should be placed on a stable surface and not held. Movement requires more bandwidth and reduces both video and audio quality.

• The device should be plugged into an AC adapter (power point). Battery operation should be avoided as videoconferencing equipment can quickly deplete batteries. This is particularly relevant in psychiatric interviews, which can extend over 1.5 – 2 hours. Where possible, the worker should practise video conferencing with another person beforehand to familiarise themselves with the process.

• The worker should be dressed as if he or she was going to see the doctor in person. It is not acceptable to wear pyjamas or unsuitable attire.

The worker should ensure the camera and microphone are switched on and working prior to the video consultation.

The MAP stated:

> 30. It appeared that Mrs Wolfe was unable to fully undertake the measures required for a video consultation. However, Mrs Wolfe and her solicitor should have been aware of the measures to be undertaken for the examination and complied with the requirements. If Mrs Wolfe found that she could not comply with the requirements this should have been raised with the Commission before the examination or with the AMS at the examination. In any event, the Appeal Panel was not satisfied on balance that there were problems during the examination that precluded the AMS from taking an adequate history. The AMS in the MAC provided a thorough history and comprehensive reasons for his assessment. Indeed, the MAC was far more detailed than the reports than that provided by the Independent Medical Examiners in this matter.

The MAP held that there is a presumption of regularity in respect of the conduct of medical examinations. The AMS is required to undertake an assessment of a worker as they present on the day of assessment and not at any other time. It was satisfied on balance that the examination was conducted in an appropriate manner. The MAC was very detailed and comprehensive and the MAP was not satisfied that the MAS made findings as to injury. He diagnosed an Adjustment disorder and noted that the appellant had developed Globus. He was required to make an assessment of the psychiatric and psychological disorder in accordance with the Guidelines and he reported Globus as a condition that was unable to be rated, as it is a somatoform disorder. The MAP agreed with this approach.

The MAP was not satisfied that the AMS made a demonstrable error in stating that most of the appellant's social avoidance was avoidance of others by her and that he did not discount the effects of her injury.

The MAP held that there was no error in the PIRS ratings made by the AMS and the appellant sought to cavil with matters of clinical judgment made by the AMS without any evidence of error. Accordingly, it confirmed the MAC.

WCC – Arbitrator Decisions

Proof of injury – worker failed to discharge onus of proof

Yang v Halliday Engineering Pty Ltd [2020] NSWWCC 298 – Arbitrator Perry – 2/092020

On 27/05/2020, the worker filed an ARD, which alleged injuries to the lumbar and cervical spines on 14/02/2007 and claimed compensation under s 66 WCA for 5% WPI (cervical spine). However, the respondent disputed the claim for the cervical spine.

On 2/09/2020, ***Arbitrator Perry*** issued a COD, which entered an award for the respondent. He noted that the worker argued that he "*cannot understand English properly without the assistance of an interpreter*" and that this is relevant to the issue regarding the lack of contemporaneous history of neck injury on 13/02/2007. He argued that he suffered much pain, particularly in his low back area, following the 2007 incident and that he was distracted by his low back pain, particularly during the early period after the incident. Although his neck pain was there at all times since the incident as well, his back pain was much worse then and so was not the focus of his complaints. He said that the fact that he is a poor historian does not mean that his neck was not injured at the time of the incident.

The respondent argued that the worker was seeking to have his 2020 statement accepted over his 2007 statement and that he is mistaken when he now recalls that he injured his neck in the 2007 incident. If the evidence is looked at as a whole, it is more likely that the worker was not complaining of neck pain or injury contemporaneously to the 2007 incident. There is nothing in his second statement, or anywhere else, that explains why he failed to mention neck symptoms etc. contemporaneously to the incident.

The Arbitrator held, relevantly:

> 52. The applicant made no mention of any injury to his neck or upper spine in his 2007 statement - where that statement provides significant detail in relation to the background to the incident, its circumstances, and the resulting low back and right leg injury. It is by no means an unprofessional statement. I infer it has been prepared by a person with reasonable skills in taking statements, such as a solicitor or investigator, and who has done his or her best to record what the applicant told him or her. The statement also refers to the applicant having had the benefit of it being to and for him. But there is no evidence he signed it or that it was translated to him. This statement is relatively contemporaneous to the incident and a reference to injury or symptoms in or about the neck would have advanced the applicant's case. Clearly, the statement does not advance the applicant's case. As to whether it harms it, I need to exercise substantial caution because it has not been signed. I propose to go no further than infer that it illustrates the absence of evidence of contemporaneous material in support of the applicant's case that he did injure his neck at about the time of the incident…
>
> 55. Then, after about 20 more visits to the centre up to 24 June 2008, there is a record of the applicant referring to "*neck pain for several month* …" I am satisfied this close examination of the centre notes shows Mr Parker's submission in this respect should be accepted; and that such does point to the likelihood that there would have been a record of any complaints of symptoms in or injury to the neck had such complaints been made before 24 June 2008.

> 56. My opinion that it is likely that the applicant did not make any complaints to the centre doctors, particularly Dr Si, until 24 June 2008, is not dispositive. But it is a significant factor militating against his case. It is a further example of an absence of evidence the applicant needs in order to prove his case. Dr Si does not otherwise provide any clear opinion that she is of the view that the applicant's complaints of symptoms and/or injury about his neck are related to either the incident or his employment generally. I do not infer Dr Si believes the neck symptoms or injury is not related to the incident or employment either. But again, there is an absence of evidence to the contrary. I need to feel actual persuasion of the facts that need to be proved for the applicant to succeed, and on the probabilities (*Nguyen v Cosmopolitan Homes* [2008] NSWCA 246).
>
> 57. This is not a case involving proof of a secondary or consequential condition. That is not the way the case was put, nor does such a case theory arise, at least with sufficient clarity, from the evidence. Nevertheless, I do bear in mind the principles in *Kooragang Cement Pty Ltd v Bates* (1994) 35NSWLR452; 10NSWCCR796. This is not only to take into account "a common-sense evaluation of the causal chain" – but also to remember that "*the mere passage of time between a work incident and subsequent incapacity … is not determinative of the entitlement to compensation*". That last principle is relevant to the facts in this case…

The Arbitrator held that it was unlikely that the worker reported a neck injury to Dr Woo and this was a feature of the fallibility of his memory due to the substantial lapse of time.

Application for reconsideration under s 350 WIMA refused

Mitropoulos v Qantas Airways Limited [2020] NSWWCC 297 – Arbitrator Young – 2/09/2020

On 31/07/2016, the worker injured both shoulders at work. He claimed compensation under s 66 *WCA* for 15% WPI based upon assessments from Dr Patrick, but the respondent disputed the claim based upon assessments from Professor Ryan (7% WPI).

On 3/01/2020, Dr Gorman issued a MAC, which assessed 6% WPI (2% right upper extremity and 4% left upper extremity). On 7/02/2020, Arbitrator Wright issued a COD, based upon the MAC, which determined that the worker was not entitled to compensation under s 66 *WCA.*

The worker did not appeal against the MAC, but sought reconsideration of the AMS' assessment for the left upper extremity and the COD, based upon a further report from Dr Patrick on the following grounds: (1) the AMS failed to include any assessment if symptomatic left shoulder stability patterns; and (2) the AMS did not advance reasons as to why he disagreed with Dr Patrick's opinion.

Arbitrator Young noted that the worker's solicitor wrongly believed that the appeal period commenced from the date that the COD issued. He stated:

> 20. But in my view none of this is really of any moment. The reconsideration application presently before this Commission was filed at the earliest on 6 May 2020, namely two months after the date when the applicant's solicitor concedes that he thought that a deadline existed. Much of the matters raised concerning timelines just don't make much further sense in these circumstances.
>
> 21. I mention these matters because an important consideration in exercising discretion concerning reconsideration applications is the question of delay. I do not think it is of benefit to canvass the matter beyond what I have just said because there may exist a significant amount of evidence (or none) to explain that issue. The delay issue is a significant one in my view in this matter.

The Arbitrator noted that in *Samuel v Sebel Furniture Limited* [2006] NSWWCCPD 141, Roche DP identified matters relevant to the exercise of the Commission's discretion. In the matter of *Schipp v Herfords Pty Ltd* [1975] 1 NSWLR 413 , the Court of Appeal considered the relevant factors as being: (a) delay; (b) whether the worker failed to exercise a right of appeal; (c) waiver and estoppel; (d) the effect that rescinding an earlier determination would have in terms of allowing fresh proceedings to occur; and (e) consideration of the distinction between "fresh evidence" and "more evidence".

The Arbitrator noted that in *Galea v Ralph Symonds Pty Limited* (1989) 5 NSWCCR 192, O'Meally J adverted to the importance of the distinction between "fresh evidence" and "more evidence" in reconsideration applications. In this matter, he considered this distinction to be important because the worker was, in effect, seeking to cavil with the MAC by providing more (post-MAC) evidence from Dr Patrick. However, he considered it fair to say that Dr Patrick was simply re-stating his earlier opinions and there are no legislative provisions that entitle a party to dispute an AMS' decision simply because they are not happy with the outcome.

The Arbitrator noted that in *Maksoudian v J Robins & Sons Pty Limited* (1993) 9 NSWCCR 642, Bishop J commented that the reconsideration test involves a two-step process. First, is there fresh evidence? In my view, if Dr Patrick's new comments about the AMS approach of Dr Gorman is "fresh evidence" it is only "fresh" in the sense that it is a restated opinion following the AMS assessment, not "fresh" in terms of any changed factual circumstances or unknown earlier circumstances relevant to the applicant's original injury and/or assessment. The second part of Bishop J's test is to ask whether, had this evidence been earlier available, would it have likely affected the earlier outcome? In terms of this second limb, again Dr Patrick's further opinion follows evidence which is already in place and which was before the AMS. Dr Patrick's further comments regarding the approach by the AMS are not evidence, but rather further opinion. He stated:

> 32. In general terms, the approach to reconsideration applications involves a number of considerations, including those mentioned above. I think that they are:
>
> (a) Section 354 of *the 1998 Act* requires that decisions be made with as little technicality and formality as is appropriate.
>
> (b) The discretion to reconsider must be exercised fairly to both parties and also consider responsibilities for delay.
>
> (c) There is clear public interest in the finality of litigation so that re-airing of determined grievances is a matter to be avoided.
>
> (d) It is only if new evidence could not with reasonable attention by a party be obtained at the prior application that any new evidence should be considered.
>
> (e) *Anshun* estoppel applies. A party cannot on a reconsideration application pursue an argument or position pleading which should have reasonably been raised at an earlier time, specifically in the earlier action.
>
> (f) Mistakes on the part of lawyers do not constitute grounds for reconsideration.
>
> (g) An overriding principle is that the Commission must do justice to the parties according to the substantial merits of their cases.
>
> 33. In *Samuel,* the applicant after an initial Determination underwent surgery. That surgery unveiled and discovered specific physical pathology which was earlier thought by the doctors did not exist. For that reason, fresh evidence emerged which was not earlier available. It was appropriate for a reconsideration of the earlier Determination to occur. That I think is a lesson from the Samuel decision and in my view it is correct.

34. This Commission is not suggesting that identical facts to the Samuel situation is necessary to establish a worker's entitlement. The existence of discretion in varied factual circumstances is the key, so that there may well be many pathways to seek reconsideration of an earlier decision of the Commission. Because the discretion is wide, it is likely in my view that the categories of reasons for exercise of it are not circumscribed.

35. An illustration of the facts is perhaps (by obiter) of assistance. This matter is unlike *Samuel*. Dr Patrick's post MAC report does not provide any new revelations concerning the applicant's physical pathology, physical capacity or any potentially changed diagnosis. It simply argues the case that Dr Patrick's diagnosis is correct and the AMS's diagnosis and opinion is incorrect. That is a matter which might have been pursued, if at all, by an appeal process, namely appeal to the Medical Appeal Panel with an allegation that Dr Gorman approached the Guidelines incorrectly or failed to properly categorise the applicant in accordance with AMA 5, or whatever else those allegations to be aired might be.

Accordingly, the Arbitrator refused the applications to reconsider the MAC and to set aside the COD.

Psychological injury – background of prior claims – s 11A WCA - injury caused by reasonable action with respect to discipline

Mani v Secretary, Department of Education [2020] NSWWCC 308 – Arbitrator McDonald – 8/09/2020

The worker alleged that she suffered a psychological injury as a result of bullying and harassment by the respondent from 28/01/2018 to 22/05/2019, during a series of meetings with the Principal of the school (commencing on 19/03/2019), during which she was informed of complaints made by parents, and events that followed.

The respondent admitted that the worker suffered a psychological injury, but asserted that it was wholly or predominantly caused by reasonable action with respect to discipline. It approved provisional payments under s 36 *WCA* until 15/08/2019. The worker claimed continuing weekly payments from 16/08/2019, s 60 expenses and lump sum compensation under s 66 *WCA.*

On 14/07/2020, ***Arbitrator McDonald*** conducted a conciliation and arbitration by teleconference, during which the parties were directed to file written submissions. On 8/09/2020, she issued a COD, which entered an award for the respondent. She was satisfied that the injury was wholly caused by the events that occurred from March to May 2019. The only issue to be determined is whether the steps taken by the Principal on behalf of the Department during that period was reasonable action with respect to discipline. She stated:

125. The test of reasonableness was considered by Geraghty CCJ in *Irwin v Director-General of Education*

> …the question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.

126. In *Ivanisevic v Laudet Pty Ltd* Truss CCJ said:

> In my view when considering the concept of reasonable action the Court is required to have regard not only to the end result but to the manner in which it was effected.

The Arbitrator referred to the decisions of Spigelman CJ in Department of Education and Training v *Sinclair* [2005] NSWCA 465, O'Grady DP in *Walsh* and Sackville AJA in *Heggie* and she noted (at [130]) that in the latter decision, Sackville AJA stated:

> In my opinion, the better view is that the reasonableness of an employer's action for the purposes of s 11A(1) of the WC Act is to be determined by the facts that were known to the employer at the time or that could have been ascertained by reasonably diligent inquiries. The statutory language directs attention to whether the psychological injury was caused by reasonable disciplinary action taken or proposed to be taken by the employer. Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care. The language does not readily lend itself to an interpretation which would allow disciplinary action (or action of any other kind identified in s 11A(1)) to be characterised as not reasonable because of circumstances or events that could not have been known at the time the employer took the action with respect to discipline.

The Arbitrator held that at the meeting on 19/03/2019, the Principal told the worker about a series of complaints which had been brought to his attention. He also told her that EPAC had been informed. She noted that less than 2 months after the beginning of the school year, the Principal had received 9 complaints from parents and he received another immediately after the meeting. The complaints were of the kind that a school would be expected to take very seriously – particularly those relating to the reluctance of children to attend school on the day of the worker's science classes and that children were being publicly embarrassed in front of their peers. She stated:

> 139. I am satisfied that the complaints as described in the Department's evidence were serious and that they reflected more than a disagreement about teaching methods. Ms Mani's responses suggest that she did not understand the seriousness of the complaints. She has interpreted efforts to resolve those complaints as intimidating and threatening.
>
> 140. Mr Baran said that a report to EPAC was reserved for the worst kind of misbehaviour. However, the Complaints Handling Policy, of which a summary appears in the ARD, shows that the work of EPAC covers a range of areas and that the Staff Efficiency and Conduct Team manages, among other things, "parental … complaints against staff." Mr Lambert was acting on parental complaints received about Ms Mani's teaching. On that basis, contacting EPAC was reasonable.
>
> 141. In accordance with advice from EPAC, Mr Lambert gave Ms Mani the option of having the issues dealt with locally or dealt with by EPAC…
>
> 143. Because Ms Mani was still teaching, I consider it was reasonable for Mr Lambert not to disclose the identity of the complainants. Again, the Complaints Handling Policy requires confidentiality.
>
> 144. Rather than sending Ms Mani a series of complaints, Mr Lambert sought to discuss them in a meeting. The minutes of the meeting show that Mr Lambert opened by again offering that Ms Mani could have a support person present and offering to defer the meeting. Again, Ms Mani declined. Ms Mani did not describe that offer in her statement.
>
> 145. While her statement provided a description of what occurred at the meeting, the description is editorialised with comments about what Ms Mani considered that Mr Lambert should have done by reference to the Code of Conduct and the Complaints Handling Policy and the time frames set out in those documents.

146. Mr Lambert provided copies of minutes of meetings. He signed his statement on 7 June 2019, only two weeks after Ms Mani ceased work. Where his evidence differs from that of Ms Mani in her statement about what occurred, I prefer his contemporaneous statement and the documentary evidence.

147. An example is the evidence about how Ms Mani was to respond to the allegations. Ms Mani said that she had to ask for the complaints and sought time to respond in writing. The minutes of the meeting show that Mr Lambert asked Ms Mani to respond in writing. That evening he emailed Ms Mani the minutes of the meetings and sought her written response. He acknowledged that the complaints were unpleasant and provided Ms Mani with the details of the EAP.

The Arbitrator accepted that the minutes were accurate because the worker did not explain how they were accurate.

The worker alleged that she was denied procedural fairness and was interrogated at the further meeting with the Principal on 29/03/2019. She complained that her professional responses did not receive due respect and she was asked to provide pro-active responses and to show that she was taking action to improve her interaction with students. However, she received advice that this was against protocol.

However, the Arbitrator noted that the minutes reflect a careful record of a careful discussion and show that the worker was provided with an opportunity to explain her responses and that the Principal stressed that the school was seeking to worker with her. In that context, a request that she consider how to interact with students in future was not unreasonable. The Principal explained that EPAC was contacted because of the volume of complaints in a short period and that many of the worker's responses failed to show self-reflection. He stated that the worker needed to change her manner and take account of all learners in her care and he explained that the next step was that her PDP goals would be reviewed in the next term to reflect that need. He also reminded the worker about the EAP.

The Arbitrator also noted that the contemporaneous minutes of the meeting on 8/05/2019 contrast with the worker's summary of it. The minutes record that the worker asked what happened with the EPAC complaint and that the Principal said that he had sent his findings to it and was awaiting its response. In the meantime, adjustments should be made to her PDP goal. The worker again sought to discuss the issues and she considered that they stemmed from a misunderstanding by the parents. She was resistant to amendment of a PDP goal to address the issues about classroom management and she had little insight into how the complaints had arisen and how she should respond. She said she felt stressed and was allowed time to consider the goal.

The worker alleged that she felt humiliated to be asked to attend a fourth meeting in a letter dated 13/05/2019, during which she was given a direction under the Code of Conduct and shortly afterwards she ceased work. However, the Arbitrator noted that the letter indicated that its purpose was to support the worker, it was in clear language and explained the consequences of non-compliance. The Principal's statement recorded that the worker said she would not accept changes to the PDP and that she would not participate in the support that was offered.

The Arbitrator held that in accordance with the discussion in *Sinclair*, she is required to assess the whole of the process and that the action may be reasonable even if there are some defects in the process. The conduct must be assessed objectively, based upon what the school knew at the time when the process commenced. The respondent knew that there had been 9 complaints received within a short period in respect to a teacher.

The Arbitrator noted that the worker alleged that the respondent's conduct was unreasonable because: (a) it spoke to EPAC before speaking to her; (b) it did not give her advance notice and denied her procedural fairness; (it did not permit her an opportunity to present her case and investigate the matters she raised; (d) it ignored what she said in her defence, and (e) it did not point out if a clause of the code of conduct had been breached and if so, which one. However, she did not accept that any of these were made out. While she accepted that the worker was telling the truth about her perception of what occurred, her evidence shows a lack of insight about her previous claims and the complaints that are the subject of these proceedings. Her subjective view does not assist in the objective assessment of the respondent's actions.

The worker argued that the decision in *Chemler* requires the respondent to take her as it found. The Arbitrator noted that in *Chemler*, the Court of Appeal said that the worker's perception of events was relevant in determining whether there was an injury to which employment was a substantial contributing factor. However, she stated:

> 171. Here there is no dispute that Ms Mani suffered a psychological injury to which employment was a substantial contributing factor. There is no dispute that the injury was caused by the Department's action, which I am satisfied was with respect to discipline. The issue is whether the action was reasonable. That is an objective test and not a subjective one.
>
> 172. The school had received a series of nine complaints about Ms Mani's teaching in a short time in early 2019 and another complaint was received as the disciplinary process began Mr Lambert as the Principal was required to consider and act on those complaints. Ms Mani was not told about the complaints immediately because Mr Lambert was away from the school. If a policy was breached by failing to do so, that non-compliance is not unreasonable. It was appropriate that the complaints be dealt with by the Principal…
>
> 174. Even if the complaints were not serious, the sheer number of complaints in a short period required action, particularly where Ms Mani's role had been changed at the end of the previous year after the other complaints described in Mr Lambert's statement.
>
> 175. Ms Mani focussed on the report to EPAC. The Complaints Handling procedure shows that the work of EPAC includes parental complaints about staff. EPAC agreed that the complaint could be managed locally and Ms Mani also agreed.
>
> 176. The Complaints Handling policy mandates confidentiality. There was nothing unreasonable in Mr Lambert not disclosing the identity of the complainants, particularly as Ms Mani continued to teach the children.
>
> 177. The Complaints Handling policy shows that the Teachers Federation considered that staff who are the subject of a complaint should be informed within five days. That did not occur in respect of all of the complaints because Mr Lambert was absent from the school. I do not accept that breach of a recommendation amounts to unreasonable conduct.

The Arbitrator found that the worker was given an opportunity to address the issues during the first and second meetings with the respondent and that the Principal gave the worker a detailed explanation of the areas in which her teaching practice required improvement. The Arbitrator stated:

183. The Department did not, however, accept Ms Mani's explanations of her conduct. Ms Mani said that the rights of the children at the school had to be weighed against her right to be employed in a safe environment, free of bullying and harassment. Because of the serious substance of the complaints, Mr Lambert's action was not only reasonable but necessary. I am satisfied that the process undertaken was a reasonable process, was conducted in a reasonable manner and did not amount to bullying and harassment.

184. The third meeting on 8 May 2019 was arranged to discuss amendment of the PDP. The minutes suggest that Ms Mani considered that her professional development was quite separate to resolving the complaints. Objectively, the amendment of the goals to seek to improve Ms Mani's performance in the areas in which there had been complaints was reasonable.

185. The fourth meeting was called to give Ms Mani the letter dated 13 May 2019. Mr Lambert stressed that the purpose of the direction was support. The letter was the first time in 2019 that there was any reference to disciplinary or remedial action if she did not comply. It was handed to her in a meeting rather than being sent to her.

186. While the events can be described as a disciplinary process, no discipline other than the direction was undertaken in 2019. I am satisfied that the process was conducted in a careful manner over an extended period and that it was aimed at improving Ms Mani's performance as a result of parental complaints about serious issues.

187. I am satisfied that the Department's conduct, taken as a whole, was reasonable conduct with respect to discipline. As that conduct was the cause of Ms Mani's injury, no compensation is payable under s 11A (1) and I make an award for the respondent.